

# CURRICULAR CONTROL AND PARENTAL RIGHTS: BALANCING THE RIGHTS OF EDUCATORS AND PARENTS IN AMERICAN PUBLIC SCHOOLS

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## I INTRODUCTION

In 1925, in *Pierce v Society of the Sisters (Pierce)*,<sup>3</sup> the United States Supreme Court acknowledged that '[t]he 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 recognise and prepare him for additional obligations'.<sup>4</sup> In reasoning that the parents in *Pierce* had the right to send their children to a religiously affiliated non-public school and to a private military academy, rather than the State's secular schools,<sup>5</sup> as a means of satisfying Oregon's compulsory attendance statute, the Court emphasised that the State, acting in and through local school boards, may not 'unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control'.<sup>6</sup> In fact, while the *Pierce* Court and later judgments focus on parental rights, they recognise that the Constitution protects 'the fundamental right of parents to make decisions concerning the care, custody, and control of their children'.<sup>7</sup> Insofar as 'the custody, care and nurture of the child reside first in the parents',<sup>8</sup> there is a parental right to withdraw children from the States' education system.<sup>9</sup> In furtherance of their well-established judicially-created, as opposed to one found in the constitution or statutes, right to direct the educational upbringing of their children, parents may choose to send their offspring to non-public schools (regardless of whether they are religiously affiliated),<sup>10</sup> to educate their children at home,<sup>11</sup> or to withdraw their older children from schools altogether.<sup>12</sup> Moreover, to date, the judiciary has focused on the rights of parents, rather than students. The courts have emphasised the rights of parents because they recognise that as long as children are minors, parents are responsible for the well-being of their offspring. Even so, keeping the best interests of children in mind, the final section of this article reflects on the possible tension between the rights of parents and their children with regard to educational programming.

As important as the parental right to direct the upbringing of their children, which includes the ability to withdraw their offspring from State educational systems,<sup>13</sup> is, lower federal courts have sent a different message in this regard once parents permit their children to attend State

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schools.<sup>14</sup> To this end, as recent decisions from the United States Circuit Courts of Appeals<sup>15</sup> for the First,<sup>16</sup> Third,<sup>17</sup> and Ninth<sup>18</sup> Circuits demonstrate, parents may well have little or no say in issues concerning sexuality education in State schools.<sup>19</sup> As the Sixth Circuit noted,<sup>20</sup> '[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child'.<sup>21</sup> Without a doubt, State and local school officials have broad discretion to set curricular content.<sup>22</sup> Yet, legitimate questions can be raised about the extent to which parents should have a say directing the education of their children and/or when they should be free to have their children excused from courses or other activities that the parents deem objectionable.

Given the growing tension between the parental right to direct the education of their children and the authority of the States, *qua* local school boards, to decide curricular matters for all students in their schools, especially when these actions conflict with legitimate parental desires, this article seeks to illuminate issues while highlighting considerations which may be relevant to policy makers in the United States as well as in Australia, New Zealand, and other places. In addressing the tension between the duty of educators in State to control curricular content and rights of parents to direct the educational upbringing of their children this article is divided into two sections. The first part reviews the cases while the second section reflects on the implications of this tension for educational policy makers and parents as they seek to work together to provide quality educational programs for all children.

This article does not seek to prescribe a solution for Australia, New Zealand, or any other nation. Just as the United States must look to its own unique constitutional heritage and political culture in order to fashion solutions to its problems, each nation must draw on its experience. Nevertheless, the American experiences, in light of our shared heritage of British common law, may be able to provide a catalyst for uniquely Australian and/or New Zealand responses. Further, to the extent that educational issues that deal with such basic concerns as curricular content have a way of appearing in different locations throughout the world, in the event that such a controversy rears its head in Australia or New Zealand, perhaps lawyers and other interested parties may look to this manuscript for a source of potential guidance. Additionally, the authors believe that the experiences of Australia and New Zealand can also inform and influence American responses.

## II THE CASES

### A *Brown v Hot, Sexy, and Safer Productions*

In *Brown v Hot, Sexy and Safer Productions (Brown)*,<sup>23</sup> parents in Massachusetts unsuccessfully challenged an explicit sex-education/AIDS awareness program for high school students. Despite the fact that a board policy provided for parental notification of such a program, school officials permitted it to proceed without affording parents any opportunity to have their children excused from attending.<sup>24</sup> Two students and their parents filed suit on constitutional grounds, alleging that educators violated their privacy rights under the First and Fourteenth Amendments, their substantive due process rights under the First and Fourteenth Amendments, their procedural due process rights under the Fourteenth Amendment, and their First Amendment rights under the Free Exercise Clause along with a charge of deprivation of their right to direct and control the upbringing of their children.<sup>25</sup> More specifically, the parents claimed that the program presented sexually explicit monologues and sexually suggestive skits with several minors chosen from the audience. As reflected in the court's opinion, the instructor:

1) told the students that they were going to have a 'group sexual experience, with audience participation'; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear'; 6) referred to being in 'deep sh--' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'orgasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt'; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.<sup>26</sup>

As a result of the presentation, the plaintiffs filed suit claiming that some students were intimidated and that others mimicked the instructor's behaviour by displaying overtly sexual behaviour.<sup>27</sup> The parent-plaintiffs asserted that the program violated their children's constitutional right to privacy as well as their right to direct and control their children's education. After a federal trial court dismissed the case for failure to state a claim, the plaintiffs sought further review.<sup>28</sup>

On appeal, the First Circuit affirmed that since the actions of school officials did not shock the conscience, the standard necessary for a federal civil rights violation, they could not be liable on this account.<sup>29</sup> Second, and more importantly for purposes of this article, the court held that the sexually explicit program did not violate the rights of the parents to direct their children's education. Interpreting the right recognised by *Pierce* in a narrow fashion, the court observed:

We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me'. The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.<sup>30</sup>

Third, the court simply rejected the student's claim that they had been exposed to 'patently offensive language'.<sup>31</sup> To this end, the First Circuit maintained that there were no cases upholding a right to be free from such language and saw no need to expand the law to offer such protection. Fourth, the court decided that the parents could not recover for the failure of the school board and building level officials to follow the board's policy with regard to notification insofar as the plaintiffs was a 'random and unauthorised act' for which the board could not be liable. Fifth, the court held that the parents' constitutional right to the Free Exercise of Religion did not trump the board's curricular choices since school officials had ultimate authority for regulating educational programming. Finally, the court declared that the children could not recover for sexual harassment because the plaintiffs failed to establish their claim that the presentation created a sexually hostile environment in the school. In sum, the fact that the parents did not wish their children to view such a sexually program, that the children themselves were offended, and that the content of the program was contrary to the religious views of both parents and children was irrelevant. The

court was convinced that the State's right to determine curriculum trumped the parental issues at bar.

### *B Fields v Palmdale School District*

In *Fields v Palmdale School District* (*Fields*)<sup>32</sup> parents in California challenged a school board's practice of permitting educators to distribute a sexually explicit survey to children in the first, third, and fifth grade.<sup>33</sup> Among the sexually explicit questions were those that sought children's attitudes about:

8. Touching my private parts too much
17. Thinking about having sex
22. Thinking about touching other people's private parts
23. Thinking about sex when I don't want to
26. Washing myself because I feel dirty on the inside
34. Not trusting people because they might want sex
40. Getting scared or upset when I think about sex
44. Having sex feelings in my body
47. Can't stop thinking about sex
54. Getting upset when people talk about sex<sup>34</sup>

Unhappy parents unsuccessfully filed suit in a federal trial court in California claiming that school officials violated their rights both to privacy and by introducing matters to their children both to and about sex. After the trial court dismissed the parents suit for failure to state a claim,<sup>35</sup> they sought further review.

On appeal, the Ninth Circuit rejected the idea that *Pierce* and its progeny allowed parents to object to specific aspect of the State's school curriculum. Relying specifically on *Brown*, the Court wrote:

Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so....

Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District-whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral, or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.<sup>36</sup>

In other words, the court was of the opinion that 'once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished'.<sup>37</sup> Thus, the court concluded that the right of parents to direct the education of their children that identified in *Pierce* 'does not extend beyond the threshold of the school door'.<sup>38</sup>

In an interesting side note, on November 16, 2005, two weeks to the day after the Ninth Circuit rendered its judgment in *Palmdale*, the United States House of Representatives condemned the court's ruling. Acting on a resolution introduced by Representative Tim Murphy (Republican-

Pennsylvania), they ‘voted 320-91 for a resolution that said the decision by the 9th U.S. Circuit Court of Appeals “deplorably infringed on parental rights”’.<sup>39</sup>

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

In *C.N. v Ridgewood Board of Education (C.N.)*,<sup>40</sup> which was resolved a month after *Fields*, three students and their mothers in New Jersey challenged a school board’s voluntary anonymous survey of children.<sup>41</sup> The suit claimed that the surveys violated their rights under the two expansive federal statutes, the Family and Educational Rights privacy Act,<sup>42</sup> and the Protection of Pupil Rights Amendment,<sup>43</sup> and the United States Constitution. The federal trial court ruled in favor of the school board.<sup>44</sup> On appeal, the Third Circuit affirmed in part and reversed in part.<sup>45</sup> On remand, the trial court again ruled in favor of the board.<sup>46</sup>

On the second appeal, the Third Circuit affirmed in all respects. First, the court held that despite the personal nature of the questions, school officials simply did not violate the rights of the students or their parents to privacy. Second, the court found that answering the questions did not constitute compelled speech, meaning that officials did not violate the rights of students by forcing them to reveal particular information about themselves. Finally, and most importantly for purposes of this article, the court thought that school officials did not violate the parent’s right to direct the education of their children in permitting the survey to be distributed. As the court noted:

The Supreme Court has never been called upon to define the precise boundaries of a parent’s right to control a child’s upbringing and education. It is clear, however, that the right is neither absolute nor unqualified ... [D]espite the Supreme Court’s ‘near-absolutist pronouncements’ concerning the right to familial privacy, the right is necessarily qualified in a school setting where ‘the state’s power is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”’ Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school’s ability to control curriculum and the school environment.<sup>47</sup>

Thus, while the court recognised the importance of *Pierce*, it determined that ‘the decision whether to permit a middle or high school student to participate in a survey of this type is not a matter of comparable gravity’.<sup>48</sup>

The Third Circuit’s narrow interpretation of *Pierce* notwithstanding, it emphasised that its view of *Pierce* was far more expansive than the Ninth Circuit’s might have been. Commenting on *Fields*, the Court declared:

In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, that the right of parents under the *Meyer-Pierce* rubric ‘does not extend beyond the threshold of the school door’. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail. Instead, we have determined only that, on the facts presented, the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme Court precedent.<sup>49</sup>

In other words, rather than painting a bright line rule as the Ninth Circuit did, the Third Circuit attempted to engage in a form of judicial balancing.<sup>50</sup> Of course, an argument can be made that whether there was a constitutional violation would depend on the individual circumstances.

Indeed, if confronted with the sexually explicit program at issue in *Fields*, the Third Circuit may well have reached the opposite result.<sup>51</sup>

### III REFLECTIONS

In light of the sensitive and controversial issues involved in *Brown*, *Fields*, and *C.N.*, an argument can be made that these cases stand *Pierce* on its head. As reflected by the Congressional furore over *Fields* in particular, the challenge for educational leaders is to reconcile the two divergent visions of the relationships between and among parents and educators.

If educators whether in America or Australia or New Zealand are unable to set a middle ground with regard to curricular concerns by seeking greater parental input, then they run the risk of existing in a perpetual state of conflict with parents. More specifically, educators must consider whether their task is essentially to supplant parents with regard to directing the education of their children, especially when dealing with such highly sensitive materials as human sexuality. Educators must consider whether they wish to give a radical new meaning to the concept of *in loco parentis*, whereby they are supposed to act 'in the place of the parent' with regard to discipline and control of school children, rather than supplant the rights and duties of these parents, or whether they are obligated to work collaboratively with parents in educating children as suggested by *Pierce*. Consequently, in seeking to strike the necessary balance when dealing with the conflicts that can arise in the tension between the duty of educators to set curricular content and the right of parents to direct the educational upbringing of their children, school officials may wish to consider the following points in order to help maintain good relations with parents.

First, before developing and implementing programs that deal with subject matter as sensitive as human sexuality in K-12 settings in as controversial, explicit, and public a manner as in *Brown*, *Fields*, and *C.N.*, educators should, at the very least, engage in some form of consultation with parents whether individually or through parent-teacher type organisations. This article certainly does not wish to grant parents a 'heckler's veto' over the decisions that educators make with regard to controversial curricular materials. Even so, educators would be wise to collaborate with parents to consider their points of view because as important a topic as sexuality education is, one wonders how much school systems can accomplish if officials ignore legitimate parental concerns in cases such as the ones discussed herein and act on their own volition. At the risk of over-simplifying, controversies such as those in *Brown*, *Fields*, and *C.N.*, cannot help to advance the legitimate educational concerns of either parents or school officials and can only lead to unnecessary, and typically costly, strife that often culminates in litigation in which both sides ultimately lose no matter who prevails in court.

Second, if educators proceed with questionnaires such as in *Fields* and *C.N.* or programs that are as sexually explicit as in *Brown*, they would be well advised to develop materials that are age appropriate. Even conceding that some of the questions may have been acceptable for adolescents in *Palmdale* and *C.N.*, others in both cases appear to be inappropriate for students of any age and run the risk of causing more harm than good, especially if they lead to misperceptions about sexuality in the minds of young, impressionable students. Moreover, since some of the questions raise fears about sex, and others may cause different worries, one can only wonder what impact they may have had on impressionable young minds. Put another way, considering that many students, especially those in first grade, may not have understood some of the questions about human sexuality, it would seem to be prudent to address the material in a way that young children can grasp and in a fashion that respects parental concerns. At the risk of appearing overly



simplistic, just as in instruction in such topics as mathematics and reading progress according to logical, sequential developmental steps, educators would be wise to adopt a similar approach with a topic as controversial as sexuality for children.

Third, educators should comply with existing opt-out provisions in state law and board policy. Alternatively, if boards do not have such policies in place, educators should consider developing them to permit parents to opt-out based on religious, philosophical, and even pedagogical grounds among others. In fact, an opt-out plan might also offer alternative programs that may be able to cover the same material in a less controversial format. Again, while fully acknowledging the authority of educational officials to direct the content of school curricula, and not wishing to see them yield too easily to parental pressures, such an approach is worth considering, especially because it can help to eliminate conflict with parents by working with them and taking their legitimate concerns into consideration. Moreover, by demonstrating a willingness to work with parents on controversial issues, educators can establish more open lines of communication that will benefit entire school communities.

Three inter-related final reflections come to mind vis-a-vis potential tensions that might arise between the rights of parents to direct the upbringing of their children and the rights of these same young people as students. In the first two of these points there was apparently no risk that parents might have overstepped their boundaries.

First, since parents are responsible for the well-being of their children, especially during their tender years, there can be no doubt that they had the right to intervene on behalf of their children as was the situation in *Palmdale*. This parental right should be especially clear in light of their reasonable concerns that their children were being exposed to material that was inappropriate at that point in their lives and that parents may well have wished to address with their children in the privacy of their homes.

Second, as students get older, as in both *Brown* and *C.N.*, they are free to join their parents in challenging the actions of school officials. As such, it appears that when parents and students act in concert, then there cannot be much of a question that, at least for the plaintiffs, the parents acted appropriately.

Third, even when parents act directly on behalf of, or in unison with their children, questions might arise about who will protect the rights of the students, an issue that Justice Douglas raised in his partial dissent in *Yoder*.<sup>52</sup> In *Yoder* Justice Douglas questioned whether children had rights apart from their parents, based on his fear that students could have been ‘harnessed’ to the lifestyles of their parents. To this end, he was particularly concerned that the students did not have the opportunity to express their own desires since the lower courts did not take their wishes into consideration. Theoretically, Justice Douglas may have had a point about self-determination. However, in reality, to the extent that *Yoder* involved children who had just completed their eighth grade of formal education, meaning that they were typically about fourteen, at most fifteen, years of age, one can only wonder what solution he might have had in mind should the children have wished to have been emancipated from the lifestyle of their parents. While the State may have had the resources to intervene and provide support for children who disagree with their parents, it would set a dangerous precedent to allow State officials to interfere in familial relations where there was no clear showing of parental abuse. Put another way, it is one thing to raise such a question about parental rights but something altogether different when dealing with children who have lived relatively sheltered lives and who were not prepared to move out independent of the wishes of their parents.

In sum, while on the whole it is important to be concerned legitimately about the rights of students, on balance, it is appropriate that parents exercise their right to direct the educational upbringing of their children by seeking to ensure that they are educated in a way that is consistent with their family values. After all, since parents have the best interests of their children in mind, an interest that is certainly superior to that of school officials, when seeking to ensure that their children are being educated in State schools, then their opinions should be taken more seriously into consideration when dealing with curricular content.

#### IV CONCLUSION

As with so many areas of the law, educational leaders, policy makers, and, ultimately, the judiciary must exercise their discretion in establishing parameters with regard to parental input into curricular content or the wide array of other topics dealing with schools. At the same time, clearly, there is no guarantee that all legal and curricular controversies can be avoided. However, to the extent that school officials treat parents as partners, by seeking their input about important matters that affect their children, rather than as adversaries who are concerned about having their children exposed to information that is traditionally discussed in the confines of the home and family, then the more successful administrators and teachers will be in providing a top quality, age and content appropriate, education for all students.

*Keywords:* Curricular control; In loco parentis; Parental rights; Sexuality education; Values education.

#### ENDNOTES

1. Panzer Chair in Education and Adjunct Professor of Law, University of Dayton (Dayton, Ohio, USA). A much shorter version of this Essay appeared as Charles Russo & William Thro, 'Parents, Educators, and the Courts: Who Directs the Education of Students?', (2006) 72(7) School Business Affairs 39.
2. State Solicitor General of the Commonwealth (State) of Virginia and Adjunct Professor of Government and Public Affairs, Christopher Newport University (Newport News, Virginia, USA). The views expressed in this Essay are those of the Authors and do not necessarily represent the views of the Attorney General of the Commonwealth of Virginia.
3. 268 U.S. 510 (1925).
4. Ibid 535.
5. Pierce was foreshadowed by *Meyer v Nebraska*, 262 U.S. 390 (1923) wherein the Court invalidated a state law forbidding instruction in specified foreign languages, most notably German in the wake of World War I in part because it arbitrarily interfered with the 'right of parents' to procure such instruction for their children. In doing so, the Court recognised 'the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men'. Ibid 399.
6. *Pierce*, 268 U.S. 510, 534-35. This right, and the right of parents to direct the educational upbringing of their children, is grounded in the Fourteenth Amendment which, in relevant part, reads: 'Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.



7. *Troxel v Granville*, 530 U.S. 57, 66 (2000).
8. *Prince v Massachusetts*, 321 U.S. 158, 166 (1944).
9. Although education is not a fundamental right under the United States Constitution, *San Antonio Indep. Sch. Dist. v Rodriguez*, 411 U.S. 1, 33 (1973), every State Constitution has a provision mandating, at a minimum, that the State provide a system of free public schools. William E. Thro, 'Judicial Enforcement of Educational Safety & Security: The American Experience' (2006) 24 *Perspectives in Education* 65, 65-66 (2006). Moreover, the Supreme Court of the United States has recognised that 'education is perhaps the most important function of state and local governments' because 'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education'. *Brown v Board of Educ.*, 347 U.S. 483, 493 (1954). Indeed, the Court has stressed 'the importance of education in maintaining our basic institutions ..'. *Plyler v Doe*, 457 U.S. 202, 221 (1982). See also *Rodriguez*, 411 U.S., 29-30 ('the grave significance of education both to the individual and to society cannot be doubted'); *Yoder*, 406 U.S. 205, 213 ('Providing public schools ranks at the very apex of the function of a State'); *Abington Sch. Dist. v Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ('Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government').
10. *Pierce*, 268 U.S., 534-36.
11. See *Peterson v. Minidoka Sch. Dist. No. 331*, 118 F 3d 1351, 1357 (9<sup>th</sup> Cir. 1997) (First Amendment right of free exercise includes right to home school a child); *Murphy v. Arkansas*, 852 F 2d 1039, 1043 (8<sup>th</sup> Cir. 1988) (acknowledging the right to home school a child, but upholding state regulation of that right). To date, more than thirty States have enacted statutes which allow parents to home school their children. In the remainder States, home schooling is legal pursuant to a variety of types of regulations.
12. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). It should be noted that *Yoder* involved children who had already attained a significant level of education but not as much as the State wished. If the parents had insisted that their children not been educated at all, the result may well have been different.
13. While the Supreme Court has never precisely defined the contours of this right, it has suggested that it is not absolute. See *Lehr v Robertson*, 463 U.S. 248, 256 (1983).
14. The decisions of the lower courts are consistent with the Supreme Court's pronouncements limiting the scope of the right recognised in *Pierce*. See *Runyon v McCrary*, 427 U.S. 160, 177, (1976) (holding that there is no parental right to educate children in private segregated schools); *Norwood v Harrison*, 413 U.S. 455, 461-62 (1973) (discussing the limited scope of the right). See also *Yoder*, 406 U.S., 239 (White, J. concurring) (Parents may not 'replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society').
15. In the United States, the Supreme Court ordinarily hears only about eighty cases each year. See Chief Justice John Roberts' *2005 Year-End Report on the Federal Judiciary* (2006) that revealed that:  
 The annual number of case filings in the Supreme Court decreased from 7,814 in the 2003 Term to 7,496 in the 2004 Term—a decrease of 4.1 percent. Filings in the Court's *in forma pauperis* [literally 'in the manner of a pauper,' meaning that individuals filed without the ability to pay fees or costs] docket decreased from 6,092 to 5,755—a 5.5% decrease. The Court's paid docket increased by 19 cases, from 1,722 to 1,741—a 1.1 percent increase. During the 2004 Term, 87 cases were argued and 85 were disposed of in 74 signed opinions, compared to 91 cases argued and 89 disposed of in 73 signed opinions in the 2003 Term. No cases from the 2004 Term were scheduled for reargument in the 2005 Term.

<<http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf>> at 15 October 2007.

The overwhelming majority of federal appeals are decided by the thirteen courts of appeals. Eleven of these courts of appeal serve various regions of the Nation. One court of appeals, the Federal Circuit, deals with intellectual property and other highly specialised cases and another court of appeals, the District of Columbia Circuit deals with cases involving administrative law and cases involving the City of Washington. In this regard, Chief Justice John Roberts' *2005 Year-End Report on the Federal Judiciary* (2006) 8 n.2 revealed that during that year,

[f]ilings in the regional courts of appeal rose 9 percent to an all-time high of 68,473, marking the 10th consecutive record-breaking year and the 11th consecutive year of growth. This increase stemmed from upswings in criminal appeals, original proceedings, and prisoner petitions ... As large as the increase is, it would have been higher had not the Court of Appeals for the Fifth Circuit's operations been affected by Hurricane Katrina.

16. The First Circuit, which is based in Boston, serves as the regional court of appeals for the States of Maine, Massachusetts, New Hampshire, and Rhode Island, as well as the territorial Commonwealth of Puerto Rico.
17. The Third Circuit, which is based in Philadelphia, serves as the regional court of appeals for the States of Delaware, New Jersey, and Pennsylvania as well as the territory of the U.S. Virgin Islands.
18. The Ninth Circuit, which is based in San Francisco, serves as the regional court of appeals for the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington as well as certain U.S. Territories in the Pacific Ocean.
19. See *C.N. v Ridgewood Bd. of Educ.*, 430 F 3d 159 (3d Cir. 2005); *Fields v Palmdale Sch. Dist.*, 427 F 3d 1197 (9<sup>th</sup> Cir. 2005); *Brown v Hot, Sexy and Safer Productions*, 68 F 3d 525 (1<sup>st</sup> Cir. 1995).
20. The Sixth Circuit, which is based in Cincinnati, serves as the regional court of appeals for the States of Kentucky, Michigan, Ohio, and Tennessee.
21. *Blau v Fort Thomas Pub. Sch. Dist.*, 401 F 3d 381, 395-96 (6<sup>th</sup> Cir. 2005).
22. Education is a responsibility of individual States under the Tenth Amendment, which reads 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'. Thus, since education is not discussed in the Federal Constitution, it is reserved to the States. However, as in the cases discussed in this article, to the extent that parents can raise claims based on the Federal Constitution or Federal statutes, then they can litigate their grievances in federal courts.
23. 68 F 3d 525 (1<sup>st</sup> Cir. 1995).
24. *Ibid* 532.
25. In relevant part, the First Amendment reads that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. Congress extended the First Amendment to the States in *Cantwell v Connecticut*, 310 U.S. 296 (1940) (invalidating convictions of violating Connecticut statute prohibiting the solicitation of money for alleged religious, charitable, or philanthropic causes without approval of the Secretary of Public Welfare).
26. *Brown*, 68 F 3d at 529.
27. *Ibid*.
28. The trial court's opinion is unpublished.
29. *Brown*, 68 F 3d 525, 531-32. As the Court explained: 'The minor teenagers in this case were compelled to attend a sexually explicit AIDS awareness assembly without prior parent approval. While the defendants' failure to provide opt-out procedures may have displayed a certain callousness towards the sensibilities of the minors, their acts do not approach the mean-spirited brutality evinced by the defendants in [previous cases]. We accordingly hold that the acts alleged here, taken as true, do not constitute conscience shocking and thus fail to state a claim'.
30. *Ibid* 533-34 (citations omitted).
31. *Ibid* 534.
32. 427 F 3d 1197 (9<sup>th</sup> Cir. 2005).
33. In America, although ages may vary from one jurisdiction to another, children in the first grade are typically six, those in the third grade are typically eight, and those in the fifth grade are typically ten.
34. *Ibid* 1201 n.3
35. The trial court opinion is reported at 271 F. Supp. 2d 1217 (C.D. Cal. 2004).
36. *Fields*, 427 F 3d, 1206.
37. *Ibid*.
38. *Ibid* 1207.
39. 'House scolds court over sex survey ruling'. Belleville (IL) News Democrat (2005, Nov. 17). A 9,

available on line at 2005 WLNR 18557582.

40. 430 F 3d 159 (3<sup>rd</sup> Cir. 2005)

41. As the Third Circuit described the survey:

Sections of the survey were devoted to drug and alcohol usage. For example, Questions 81, 82 and 83 asked students how many times they had alcohol to drink in their lifetime, during the last 12 months and during the last 30 days, with answer choices 0, 1, 2, 3-5, 6-9, 10-19, 20-39 and 40+. Questions 94 through 96 asked how many times during the last 12 months students had 'been to a party where other kids your age were drinking,' 'driven a car after you had been drinking' and 'ridden in a car whose driver had been drinking,' with answer choices 'never, once, twice, 3-4 times, and 5 or more times'. Questions 92-93 asked 'how many times, if any,' the student 'had used cocaine (crack, coke, snow, rock)' in the student's lifetime and during the last 12 months, with answer choices 0, 1, 2, 3-5, 6-9, 10-19, 20-39, and 40+. Questions 97-98 asked 'how many times, if any, have you sniffed glue, breathed the contents of aerosol spray cans or inhaled other fumes in order to get high' in 'the last 12 months' and 'during the last 30 days,' with answer choices 0, 1, 2, 3-5, 6-9, 10-19, 20-39, and 40+. Questions 104-109 asked how many times in the last 12 months a student had used 'chewing tobacco or snuff,' 'heroin (smack, horse, skag) or other narcotics like opium or morphine,' 'Alawan,' 'PCP or Angel Dust,' 'LSD ('acid'),' or 'Amphetamines (for example, uppers, ups, speed, bennies, dexies) without a prescription from a doctor,' with answer choices 0, 1, 2, 3-5, 6-9, 10-19, 20-39, and 40+.

The survey contained questions related to sex, including 'have you ever had sexual intercourse ('gone all the way,' 'made love'),' with answer choices 'no, once, twice, 3 times, and 4 or more times,' and 'when you have sex, how often do you and/or your partner use a birth control method such as birth control pills, a condom (rubber), foam, diaphragm, or IUD,' with answer choices 'never, seldom, sometimes, often, and always'. The survey contained questions about suicide and seemingly related questions about a students' sense of individual worth. For example, Question 101 asked 'have you ever tried to kill yourself,' with answer choices 'no, yes, once, yes, twice and yes, more than two times,' and students were asked to indicate their agreement/disagreement on a scale with statements including 'on a whole, I like myself,' 'at times, I think I am no good at all,' 'I feel I do not have much to be proud of' and 'sometimes I feel like my life has no purpose'. There were also questions about students' experience of violence in their neighborhood, schools and home. For example, students were asked how many times during the last 12 months they had 'taken part in a fight where a group of your friends fought another group,' 'hurt someone badly enough to need bandages or a doctor,' and 'used a knife, gun or other weapon to get something from a person,' with answer choices 'never, once, twice, 3-4 times, and 5 or more times'. Students were also asked how often they feel afraid of 'walking around your neighborhood,' 'getting hurt by someone at your school ... [or] at your home,' with answer choices 'never, once in a while, sometimes, often, and always'. Question 149 asked 'have you ever been physically harmed (that is, where someone caused you to have a scar, black and blue marks, welts, bleeding, or a broken bone) by someone in your family or someone living with you?,' with answer choices 'never, once, 2-3 times, 4-10 times, and more than 10 times'.

Numerous questions interspersed throughout the survey inquired into the parental relationship. For example, students were asked how often their parents helped with school work, talked to them about school work or attended school events or meetings. Students were also asked to indicate their agreement or disagreement on a scale with such statements as 'my parents push me to be the best I can be,' 'if I break one of my parents' rules, I usually get punished,' 'my parents give me help and support when I need it,' 'my parents often tell me they love me,' and 'I have lots of good conversations with my parents'. Question 85 asked 'if you came home from a party and your parents found out that you had been drinking, how upset do you think they would be?' Question 99 asked,

‘in an average week, how many times do all of the people in your family who live with you eat dinner together?’ Question 121 asked, ‘if you had an important concern about drugs, alcohol, sex, or some other serious issue, would you talk to your parent(s) about it?’ Question 122 asked, ‘how much of the time do your parents ask you where you are going or with whom you will be?’ Question 148 asked how much time a student spent at home without adult supervision.

Finally, there were questions related to students’ associations and views on topics of public interest. For example, students were asked how many hours in an average week they spent playing on school or community sports teams, participating in clubs or organizations (other than sports) at school or outside school, attending ‘programs, groups or services at a church, synagogue, mosque, or other religious or spiritual place,’ doing organized volunteer service, helping friends and neighbors, and practicing/taking lessons in music, art, drama or dance. The survey also asked students to rate how important certain concepts were in their lives, on a scale of not important to extremely important, including ‘helping to reduce hunger and poverty in the world,’ ‘helping to make sure that all people are treated fairly,’ ‘getting to know people who are of a different race than I am,’ ‘speaking up for equality (everyone should have the same rights and opportunities),’ and ‘giving time or money to make life better for other people’. (C.N., 430 F 3d, 168-69).

42. 20 U.S.C.A. § 1232g. In clarifying the rights of students and their parents to educational records, the statute’s two main goals are to grant students and their parents access to their educational records and to limit the access of outsiders to the educational records of students.
43. 20 U.S.C.A. § 1232h. This length amendment adds to the protections in the *Family Educational Rights and Privacy Act*.
44. The first trial court decision is reported at 146 F. Supp.2d 528 (D. N.J. 2001).
45. The first appellate judgment is reported at 281 F 3d 219 (3<sup>rd</sup> Cir. 2002).
46. The second trial court is reported at 319 F. Supp.2d 483. (D. N.J. 2003).
47. Ibid 182-83 (citation omitted).
48. Ibid 185.
49. Ibid 185 n.26 (citations omitted).
50. Of course, any judicial balancing test involves ‘malleable standards’ that are easily transformed into ‘vehicles for the implementation of individual judges’ policy preferences’. *Tennessee v Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting). In other words, an outcome may become dependent not on legal principles, but on the whim of a court majority.
51. Yet another controversy has arisen on the topic of sexuality education and parental rights. In Colorado, officials at a charter school, a kind of experimental American public school that is largely exempted from many state retirements, dismissed a teacher due to his failure to comply with a parental request that he excuse their seventh-grade daughter from a graphic discussion about sex in a class. According to a News Release issued by the public interest law group that represented the parents, the teacher expressly ignored their request and led the class in a discussion of sexual practices, reproduction, and his personal views on dating. The teacher even tried to convince the thirteen-year-old to change answers on the test she completed with her mother to reflect his own viewpoint. Liberty Counsel, ‘School Board Fires Teacher Over Inappropriate Sex-Ed Class’ (News Release, 8 August 2006) <<http://www.lc.org/pressrelease/2006/nr080806.htm>> at 15 October 2007. Of course, it remains to be seen whether this dispute is to be litigated.
52. *Yoder*, 406 U.S. 241 (1972) supra note (Douglas, J., dissenting in part).