LIBERTY UNIVERSITY

Liberty University
DigitalCommons@Liberty University

Faculty Publications and Presentations

Liberty University School of Law

7-1-2011

Holding Schools Accountable for their Sex-ed Curricula

Rena M. Lindevaldsen
Liberty University, rlindevaldsen@liberty.edu

Follow this and additional works at: http://digitalcommons.liberty.edu/lusol_fac_pubs

Part of the Education Law Commons, Family Law Commons, Juveniles Commons, and the Sexuality and the Law Commons

Lindevaldsen, Rena M., "Holding Schools Accountable for their Sex-ed Curricula" (2011). *Faculty Publications and Presentations.* Paper 52.
http://digitalcommons.liberty.edu/lusol_fac_pubs/52

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Faculty Publications and Presentations by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

5 Liberty U. L. Rev. 463

Liberty University Law Review
Summer, 2011

Articles

HOLDING SCHOOLS ACCOUNTABLE FOR THEIR SEX-ED CURRICULA

Rena M. Lindevaldsen [d1]

Copyright (c) 2011 the Liberty University Law Review; Rena M. Lindevaldsen

Abstract

This Article examines the legal and policy implications that arise when a school district decides to instruct students on issues concerning same-sex attractions. As more states afford legal recognition to same-sex relationships and adopt non-discrimination codes that include sexual orientation, schools are faced with the decision of what, when, and how to teach children about same-sex attractions. Providing instruction on this divisive issue is fraught with conflict as views and beliefs on the topic are deeply-held, diverse, and often politically charged. In disputes concerning other sensitive topics, courts long have afforded schools broad discretion to implement curriculum without interference from parents or courts. This article explores the history and purposes of public education before summarizing current state and federal law concerning parents' rights to opt children out of curriculum. It also provides specific examples of how some public schools have dealt with the topic of same-sex attractions. After highlighting the factually inaccurate and potentially harmful information some schools provide to students concerning same-sex attractions, the article explores three possible causes of action against school districts: a state educational malpractice claim, a federal parental rights claim, and a claim for declaratory and injunctive relief. In the past, these claims have, for the most part, been unsuccessful as to curriculum challenges. This article presents a novel approach for those parents, educators, and lawyers who would like to prevent schools from teaching children that a same-sex relationship is a healthy and normal option to explore.

***464** "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Thomas Jefferson [1]

Introduction

Education has long been considered vital to the continued success of our nation. While there are debates today about where that education should take place-public schools, private schools, charter schools, or home schools-everyone understands the importance of educating our youth. A topic of widespread discussion today, however, is what should be taught in our public schools. On quite a regular basis, there are conflicts between parents and school administrators over what is taught to the students. Many of those disputes involve controversies surrounding moral issues-how much religion can be discussed in the classroom, what types of religious beliefs should be discussed, should children be taught an abstinence-based curriculum, a comprehensive sex education, or anything at all by our schools concerning sexuality, and what should children be taught concerning same-sex attractions and gender identity issues.

For those who disagree with a school's decision on these matters, an often-heard argument is that schools should focus on teaching reading, writing, and arithmetic while leaving the moral training to the parents. This argument overlooks two things. First, it is impossible for a school system to teach its curriculum in a moral vacuum. The curriculum and classroom instruction

are infused with the values and beliefs of those who establish the curriculum and instruct the children. Certainly, schools could steer clear of sex education to avoid obvious conflicts on that particular controversial subject, but the divisive issues arise in other classes including literature, history, science, and social studies. Schools and teachers decide which books to read, what parts of history to discuss, which view on origins to teach, and what role government has in ensuring "equal rights." None of these can be taught in a morally neutral fashion. Second, the argument that schools should refrain from values instruction ignores the fact that from the earliest of days in America, schools were viewed as a means to transmit important moral values to the next generation. The founders of this nation understood that an educated citizenry was vital to our nation's success and that a vital component of that education was proper morals training. The *465 difficulty today, however, is that as a nation we have strayed so far from Judeo-Christian moral values that we now seek to teach in public schools values that directly contradict those our founders understood were necessary to the preservation of the republic.

Part I of this Article will discuss the history and purposes of education in America. Part II will provide a number of examples of what students are taught or exposed to in schools concerning same-sex attractions. Part III will summarize current state and federal opt out standards. It also will discuss a number of cases to demonstrate the existing conflict between rights of parents to direct the education of their children and the broad discretion afforded schools to inculcate the values they deem necessary to prepare students for participation in a diverse society. Part IV will explore three legal avenues to hold school districts accountable for teaching students factually inaccurate and potentially harmful information concerning same-sex attractions. It will explain the claim of educational malpractice as it presently exists in its very limited context and discuss how the claim could be applied to schools in a defined set of circumstances. It will also explain how a parental rights claim could be successfully maintained against school districts under these circumstances. Finally, it will discuss specific circumstances where plaintiffs could obtain injunctive relief to prevent implementation of factually inaccurate sex education curriculum.

I. The History and Purposes of Public Education in America

The founders of this nation understood that an educated citizenry was vital to our success as a nation, and that a vital component of that education was proper morals training. For example, Gouveneur Morris, a signer of the Constitution, stated that "[r]eligion is the only solid basis of good morals; therefore, education should teach the precepts of religion and the duties of man towards God." [2] Benjamin Rush, a signer of the Declaration of Independence, echoed that sentiment, linking morals training with the preservation of liberty: "the only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all *466 republican governments." [3] The emphasis placed on religious training is evident from the nation's early textbooks. Noah Webster's Blue Back Speller, which was the leading spelling book in America for more than a century, extensively quoted Scripture. [4] The New England Primer, written in 1777, taught children their alphabet with explicit references to Bible characters and events. To learn the letter "A," children recited "[i]n Adam's Fall, We sinned all." [5] For the letter "C," they recited "Christ crucify'd, For sinner's dy'd." [6] In Mr. Webster's history text, he instructed students:

The brief exposition of the Constitution of the United States will unfold to young persons the principles of republican government; and . . . our citizens should early understand that the genuine source of correct republican principles is the Bible-particularly the New Testament or the Christian religion. [7]

One of the first public education laws in America, passed by Massachusetts, directly links the purpose of education with religion. "The Old Deluder Satan Act" declared that children needed a good education so that they could read their Bible. [8] In the 1800s, the Kansas State Superintendent of public instructions warned:

*467 "[I]f the study of the Bible is to be excluded from all State schools-if the inculcation of the principles of Christianity is to have no place in the daily program-if the worship of God is to form no part of the general exercises of these public elementary schools-then the good of the State would be better served by restoring all schools to church control." [9]

Supreme Court Justice Joseph Story also commented on the important role of religion in public schools, stating in an 1844 decision:

Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a Divine revelation in the [school]-its general precepts expounded . . . and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? [10]

Our founding fathers not only understood the vital role religion played in education but also in the political success of our nation. President George Washington reminded the nation in his 1796 Farewell Address that there are two indispensable supports to the political prosperity of a republic: religion and morality. [11] He also made clear that a particular type of morality was essential to the nation's continued success-morality based on Judeo-Christian principles. [12] John Witherspoon, a signer of the Declaration of Independence, told students at Princeton, where he was President, that

***468** [H]e is the best friend to American liberty who is most sincere and active in promoting true and undefiled religion and how sets himself with the greatest firmness to bear down profanity and immorality of every kind. Whoever is an avowed enemy of God, I scruple not to call him an enemy to his country. [13]

As a result, Noah Webster cautioned young people in 1834 about the type of leaders they should elect:

When you become entitled to exercise the right of voting for public officers, let it be impressed on your mind that God commands you to choose for rules, just men who will rule in the fear of God. The preservation of a republican government depends on the faithful discharge of this duty; if the citizens neglect their duty, and place unbridled men in office, the government will soon be corrupted; laws will be made, not for the public good, so much as for selfish or local purposes; corrupt or incompetent men will be appointed to execute the laws; the public revenues will be squandered on unworthy men; and the rights of the citizens will be violated or disregarded. If a republican government fails to secure public prosperity and happiness, it must be because the citizens neglect the divine commands, and elect bad men to make and administer the laws. [14]

In addition to the strong emphasis placed on proper religious training in education, the United States Supreme Court has long recognized that from ***469** the very beginning of our nation education was viewed as an essential means to properly prepare citizens for participation in our political system. The Court has explained that:
The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests. [A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. [15]

As Alexis DeTocqueville travelled America for nine months in 1831, studying its political system as a possible model for post-revolutionary France, he noted the importance of an educated citizenry, particularly an education firmly grounded in proper morals.

It cannot be doubted that in the United States the instruction of the people powerfully contributes to the support of the democratic republic, and such must always be the case, I believe, where the instruction which enlightens the understanding is not separated from the moral education. [16]

Even today, there is little dispute over the proposition that for a republican form of government to survive, proper values must be taught to the next generation. The disagreement exists over who decides what values are "proper values." Parental delegation to public schools of the authority to transmit proper values to their children raises unique concerns when, as now, the nation is divided over many moral issues.

*470 Language from a 1986 United States Supreme Court opinion swings the door wide open for schools to inculcate those values that the school district determines appropriate. In Bethel v. Fraser, a school district suspended a high school student for a sexually graphic metaphor he used in a nominating speech he made at a school assembly. In upholding the school district's decision to sanction the student for his speech, the Court offered this explanation:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." . . . The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapable, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . . [17]

Although the question of whether the school properly punished the student is beyond the scope of this Article, the Court's decision raises obvious questions in the context of what values should be taught concerning same-sex attractions, particularly when the school's views contradict those of the parents.

*471 II. What Students Are Learning in School About Their Sexual Identity

Schools across the nation face the questions of whether, what, and when to teach children concerning same-sex attractions. [18] For example, the Sexuality Information and Education Council of the United States (SIECUS) crafted guidelines in 1991 entitled "Guidelines for Comprehensive Sexuality Education: Kindergarten-12th Grade" (the Guidelines). Over 100,000 copies have been distributed. [19] Now in its third edition, the Guidelines take specific positions on the issue of same-sex attractions. It conveys same-sex attractions as normal by telling students that people of the same sex can love each other, [20] "[p]eople do not choose their sexual orientation"-after explaining that the "origin of people's sexual orientation is not known" [21] -and "[c]hildren may have a mother, a mother and a father, two mothers, two fathers, or any other combination of adults who love and care for them." [22] California's Comprehensive Sexual Health and HIV/AIDS Prevention Education Act requires schools that provide comprehensive sex education to include materials that are "appropriate for use with pupils of all . . . sexual orientations," [23] encourages pupils to develop healthy attitudes about sexual orientation, [24] and does not "reflect or promote bias against any person" based on sexual orientation. [25] Iowa similarly requires that human growth and development instruction be "free of racial, ethnic, sexual orientation, and gender biases." [26] *472 Montgomery County, Maryland requires students to read five "coming out" stories about homosexual, bisexual, and transgendered youth as part of the training on "Respect for Differences in Human Sexuality." [27] Setting the stage nationally, President Obama embraced diverse family structures in his 2010 Mother's and Father's Day Proclamations when he said that "[n]urturing families come in many forms, and children may be raised by" either "two mothers" or "two fathers." [28]

Instruction concerning same-sex attractions is not limited to the sex education curriculum. The 2007 National School Climate Survey by GLSEN (Gay Lesbian Straight Education Network) indicates that LGBT issues are not limited to sex education courses but are taught across the curriculum, including history, literature, science, math, gym, and foreign languages. [29] The survey indicates that 12.7% of the LGBT (lesbian, gay, bisexual, and transgendered) students surveyed reported that LGTB-related topics were taught in school [30] and of that percentage, 83% reported that LGBT people or events were positively portrayed. [31]

Schools also expose students to issues concerning same-sex attractions through extracurricular activities. For example, in October 2008, a number of first graders took a field trip to San Francisco City Hall for the "wedding" of their teacher and her lesbian partner; administrators called the field trip "a teachable moment." [32] In another California school, a nurse explained that as part of the school's efforts during Gay Pride Month, the school created a Rainbow Cafe where each day students could discuss a different topic related to sexuality and LGBT issues. To encourage attendance by "kids who wouldn't be exposed to this kind of ***473** programming," teachers were encouraged to give extra credit to students who participated. [33]
In Illinois, one middle school participated in a diversity day, using resources in part from Teaching Tolerance. [34] One of the resources from Teaching Tolerance's Mix It Up program for K-12 students includes a "Homophobia Quiz" that asks students to rate how much they agree with twenty-five statements, including: "Gay people make me nervous;" "Gay people deserve what they get;" "Homosexuality is immoral;" "Marriage between homosexual individuals is acceptable;" and "I would feel uncomfortable having a gay roommate." [35]

Educators in Helena, Montana passed a health curriculum in 2010 that caused significant controversy. [36] The core competencies called for kindergarten teachers to "[i]ntroduce basic reproductive body parts (penis, vagina, breast, nipples, testicles, scrotum, uterus)" and "[r]ecognize that family structures differ . . . ." [37] First graders are to be taught to "[u]nderstand human beings can love people of the same gender & people of another gender[.]" [38] Second graders are to learn to "[a]cknowledge that individuals & families have a variety of values as it pertains to sexual behaviors . . . ." [39] Fifth graders are to "[u]nderstand that sexual intercourse includes but is not limited to vaginal, oral, or anal penetration [.]" [40] Finally, ninth through twelfth graders are to "[u]nderstand erotic images in art ***474** reflect society's views about sexuality & help people understand sexuality[.]" [41]

At times, some students seek legal recourse to ensure that schools "respect" their gender or sexual identity. In 2009, the Maine Human Rights Commission ruled that a school district unlawfully discriminated against a transgendered fifth grade student by denying the boy access to the girls' restrooms in the school. Initially, the school permitted the boy to use the girls' restrooms but required him to use a single-stall faculty bathroom after boys began to harass him for using the girls' restrooms. [42] Unhappy with that compromise, the parents filed a discrimination complaint against the school and won. The school now must allow the boy to use the girls' restrooms and take all steps to keep the child safe-except letting him use the single-stall restroom. In March 2010, the Commission held a public hearing on its proposal to require all schools in Maine to permit transgendered students to use the restroom of their choice, regardless of whether they are boys or girls. [43]

Certain organizations are leading the way in seeking to develop what it considers tolerant and diverse schools. One such organization that has dedicated itself to LGBT issues in public schools is GLSEN (Gay, Lesbian, Straight Education Network). Kevin Jennings, founder of GLSEN, was appointed by President Obama to lead the "safe school" efforts at the Department of Education. [44] Soon after the appointment, it was reported that while Jennings was a teacher he failed to report to authorities that a 15 year old student told him of a sexual relationship with an older man. [45] Instead, Jennings cautioned the boy to use a condom. [46] GLSEN's educational efforts directly encourage acceptance of same-sex relationships. GLSEN seeks to eradicate what it describes as "homophobia" and "heterosexism" in schools, it creates curriculum for teachers to use in schools, it

encourages *475 students to participate in several special days throughout the school year-including Ally Week, No Name Calling Week, TransAction Day, and Day of Silence-and promotes formation of the now more than 4,000 gay-straight alliance clubs in schools around the country.[47]

In one of its educational resources, GLSEN discusses the perceived problem of "institutional heterosexism" in schools.[48] GLSEN defines heterosexism as "the belief . . . that homosexuality is 'wrong' or 'less than [heterosexuality],"' the belief that "heterosexuality is 'better' or [more] 'normal [than homosexuality],"' or the "assumption that the gender roles today's society assigns to males and females are 'natural' and 'right."'[49] "[H]eterosexism can also be understood as the assumption that a dual gender role system based on birth assigned sex is natural and desirable."[50] "Heterosexism is not a replacement for homophobia. Rather it is a broader term that does not imply the same level of hatred, and which can describe seemingly innocent thoughts and behavior on the belief that heterosexuality is the norm."[51]

To gain broad-based public acceptance for those with same-sex sexual attractions or gender identity confusion, GLSEN sponsors various special days. For example, Ally Week takes place in October and encourages all students to become allies against anti-LGBT discrimination and harassment.[52] GLSEN hosts an Education Allies Network in support of the day and offers educators a Safe Space kit.[53] On the Day of Silence, in April each year, students are encouraged to remain silent all day and distribute *476 cards to encourage other students to end the silence about the alleged anti-LGBT discrimination taking place in the schools.[54] While this Author believes schools should punish youth who harass other youth, GLSEN's efforts go much further. By recognizing these "special days" devoted to LGBT issues, GLSEN seeks to normalize same-sex attractions in the minds of our children.

A fairly recent day created by GLSEN is TransAction Day, which is celebrated in February of each year.[55] It is a "day to encourage dialogue about gender, gender roles and the full range of gender identities, and to advocate for inclusive, safe schools for all students."[56] GLSEN makes a variety of resources available to students and teachers, including materials entitled From Denial to Denigration: Understanding Institutionalized Heterosexism in Our Schools and The Power of Children's Literature: Gay and Lesbian Themes in a Diverse Childhood Curriculum.[57] One of the resources also includes a two-page document entitled Gender Terminology.[58] Some of the defined terms are: "Genderism: Related to sexism, but is the systematic belief that people need to conform to the gender role assigned to them based on a gender binary system which includes only female and male. This is a form of institutionalized discrimination as well as individually demonstrated prejudice."[59] In other words, children are told that it is discriminatory to believe that children should be encouraged to live consistently with their biological sex. "Butch" is used to describe "people of all genders and sexes who act and dress in *477 stereotypically masculine ways."[60] The Gender Terminology document also explains that we need to begin using "gender-neutral pronouns" to avoid discrimination.[61] Instead of "he" or "she," we are encouraged to use "zie;" instead of his or her, we are encouraged to use "hir."[62] GLSEN encourages teachers to use the instructional materials in classrooms around the nation.[63] GLSEN is not alone in its efforts.

Another organization that directs its efforts toward children, PFLAG (Parents, Families and Friends of Lesbians and Gays), markets for students a brochure called Be Yourself.[64] In it, PFLAG explains to students that "One or two sexual experiences with someone of the same sex may not mean you're gay . . . . Your school years are a time of figuring out what works for you, and crushes and experimentation are often part of that."[65] PFLAG also tells students that being gay, lesbian, bisexual, or transgender is "as natural" as being straight, and "it's as healthy to be gay, lesbian or bisexual as to be straight-no matter what some people might tell you."[66] In other words, the brochure encourages students to experiment, at a young age, with their sexuality.

Schools also expose students to gender identity issues. For example, in one upstate New York school district, when a male high school teacher returned after summer break dressing as a female-as part of his transition period before having sex reassignment surgery-administrators showed students a slideshow presentation entitled Gender Identity Awareness.[67] It told students that a person with GID "[w]ake[s] up every day in the wrong body."[68] As a result, administrators told students that they were to "respect all peoples' differences," including addressing the male teacher as "Ms."[69]

***478** Still other schools tacitly condone gender identity expression that is inconsistent with a student's biological sex. For example, a female student at a high school in Tuscon, Arizona was nominated for homecoming prince and a homosexual male student at a Los Angeles school was crowned prom queen.[70] For those parents who object to having their children exposed to these materials or events in schools, traditional legal remedies have not posed any real obstacle to the schools' efforts.

III. Existing State and Federal Laws May Not Protect Our Children

A. State Law

In many states, parents have a statutory right to opt children out of certain objectionable curriculum. The opt-outs, however, are not broad ones that permit a student to be excused from any material parents find objectionable. Rather, the opt-outs tend to center around sex education. According to a April 1, 2011 State Policies in Brief from the Guttmacher Institute,[71] twenty states and the District of Columbia mandate that schools teach sex education,[72] and thirty-two states and the District of Columbia mandate STD/HIV education.[73] Only three of the thirty-two states that have mandatory sex education or STD/HIV education require prior parental permission.[74] While all but seven of the remaining states that have mandatory sex or STD/HIV education permit parents to opt their children out of the curriculum under some circumstances,[75] very few require parents ***479** to be notified of the curriculum prior to instruction.[76] Thus, while parents have the legal right to opt-out, they may not even know about their rights or that the school is teaching potentially objectionable materials. Of the states with an opt-out, five of the states only permit parents to opt-out based on religious or moral beliefs.[77] And three of the states with an opt-out permit students to opt-out of the STD/HIV instruction only-not sex education.[78]

What none of the states permit, however, is a general opt-out from discussion or instruction about same-sex attractions that occurs outside the context of a sex or STD/HIV education class. Thus, parents do not have any right to opt children out of other classroom instruction or discussion that seeks to normalize same-sex attractions. Thus, if the history, literature, sociology, psychology, or science teacher wishes to discuss the issues with students, parents have no legal right to opt-out under state law.

B. Federal Law

Parents have fewer rights under federal law. No federal law grants parents the right to opt children out of any curriculum in government schools.[79] As a result, parents have resorted to claims that a state's refusal ***480** to permit an opt-out violates the parents' fundamental right to direct the education and upbringing of their children.[80] Those claims, however, have not been successful despite the fact that the United States Supreme Court long has protected a parent's liberty right in making decisions concerning their child's upbringing.[81]

A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests . . . ."[82] The Supreme Court has explained that because "[t]he child is not the mere creature of the state,"[83] "[i]t is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the

state can neither supply nor hinder." [84] The Court's parental rights cases, Meyer, Pierce, Prince, and Yoder, are the foundation for any parental rights claim.

In Meyer v. Nebraska, [85] the state made it unlawful to teach a foreign language to a child before she passed the eighth grade. When a teacher was prosecuted for teaching German in violation of the statute, he challenged the constitutionality of the law. In striking down the statute, the Supreme Court explained that

While this court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment] . . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, 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 ***481** common law as essential to the orderly pursuit of happiness by free men. [86]

Thus, even though a teacher challenged the law, the Court decided the case by relying on the parents' right to direct their child's education.

Two years later, the Supreme Court again analyzed the scope of the parental right when it overturned an Oregon statute that prohibited parents from enrolling their children in private school. [87] The Supreme Court reaffirmed in Pierce that the fit parent's liberty interest in the child was superior to the state's interest in the welfare of the child. The Court explained that the statute

unreasonably interferes with the liberty of the parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state [and] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. [88]

Nearly two decades later, the Court revisited the parental liberty interest in Prince v. Massachusetts. [89] In Prince, a woman was prosecuted for taking her niece, over whom she had guardianship, along with her to sell religious literature. [90] The Court affirmed the prosecution, explaining that the state, as parens patriae, may, under certain circumstances, restrict the parents' right. [91] The state interest, however, is limited. "The religious training and indoctrination of children may be accomplished in many ways . . . . These and all others except the public proclaiming of religion on the streets . . . remain unaffected by the decision." [92]

In 1972, the Court again acknowledged the fundamental liberty interest of parents in directing the upbringing of their children, albeit in the context ***482** of a free exercise claim. In Wisconsin v. Yoder, the Court upheld the right of Amish parents to educate their children at home after the eighth grade notwithstanding a state law requiring education in a state-approved school. [93] The Court found that the state's interest in providing universal education was secondary to the parents' rights to education their children according to their Amish faith. The Court explained that

Providing public schools ranks at the very apex of the function of a State. Yet, ... a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children . . . . [94]

The parents' duty to prepare a child for additional obligations "include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship." [95] For the Amish, they believed children beyond the eighth grade should be educated at home in the Amish way of life.

The importance placed upon the relationship between the child and fit, legal parents, also has been emphasized by the higher standard of proof required before the state can substantially interfere with the parents' constitutional rights. [96] "[T]he interest of

a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."' [97] "Choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the state's ***483** unwarranted usurpation, disregard, or disrespect." [98] The state's interest in caring for the child of natural or adoptive parents is de minimis if the parents are fit parents. [99]

What appears to be a strong case in favor of parents to decide when and how their children will be exposed to comprehensive sex education, including instruction on sexual and gender identity issues, evaporates in the face of the broad discretion afforded schools to educate children. The United States Supreme Court has explained that schools are tasked with educating youth with the

[F]undamental values necessary to the maintenance of a democratic political system. . . .

. . . .

. . . [S]chools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, or offensive speech and conduct . . . . [100]

In two other cases, the Court further explained

[A] sound education "is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.". . . "We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government . . . and as the primary vehicle for transmitting the values on which our society rests. . . . In sum, education has a fundamental role in maintaining the fabric of our society." [101]

The Supreme Court has given "broad discretionary powers" for schools to teach whatever values they deem appropriate. [102]

Given the broad powers afforded schools, the obvious question becomes what happens when the school's values instruction conflicts with the beliefs ***484** of the students' parents. Several federal appellate courts have concluded that the state, not the parents, will prevail in the conflict as long as the school has a legitimate reason for its instruction. [103] One court stated it this way:

It is axiomatic that competing constitutional claims are found in a school setting. Students, teachers, parents, administrators, and the state as parens patriae, all have legitimate rights to further their respective goals. Sometimes these rights clash. Thus, while there is a constitutional right to freedom of religion, it is not absolute and may be circumscribed by a compelling state interest. [104]

In deciding between the two competing interests, courts have decided that the school's obligation to educate trumps parental rights once parents place their children in the public schools. As a result, "parental requests that their children be exempted from a part of the general public school programs have been frequently denied." [105] The courts have explained that when "parents choose to enroll their children in public schools, they cannot demand that the school program be tailored to meet their individual preferences, even those based on religion or a right of privacy." [106] A review of a few cases in this area highlights the broad discretion granted to school boards.

In Brown v. Hot, Sexy and Safer Productions, Inc., [107] the parents of two high school students complained that the officials of a public school district violated their parental rights to direct the upbringing of their children and to educate in accord with their

own views of morality. At issue in that case was a mandatory school AIDS awareness assembly during which the presenters used sexually explicit language and performed sexually explicit skits with several students selected from the audience. In the complaint, the students alleged that during the assembly, presenters also advocated and approved oral sex, masturbation, homosexual sexual activity, and premarital sex. [108] In rejecting the parents' claim that the instruction violated their parental rights, the court explained that a parent's right involves

*485 choosing a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language. . . . [T]he state does not have the power to "standardize its children" or "foster homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. [109]
Parents do not, however, have a

right to dictate the curriculum at the public school to which they have chosen to send their children. . . . If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. [110]

In another case from Massachusetts, the highest court of that state was asked whether it violated parents' rights for a school to provide condoms to juniors and seniors without parental notice or a right of parents to opt their children out of the program. Holding that the "[p]ublic education of children is unquestionably entrusted to the control, management, and discretion of State and local communities," [111] the court concluded that the condom distribution program did not violate the parents' constitutional rights:

We discern no coercive burden on the plaintiffs' parental liberties in this case. No classroom participation is required of students. Condoms are available to students who request them and, in high school, may be obtained from vending machines. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. . . . For their part, the plaintiff parents are free to instruct their children not to participate. . . . Although exposure to condom vending machines and to the program itself may offend the moral and religious sensibilities of plaintiffs, mere exposure to programs offered at school does not amount to an unconstitutional interference with parental liberties *486 without the existence of some compulsory aspect of the program. [112]

The Ninth Circuit also rejected a claim that parents' rights were violated when their elementary school children in California schools were exposed to sexual questions in a questionnaire that parents were told was designed to assess trauma. [113] Some of the questions asked the elementary school students to rate various activities on a scale from "never" to "almost all of the time." [114] Those questions included the following: (i) touching my private parts too much, (ii) thinking about having sex, (iii) thinking about touching other people's private parts, (iv) thinking about sex when I don't want to, (v) not trusting people because they might want sex, and (vi) can't stop thinking about sex. [115]

The Ninth Circuit held that the parents' rights were not violated because parents have no rights concerning what their children are taught in school. Echoing the rationale of the First Circuit in Brown v. Hot, Sexy and Safer Productions, Inc., the Ninth Circuit held that:

[O]nce 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. The constitution does not vest parents with the authority to interfere with the public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise. . . . "While parents may have a fundamental right to decide whether to send their children to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals

hired to teach at the school, the extracurricular activities offered at the school . . . these issues of public education are generally committed to the control of state and local authorities." [116]

*487 What makes Brown and Fields particularly troubling for parents is that in both instances the schools violated state laws mandating that parents receive notice in advance of such events that specifically told them (i) about the proposed instruction and that (ii) they have the right to opt their children out of the instruction. Despite the fact that the schools violated state law that expressly gave parents an opt out right, the courts refused to find any violation of the parents' rights.

In yet another decision arising out of an incident in Massachusetts schools, the court reaffirmed that parents have no constitutional right to dictate what their children are taught. As part of the Lexington school system's effort to educate its students to understand and respect gays, lesbians, and diverse families, teachers read to first grade students a book entitled "King and King," which is a story where a prince marries another prince. [117] When the parents learned that the school read the book to their children, some asked the school for a right to opt their children out of future instruction that demonstrates acceptance of same-sex relationships. [118] While Massachusetts law gives parents the right to exempt children from any curriculum that primarily involves human sexual education or human sexuality issues, that statute does not cover the type of classroom discussion that the plaintiffs' children encountered. [119]

In rejecting the parents' constitutional claims, the court articulated an extremely broad grant of authority to the public schools:

In essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation. . . . It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate the effects of past discrimination and, in the process, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society. In addition, it is reasonable for those educators to find that teaching young *488 children to understand and respect differences in sexual orientation will contribute to an academic environment in which students who are gay, lesbian, or the children or same-sex parents will be comfortable and, therefore, better able to learn. [120]

The court explained that if the school were required to permit parents to opt children out of discussions concerning homosexuality, "[a]n exodus from [the classroom] . . . could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students." [121] "[T]he very purpose of schools is the preparation of individuals for participation as citizens and therefore local education officials may attempt to promote civic virtues that awaken . . . the child to cultural values. . . . Schools are expected to transmit civic values. . . . [T]he state is expected to teach civil values as part of its preparation of students for citizenship." [122] "One of the most fundamental of those values is mutual respect. . . . Students today must be prepared for citizenship in a diverse society." [123]

The court also was quite clear that the schools are tasked with changing the minds of children on the issue of homosexuality, even if such instruction is contrary to parents' religious beliefs on the issue: "A key to changing a mind is to produce a shift in the individual's mental representations. As it is difficult to change attitudes and stereotypes after they have developed, it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students . . . ." [124]

A proposed Maryland curriculum [125] further demonstrates the inevitable conflict between the religious beliefs of some parents and curriculum designed to positively portray same-sex relationships:

· "Myth: If you are 'straight,' you can become a homosexual. Fact: Most experts in the field have concluded that sexual orientation is not a choice." [126]

*489 · "Family" was defined as "two or more people who are joined together by emotional feelings or who are related to one another." All references to "husband" and "wife" were deleted. [127]

· In a sample quiz, the curriculum answered the question of whether homosexuality is a sin by responding that "many religious denominations do not believe this." [128]

· In a teacher resource, teachers were told that they should tell students "It is perfectly natural to be gay, lesbian, bisexual, and/or transgender" and that they should "[a]ssure the young person that he/she is absolutely normal." [129]

The 2009 Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation echoes these statements, concluding that:

· Students should be told that "same-sex sexual attractions, behavior, and orientation per se are normal and positive variants of human sexuality [.]" [130]

· Students should be taught that "[g]ay men, lesbians, and bisexual individuals form stable, committed relationships and families that are equivalent to heterosexual relationships and families in essential respects." [131]

· Students who express a desire to want to resist same-sex attractions should be told that their feelings are based on stigma the students feel from religious beliefs of parents or friends. [132]

*490 · Students should be told that they should explore their sexual identity "by accepting homosexuality and bisexuality as normal and positive variants of human sexual orientation" [133] and that any attempts to resist or change their same-sex attractions could be harmful. [134]

While courts have granted schools broad discretion to instill values the schools believe constitute "shared values of a civilized social order," [135] nothing in the case law grants schools authority to teach children false or harmful information. To the extent schools teach children factually inaccurate or physically harmful information concerning same-sex sexual attractions, behavior, and orientation, they should be subject to legal liability.

IV. Public Schools Violate Parents' Rights and Engage in Educational Malpractice When They Teach Children That Engaging in Homosexual Conduct is Healthy and Normal.

A. Schools Fail to Provide Factually Accurate Information Concerning Sexual Orientation and Same-Sex Attractions.

A 2010 open letter to school superintendents by the American College of Pediatricians highlights the inaccurate and harmful information conveyed when schools instruct students that same-sex attractions are healthy and normal variants of sexuality. [136] The letter points out that "there is no scientific evidence that an individual is born 'gay' or 'transgender"' and that some who seek to resist same-sex attractions "respond well to therapy." [137] Quoting Dr. Francis Collins, former Director of the Genome Project, the letter states that "while homosexuality may be genetically influenced, it is 'not hardwired by DNA, and that whatever genes are involved represent predispositions, not predeterminations."' [138] The letter cautions schools not to encourage students to self-identify as gay or lesbian *491 based on the fact that "[r]igorous studies demonstrate that most adolescents who initially experience same-sex attraction, or are sexually confused, no longer experience such attractions by age 25." [139] Discouraging early identification as gay or lesbian also has direct safety benefits. A 1991 study found that "for each year an adolescent delays, the risk of suicide alone decreases by 20%." [140]

Despite its recommendations to encourage students to explore their sexual identity, the APA's materials actually are consistent with the American College of Pediatrician's Open Letter concerning the lack of scientific evidence for a "gay gene." For example, in August 2009, the Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation was released. [141] In it, the APA task force admits that politics, rather than well-documented scientific or medical evidence, provided the impetus to declassify homosexuality as a disorder in 1973. [142] The lack of scientific evidence to support a "gay gene" is further evidenced by a statement on the APA's website in response to the question of "what causes a person to have a particular sexual orientation?"

There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation. [143]

***492** The Task Force Report also concedes that there is a "dearth of scientifically sound research on the safety of sexual orientation change efforts." [144] Despite the lack of evidence establishing either that there is a "gay gene" or that it is harmful to try to resist same-sex attractions, the Task Force Report concludes that "same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality" [145] and that efforts to change one's sexual orientation should be avoided. [146] The Task Force Report even encourages licensed mental health professionals to uncover and deconstruct the client's dominant worldview beliefs that might be influencing the client's desire to change his sexual orientation. [147]

Significantly, the Task Force Report wholly ignored a 2009 peer-reviewed journal issued months earlier by NARTH. [148] In that first volume of the Journal of Human Sexuality, the results of more than a century of scientific and medical literature were presented. [149] The NARTH Report "responds to three major claims underlying the APA's objections to the treatment of homosexuality." [150] Those claims are:

1. There is no conclusive or convincing evidence that sexual orientation may be changed through reorientation therapy.

2. Efforts to change sexual orientation are shown to be harmful and can lead to greater self-hatred, depression, and other self-destructive behaviors.

3. There is no greater pathology in the homosexual population than the general population. [151]

As to the first issue, the NARTH Report dedicates twenty-six pages summarizing 125 years of clinical and scientific reports, reaching the ***493** conclusion many clinicians have found, that therapies to help those struggling with unwanted same-sex attractions are helpful-in other words, that change is possible. [152]

The fact that efforts to change have proven helpful echoes the APA's admission that there is no evidence that sexual orientation is determined solely by genetics. It is also consistent with scientific research finding that there is no "gay gene." For example, the most recent twin study repeats the findings of three earlier twin studies. [153] This most recent, and largest study, which involved a random sampling of twins in Finland (6,001 female individuals and 3,152 males), demonstrates that homosexuality is not determined solely, or even in large part, by genes. Dr. Whitehead offered his explanation of the results of the study: "The results, by my calculations, do in fact, reinforce one conclusion drawn from previous studies. That is, if one identical twin-male or female-has SSA [same-sex attractions], the chances are only about 10% that the co-twin also has it. In other words, identical twins usually differ for SSA." [154]

The NARTH Report also concluded, consistent with the Task Force Report conclusion, that there is no evidence that it is harmful to try and change unwanted same-sex attractions. [155] Finally, the NARTH Report detailed the high risks of a wide-range of medical, psychological, and relational dysfunctions among those who are involved in homosexual relationships. Those risks include, for example, "significantly poorer mental health in terms of anxiety, depression, suicidality, and negative affect than the heterosexual group." [156] In particular, homosexual women demonstrated 3.5 times increased risk of drug dependence, 3.42 times increased risk of substance abuse disorder, and 4 times increased risk of alcohol dependence of 12-month prevalence, as compared to heterosexual women. [157] A 2005 study reported that 41.8% of lesbians and 45.6% of bisexuals reported they ***494** were heavy alcohol drinkers, compared with 12.7% of heterosexuals. [158] Homosexual men demonstrated higher risks than heterosexual men in those same categories, albeit by lower percentages than the women. [159]

According to reports from the Centers for Disease Control and Prevention Agency of the U.S. Department of Health and Human Services, men who have sex with men (MSM) also are at significantly higher risks for sexually transmitted diseases. Specifically, MSM accounted for 71% of all HIV infections among male adults and adolescents in 2005, [160] and this group accounts for more than half of all new HIV infections in the United States each year. [161] The CDC also reported that the rate of new HIV diagnoses, among MSM in the United States is more than 44 times that of other men. [162] The significant health risks are not limited to HIV. MSM are 46 times more likely to contract syphilis than heterosexual men or women. [163] Men and women engaged in homosexual conduct are also at a greater risk to suffer from psychological disorders, mental depression, and eating disorders. [164] The NARTH Report summarizes various studies and findings where homosexual men and women reported experiencing sexual addiction and being the victims or perpetrators of "sexual molestation, rape, ***495** and other predation at rates much higher than their heterosexual counterparts." [165]

Despite these facts, some schools fail to warn students of the risks of same-sex sexual activity when they choose to include the topic of same-sex attractions in the curriculum.

B. Schools Should Be Liable for Teaching Factually Inaccurate Information

When schools teach children that "same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality," they fail to provide factually accurate information. The medical community has long documented the increased health risks associated with homosexual conduct, yet, as discussed above, some schools are encouraging student exploration with same-sex attractions through misinformation and omission. Under these circumstances, at least three separate claims, one federal and two state, should be advanced when schools teach factually inaccurate information that is harmful to students: a state claim of educational malpractice and a federal parental rights claim.

Although the claim of educational malpractice has been disfavored in American jurisprudence, [166] the claim should exist for school districts that teach factually inaccurate and potentially harmful information to students concerning same-sex attractions. As a cause of action based in negligence principles, when school districts teach factually inaccurate information to students, thereby encouraging them to explore an unhealthy lifestyle, schools breach a duty of reasonable care owed to their students. [167] In addition, a parental rights claim also could potentially be successful by ***496** convincing courts that school districts lose their usual veil of broad discretion to inculcate whatever values they desire when they teach factually inaccurate information.

1. Schools should be liable in tort for teaching factually inaccurate information concerning same-sex attractions.

To succeed on a claim of educational malpractice, as a tort claim, a plaintiff would need to prove that the school owed the students or parents a duty of care, that the school negligently breached the duty, and that plaintiff suffered injury proximately caused by defendant's breach. [168] The first hurdle an educational malpractice plaintiff would have to overcome is to establish

that schools owe students or parents a duty of care that is breached when schools teach materials that are factually or medically inaccurate and, as a result of the misinformation, potential harm may come to the students.

One of the two leading educational malpractice claim cases specifically concluded that there is no duty of care owed to students. [169] That case, however, did not involve teaching factually inaccurate and harmful information to students. Rather, the case involved a claim that the school failed to adequately educate the student. The court held that there was no duty of care, in part, because "classroom methodology affords no readily acceptable standards of care, or cause, or injury." [170]

In Peter W., an eighteen-year old student who had recently graduated sued the school, asserting various tort claims. The basis of his claim was that the school had failed to apprehend his reading disabilities, had passed him from one grade to the next without ensuring that he had achieved the necessary skills, and permitted him to graduate even though he was unable to read above the eighth grade level. [171] The question before the court was whether the school owed a duty of care to students. The court acknowledged that schools owe a duty of care in carrying out their responsibilities but that the duty did not satisfy the legal standard for duty of care. In dismissing the plaintiff's claims, the court readily dispensed with the argument that because schools assume the "the function of instruction" they have a "duty to exercise reasonable care in its discharge." [172] The court ***497** also rejected the student's argument that the special relationship between students and teachers imposed a duty to exercise reasonable care. [173]

The court's rationale highlights the substantive distinction between the claims asserted in Peter W. and the claim of educational malpractice based on teaching factually inaccurate and harmful information. The Peter W. court explained:

[C]lassroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any laymen might-and commonly does-have his own emphatic views on the subject. [174]

Disputes over classroom methodology, however, are distinct from teaching inaccurate and harmful information. For example, over the years, educators and parents have debated the propriety of various teaching methodologies, including new math, [175] whole language, and phonics. [176] The courts, as reflected in the rationale of the Peter W. court, have given school districts complete discretion on the educational methodologies. Teaching methodology, however, cannot be interpreted so broadly as to include inaccurate and harmful information. [177]

The highest court in New York took a slightly different approach in the second leading educational malpractice case, concluding that negligence claims based on failure to properly educate should be heard before the proper educational administrative agency. [178] In Donohue, the recent graduate brought a claim for educational malpractice, alleging that "notwithstanding his receipt of a certificate of graduation he lacks even the ***498** rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment." [179] He alleged that the school failed to, among other things, properly perform its duties insofar as it gave him passing grades, evaluate his mental ability and capacity, and provide adequate school facilities and personnel. [180] The court explained the basis for its hesitancy to review educational malpractice claims:

To entertain a cause of action of "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies-a course we have unfalteringly eschewed in the past-but, more importantly to sit in review of the day-to-day implementation of these policies. [181]

Even that court, however, left open the possibility of an educational malpractice claim under the right circumstances: "this is not to say that there may never be gross violations of defined public policy which the courts would be obliged to recognize and correct." [182]

Outside the context of educational methodologies and day-to-day implementation of those methodologies, courts have found school districts liable for negligence in a limited set of circumstances. For example, schools can be liable for negligent supervision of a teacher who molests a student. [183] Similarly, a school district can be liable for negligent supervision of students if a student harmed another student; although a plaintiff would need to show a history of harmful incidents on campus of which the school was aware and did nothing to correct the situation. [184]

A claim for educational malpractice based on teaching factually inaccurate and harmful information is more analogous to the negligent supervision cases than the classroom methodology cases. Whatever the scope of discretion afforded educators in fulfilling their educational duties, it cannot reach so far as to permit educators to teach factually inaccurate information that is harmful to students. Once educators assume the responsibility to teach other parents' children, they must satisfy a minimal duty of care that precludes them from teaching misinformation. In fact, the ***499** definition of "teach" is "to instruct, to inform, to communicate to another the knowledge of that of which he was before ignorant." [185] "Knowledge" is then defined as "a clear and certain perception of that which exists, or of truth and fact." [186]
Not surprisingly, therefore, state laws and regulations, require that the curriculum be medically and factually accurate, citing the federal Centers for Disease Control and Prevention (CDC) as a proper source of information. A Washington statute, for example, requires schools to "assure that sexual health education is medically and scientifically accurate," which it defines as

verified or supported by research in compliance with scientific methods, is published in peer-review journals, where appropriate, and is recognized as accurate and objective by professional organizations and agencies with expertise in the field of sexual health including but not limited to . . . the federal centers for disease control and prevention. [187]

As mentioned above, the CDC statistics reveal increased health risks associated with homosexual behavior, including HIV and sexually transmitted diseases. Significantly, a CDC report published for youth found that 54% of all new people infected with HIV, coming from the 13-24 age group, were from male-to-male sexual contact. [188] From 2001 to 2006, ***500** male-to-male sex was the largest transmission category for HIV and, in fact, the only category with increasing numbers. [189] Therefore, whether it is based on a statute that requires factual information or simply a common sense approach to the role of an educator to impart knowledge, educators breach a duty to provide factually accurate information when they tell students that same-sex sexual activity is healthy and normal.

The next hurdle in an educational malpractice claim requires the student to establish that the school breached the duty of care and that the breach of duty directly caused harm to the student. Both the Peter W. and Donohue courts acknowledged the difficulty in proving causation. The Peter W. court explained that the "'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers." [190] The Donohue court was slightly more optimistic: "[a]s for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established." [191] Both cases, however, stand for the proposition that there are too many factors that influence a student's academic success or failure to be able to hold school districts liable when a student graduates despite failing to achieve certain educational benchmarks.

Depending on the circumstances, a plaintiff could establish that defendant's breach of duty to exercise reasonable care in educating him proximately caused the harm suffered by the student who follows the school's instruction that homosexual conduct is perfectly normal and healthy. While there are a variety of factual scenarios that could support legal action, one example would include the student who is encouraged to explore homosexuality during the normal teen identity struggles. Causation might be established if the student or his parents can show that the student experimented with same-sex relationships, not because he

felt he was "born gay," but because the educational instruction made the option more attractive through the factually inaccurate information, and the student subsequently contracted HIV, "voluntarily" entered into a sexual relationship with an older man (statutory rape), or committed suicide as a *501 result of depression. Similarly, if educators and school counselors encourage youth to explore same-sex attractions without warning of the substantial health and emotional risks, a plaintiff might be able to establish causation and harm under the scenarios mentioned above. [192]

Admittedly, there are problems in trying to prove a claim of educational malpractice. That fact alone, however, should not shield schools from liability for encouraging youth to engage in potentially harmful conduct based on factually inaccurate instruction. At a minimum, plaintiffs' claims should survive a motion to dismiss to permit litigation on the questions of causation and harm.

2. Schools violate parental rights when they teach factually inaccurate information concerning sexual orientation.

Perhaps an easier claim to advance is a parental rights claim. As discussed above, traditionally parental rights challenges to curriculum have failed. [193] Those cases, however, did not challenge the truthfulness and accuracy of the information conveyed, which is a constitutionally significant fact. For example, while the Parkers, who sued after King and King was read to their elementary school student, sought the right to opt their children out of training in Massachusetts schools based on their religious or moral objections to the instruction, they did not challenge the school district's authority to even teach the materials in the first place. Unquestionably, courts have found that schools have broad discretion concerning curriculum choices. One federal district court aptly summarized the case law:

A school district has the undoubted right to determine school curriculum and control the in-class pedagogical methods of its teachers. *502 Conward v. Cambridge School Comm., 171 F.3d 12, 23 (1st Cir.1999); Ward v. Hickey, 996 F.2d 448, 452-53 (1st Cir.1993). School officials have broad discretion to restrict school speech in order to further educational goals. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683-86 (1986); Conward, 171 F.3d at 23; Ward, 996 F.2d at 452. This discretion includes "the right to design curricula and select textbooks." Conward, 171 F.3d at 23. It is based on "the State's power to prescribe a curriculum for institutions which it supports." Meyer v. Nebraska, 262 U.S. 390, 402 (1923). In Milliken v. Bradley, 418 U.S. 717, 741 (1974), Chief Justice Burger wrote: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." [194]

No state, however, vests school districts with authority to teach false information. In fact, the statement is an oxymoron-to instill false information in students is not teaching-and directly contrary to the statutes or regulations in some states. Thus, when plaintiffs sufficiently plead that the school district is providing factually inaccurate information, and thus is not entitled to the discretion typically afforded schools concerning curriculum decisions, the burden should shift to the school board to establish that the curriculum is factually and medically accurate. Absent such proof, plaintiffs should prevail on their parental rights claim. A school would, therefore, be obligated to accommodate the parents' opt out request.

It is important to point out that even if parents were successful in asserting a parental rights claim, schools would not be prohibited from teaching the material. Instead, parents would be able to opt their children out from the objectionable material, and potentially receive a monetary award in the form of damages and attorneys' fees. The long-term result, however, might be that schools stop teaching the material in order to avoid the costs of litigation.

***503 C. Courts Should Enjoin Factually Inaccurate Curricula.**

A final option is for plaintiffs to seek a court order declaring the curriculum to be factually inaccurate and enjoining its implementation. According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant the requested relief. [195] A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the

public interest would not be disserved by a permanent injunction. [196] A situation where school districts are conveying factually and medically inaccurate information that jeopardizes the health and safety of its students should satisfy the four-factor test.

In those states that affirmatively require schools to provide medically and factually accurate information concerning same-sex sexual attractions, plaintiffs should be entitled to permanent injunctive relief in connection with an action that seeks a declaratory judgment that the curriculum fails to comply with the statutory requirements. [197] Given the staggering health risks associated with same-sex sexual activity, particularly among the youth, plaintiffs can demonstrate that they will suffer irreparable injury if the curriculum is not enjoined. As to the second factor, any harm that would ensue as a result of a child engaging in risky sexual activity after exposure to the false information provided by the school could not adequately be compensated monetarily. For these same reasons, equity weighs in favor of granting the injunction and enjoining the factually inaccurate curriculum-the school simply has no legitimate, protected interest in providing false information to its students. Finally, the public interest is served through an order that protects our youth from unnecessary exposure to risky sexual behavior.

Conclusion

In an effort to be tolerant and accepting, schools are normalizing homosexual conduct by failing to warn students of the significant health ***504** risks associated with same-sex sexual conduct. Although based on novel theories, or novel twists to old theories, lawsuits need to be brought challenging the authority of school districts to mislead children about same-sex attractions. Armed with the growing body of research refuting the unsupported conclusions that people are born gay and cannot change, school districts have an obligation to provide accurate information to the students entrusted to their care. When they abdicate that responsibility, they should be held liable in tort and for violating the fundamental liberty interest of parents who expect schools to educate and not harm their children.

Footnotes

d1 Associate Professor of Law, Liberty University School of Law. Associate Director, Liberty Center for Law & Policy. Special Counsel to Liberty Counsel. J.D., magna cum laude, Brooklyn Law School.

1 11 Thomas Jefferson, Letter to Colonel Charles Yancey, in The Works of Thomas Jefferson 497 (Paul Leicester Ford ed., 1905).

2 3 Jared Sparks, Notes on the Form of a Constitution for France, in The Life of Gouverneur Morris, with Selections from His Correspondence and Miscellaneous Papers 483 (Boston, Gray & Bowen 1832). Governor Morris took rough ideas of the constitution at convention and created the final language.

3 Benjamin Rush, Of the Mode of Education Proper in a Republic (1798); see also Adrienne Koch, The American Enlightenment 239. “Liberty cannot be preserved without a general knowledge among the people . . . .” Id.

4 See David Barton, Four Centuries of American Education 49 (2004) (quoting Columbia History of Education in Kansas 82 (Topeka, Edwin H. Snow 1893)).

5 Id. at 35.

6 Id.

7 See Noah Webster, History of the United States 6 (1832).

8 The full text of the statute provided:
It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these latter times by persuading from the use of tongues, that so that at least the true sense and meaning of the original might be clouded and corrupted with false glosses of saint-seeming deceivers; and to the end that learning may not be buried in the grave of our forefathers, in church and commonwealth, the Lord assisting our endeavors.

It is therefore ordered that every township in this jurisdiction, after the Lord hath increased them to fifty households shall forthwith appoint one within their town to teach all such children as shall resort to him to write and read, whose wages shall be paid either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those that order the prudentials of the town shall appoint; provided those that send their children be not oppressed by paying much more than they can have them taught for in other towns.

And it is further ordered, that when any town shall increase to the number of one hundred families or householders, they shall set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university, provided that if any town neglect the performance hereof above one year that every such town shall pay 5 pounds to the next school till they shall perform this order.

The Old Deluder Satan Act (1647), in 2 Records of the Governor and Company of the Massachusetts Bay in New England 203 (Nathaniel B. Shurtleff ed.,1853).

9 See Barton, supra note 4, at 21 (quoting Kansas Educators, Columbian History of Education in Kansas 82 (1893)).

10 Vidal v. Girard's Executors, 43 U.S. 127, 200 (1844).

11 George Washington, Farewell Address (1796), available at http:// avalon.law.yale.edu/18th_century/washing.asp. In the Northwest Ordinance, signed by President Washington in 1789, he stated, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance, art. III, 1 Stat. 50 (1789).

12 George Washington, Farewell Address (1796), available at http:// avalon.law.yale.edu/18th_century/washing.asp. Daniel Webster also explained that

[i]t is not to be doubted, that to the free and universal reading of the Bible, in that age, men were much indebted for right views of civil liberty. The Bible is a book of faith, and a book of doctrine, and a book of morals, and a book of religion, of especial revelation from God; but it is also a book which teaches man his own individual responsibility, his own dignity, and his equality with his fellow-man. 1 Daniel Webster, The Works of Daniel Webster 102 (1851).

13 3 John Witherspoon, The Dominion of Providence over the Passions of Men, in The Works of the Reverend John Witherspoon 42 (1802) (delivering the speech at Princeton on May 17, 1776).

14 Noah Webster, Advice to the Young, in Value of the Bible and Excellence of the Christian Religion (1834). He also cautioned that "[t]he education of youth should be watched with the most scrupulous attention. . . . [I]t is much easier to introduce and establish an effectual system . . . than to correct by penal statutes the ill effects of a bad system. . . . The education of youth . . . lays at the foundations on which both law and gospel rest for success." Id.

15 Plyler v. Doe, 457 U.S. 202, 221 (1982) (citations omitted).

16 Alexis DeTocqueville, Democracy in America 329-30.

17 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added) (citations omitted).

18 See, e.g., Cynthia Dallard, Sex Education: Politicians, Parents, Teachers and Teens, 4 Guttmacher Rep. on Pub. Pol'y 9, 10-11 (Feb. 2001), available at http://www.guttmacher.org/pubs/tgr/04/1/gr040109.pdf (discussing percentages of parents and educators who believe topics concerning same-sex attractions should be discussed in sex education classes); Angry Parents Suing California Schools Over Mandatory Gay-Friendly Classes, Fox News (Sept. 3, 2009), http://www.foxnews.com/us/2009/09/03/angry-parents-suing-california-schools-mandatory-gay-friendly-classes (reporting suit brought by parents when school refused to permit parents to opt out kindergarten children from LGBT lessons).

19 Sexuality Info. and Educ. Council of the U.S., Guidelines for Comprehensive Sexuality Education, at "Acknowledgments" (3d ed. 2004), available at http://www.siecus.org/_data/global/images/guidelines.pdf (last visited Apr. 15, 2011).

20 Id. at 29.

21 Id. at 29-30.

22 Id. at 34.

23 Cal. Educ. Code § 51933(b)(4) (West 2006).

24 Id. § 51930(b)(2).

25 Id. § 51933(d)(2) (incorporating Cal. Educ. Code § 220 (West Supp. 2011)).

26 Iowa Code Ann. § 279.50(9)(d)(2) (West 1996); see also Wis. Stat. Ann. § 118.019(2)(b) (West 2004) (requiring materials be free of bias based on sexual orientation).

27 Montgomery Cnty. Pub. Schs., Respect for Differences in Human Sexuality Lesson 7-9 (2007), available at http:// www.mcpscurriculum.com/pdf/Grade10Lesson2.pdf (last visited Apr. 15, 2011).

28 See Press Release, President Barack Obama, Presidential Proclamation-Mother's Day (May 7, 2010), available at http:// www.whitehouse.gov/the-press-office/presidential-proclamation-mothers-day; Press Release, President Barack Obama, Presidential Proclamation-Father's Day (June 18, 2010), available at http://www.whitehouse.gov/the-press-office/presidential-proclamation-fathers-day.

29 Joseph G. Kosciw et al., 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in our Nation's Schools 100 (2008).

30 Id.

31 Id.

32 School Field Trip to Teacher's Lesbian Wedding Sparks Controversy, Fox News (Oct. 13, 2008), http://www.foxnews.com/ story/0,2933,436961,00.html.

33 Voices from our Schools: Susan, S.F. Unified Sch. Dist. LGBTQ Support Servs., www.healthiersf.org/LGBTQ/InTheClassroom/ voices-susan.html (last visited Apr. 23, 2011).

34 See Laurie Higgins, District 204 Participates in Teaching Tolerance's Mix It Up Day, Ill. Family Inst., Div. of Sch. Advocacy, (Nov. 13, 2009 12:36 PM), http://www.illinoisfamily.org/dsa/contentview.asp?c=34635.

35 See Homophobia Quiz, Teaching Tolerance, http:// www.tolerance.org/activity/homophobia-quiz (last visited Apr. 23, 2011); Homophobia Questionairre, PBS, Frontline, http:// www.pbs.org/wgbh/pages/frontline/shows/assault/etc/quiz.html (last visited Apr. 23, 2011).

36 See, e.g., Marnee Banks, Helena School's Draft Sex-Ed Document Causing Controversy, KRTV News (July 8, 2010), http://www.krtv.com/news/helena-schools-draft-sex-ed-document-causing-controversy; Montana City's Sex Ed Plan Draws Fire, CNN (July 15, 2010), http://articles.cnn.com/2010-07-15/us/montana.sex.education_1_school-board-meeting-sexual-orientation-teaching-students.

37 Helena Pub. Schs., Health Enhancement: K-12 Critical Competencies 36, 38, available at http:// www.helena.k12.mt.us/images/ documents/curriculum/HealthCurriculum/K12FinalHealth.pdf (last visited Apr. 23, 2011).

38 Id. at 45.

39 Id. at 38.

40 Id. at 45.

41 Id.

42 Abigail Curtis, State Rules in Favor of Young Transgender, Bangor Daily News (July 1, 2009), http://www.bangordailynews.com/detail/109732.html.

43 Id.

44 See, e.g., Mark Tapscott, Obama Appointee Lauded NAMBLA Figure, The Examiner (Oct. 1, 2009), http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Obama-appointee-lauded-NAMBLA-figure-63115112.html.

45 Maxim Lott, Critics Assail Obama's “Safe School” Czar, Say He's Wrong Man for the Job, Fox News (Sept. 23, 2009), http://www.foxnews.com/politics/2009/09/23/critics-assail-obamas-safe-schools-czar-say-hes-wrong-man-job.

46 Former Student Defends Obama's “Safe Schools” Czar Against Allegations, Fox News (Oct. 3, 2009), http:// www.foxnews.com/politics/2009/10/03/student-defends-obamas-safe-schools-czar-allegations/.

47 See What We Do, GLSEN, http://www.glsen.org/cgi-bin/iowa/all/what/index.html (last visited Apr. 15, 2011) (providing links to Day of Silence, No Name Calling Week, and Gay Straight Alliances); Ally Week, GLSEN, http://www.allyweek.org (last visited Apr. 15, 2011); Students Celebrate GLSEN's TransAction! To Educate Peers About Gender, GLSEN (Feb. 27, 2009), http://glsen.org/cgi-bin/iowa/all/news/record/2383.html.

48 GLSEN, From Denial to Denigration: Understanding Institutionalized Heterosexism in Our Schools 1 (2002), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/222-1.pdf (last visited Apr. 23, 2011).

49 Id.; GLSEN, Institutional Heterosexism in our Schools: A Guide to Understanding and Undoing It 1 (2002), available at http:// www.professorreed.com/GLBT_-E-_institutionalized_heterosexism_in_our_schools__a_guide_to_understanding_and_undoing_it.pdf (last visited Apr. 23, 2011).

50 GLSEN, supra note 48, at 2.

51 GLSEN, supra note 49, at 2.

52 See Ally Week FAQs, Ally Week, http:// www.allyweek.com/about/index.cfm (last visited Apr. 20, 2011).

53 See Student and Educators, Ally Week, http:// www.allyweek.com/studentseducators/index.cfm (last visited Apr. 20, 2011).

54 See Day of Silence, Day of Silence, http:// www.dayofsilence.org/index.cfm (last visited Apr. 20, 2011).

55 See Students Celebrate GLSEN's TransAction! To Educate Peers About Gender, GLSEN (Feb. 27, 2009), http://glsen.org/cgi-bin/iowa/all/news/record/2383.html.

56 Id.

57 GLSEN, supra note 48; Sandra K. Chapman, GLSEN, The Power of Children's Literature: Gay and Lesbian Themes in a Diverse Childhood Curriculum, http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/115-1.pdf (last visited Apr. 20, 2011). The Gay-Straight Alliance Network, Transgender Law Center, and National Center for Lesbian Rights make available Beyond the Binary: A Toolkit for Gender Identity Activism in School, available at http://www.transgenderlawcenter.org/pdf/beyond_the_binary.pdf (last visited Apr. 20, 2011). Lambda Legal makes available Bending the Mold: An Action Kit for Transgender Students, available at http:// www.lambdalegal.org/publications/bending-the-mold/order-bending-the-mold.html (last visited Apr. 20, 2011).

58 GLSEN, TransAction!, Gender Terminology, available at http:// www.dayofsilence.org/downloads/TransActionGuide-Terminology.pdf (last visited Apr. 23, 2011).

59 Id. at 1.

60 Id.

61 See id. at 2.

62 Id.

63 See K-12 Curricula and Lesson Plans, GLSEN, http:// www.glsen.org/cgi-bin/iowa/all/library/record/2461.html (last visited Apr. 20, 2011) ("GLSEN's Education Department offers free curricula and lesson plans for educators to use with elementary, middle and high school students. These resources provide a framework for facilitating classroom discussion and engaging students in creating safer schools for all.")

64 PFLAG, Be Yourself (2006), available at http:// www.pflag.org/fileadmin/user_upload/Publications/Be_Yourself.pdf (last visited Apr. 20, 2011).

65 Id. at 3-4.

66 Id. at 5.

67 Batavia High School, Gender Identity Awareness: Presentation for Batavia City High School Students (unpublished manuscript) (on file with Author).

68 Id. at 7.

69 Id. at 10.

70 Jan Hoffman, Can a Boy Wear a Skirt to School?, N.Y. Times, Nov. 8, 2009, at ST1 http://www.nytimes.com/2009/11/08/fashion/08cross.html.

71 Guttmacher Institute, State Policies in Brief: Sex and STI/HIV Education, Apr. 1, 2011, available at http://www.guttmacher.org/pubs/spib_ SE.pdf.

72 Id. (including Delaware, District of Columbia, Florida, Georgia, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and West Virginia).

73 Id. (including Alabama, California, Connecticut, Delaware, District of Columbia, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin).

74 Id. (including Arizona, Nevada, and Utah).

75 Id. (including Delaware, Indiana, Kentucky, Montana, Nevada, North Carolina, and Utah do not permit parental opt-out).

76 California, for example, requires schools to send a notice at the beginning of each year in which sex or STD/HIV education. The notice must be given the opportunity to review the instructional materials at the school and the opportunity to request in writing that their child not participate in the instruction. The law, however, does not permit students to opt out of anti-harassment programs or other instruction that discusses gender, sexual orientation, or family life that does not discuss human reproductive organs and their functions. See Cal. Educ. Code § 51938.

77 Guttmacher Institute, supra note 71, at 2 (including Alabama, Massachusetts, New Jersey, Oregon, and Vermont).

78 Id. (including Arizona, New York, and Pennsylvania).

79 See Fields v. Palmdale, 427 F.3d 1197, 1208 (9th Cir. 2005) ("Thus, the right of the parents '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' is not protected by the constitutional right to privacy, at least not as that purported right is understood by the parents in this case."), op. amended upon reh'g 447 F.3d 1187, 1190 (9th Cir. 2006); Leebaert v. Harrington, 332 F.3d 134, 140-41 (2d Cir. 2003) (rejecting argument that the parental right to direct the upbringing and education of children includes the "right to exempt one's child from public school requirements"); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995) ("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."); Immediato by Immediato v. Rye Neck Sch. Dist., 873 F. Supp. 846, 852 (S.D.N.Y. 1995) ("We find no federal case law which recognizes a constitutionally protected parental right for students to opt out of an educational curriculum for purely secular reasons.").

80 See, e.g., Fields, 447 F.3d at 1190 (dismissing parental rights argument, explaining that parents "'do not have a fundamental [due process] right generally to direct how a public school teaches their child"' (citation omitted)); Leebaert, 332 F.3d at 140-41 (rejecting claim that parental rights are unconstitutionally infringed when school refuses to opt out child from mandatory health education curriculum).

81 See, e.g., Fields, 447 F.3d at 1190; Leebaert, 332 F.3d at 140; Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998); Brown, 68 F.3d at 534.

82 Troxel v. Granville, 530 U.S. 57, 65 (2000).

83 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

84 Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

85 262 U.S. 390 (1923).

86 Id. at 399 (citations omitted).

87 Pierce, 268 U.S. at 510.

88 Id. at 534-35.

89 321 U.S. 158 (1944).

90 Id. at 159-60.

91 Id. at 166. Black's Law Dictionary explains that parens patriae literally means "parent of the country," and traditionally refers to the "role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child." Black's Law Dictionary 1144 (8th ed. 2004).

92 Id. at 175. The Court cited safety concerns with young children selling religious literature door to door. Id. at 169.

93 406 U.S. 205, 230-31 (1972).

94 Id. at 213-14.

95 Id. at 233.

96 See Santosky II v. Kramer, 455 U.S. 745, 766-67 (1982) (noting that "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); Garcia v. Rubio, 670 N.W.2d

475, 483 (Neb. Ct. App. 2003) ("A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have the child custody or has legally lost the parental superior right in a child.") (citation omitted).

97 Stanley v. Illinois, 405 U.S. 645, 651 (1972) (dealing with rights of an unwed father).

98 M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citations omitted).

99 Stanley, 405 U.S. at 657-58.

100 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

101 Sheff v. O'Neill, 678 A.2d 1267, 1289 (Conn. 1996) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) and Plyler v. Doe, 457 U.S. 202, 221 (1982)).

102 Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260, 271 (3d Cir. 1998).

103 See supra note 79 (quoting several court opinions).

104 Roman v. Appleby, 558 F. Supp. 449, 456 (C.D. Penn. 1983) (citations omitted).

105 Id.

106 Id.

107 68 F.3d 525, 529 (1st Cir. 1995).

108 Id.

109 Id. at 533.

110 Id. at 533-34.

111 Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580, 584 (Mass. 1995).

112 Id. at 586.

113 Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006).

114 Id. at 1201.

115 Id. at 1202 n.3.

116 Id. at 1206 (quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005)).

117 Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass. 2007), aff'd 514 F.3d 87 (1st Cir. 2008).

118 Id. at 266.

119 Id. at 266-67.

120 Id. at 263-64.

121 Id. at 265.

122 Id. at 271-72.

123 Id. at 274.

124 Id. at 275 (citations omitted).

125 The religious aspects of the proposed curriculum were not implemented because a federal district court preliminarily enjoined that portion of the curriculum as potentially violating the Establishment Clause. See Citizens for a Responsible Curriculum v. Montgomery Co. Public Schools, No. Civ. A. AW-05-1194, 2005 WL 1075634, *12-13 (D. Md. May 5, 2005).

126 Id. at *2.

127 Complaint at Ex. 2, Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch. (2005) (No. Civ. A. AW-05-1194) (on file with author).

128 Citizens for a Responsible Curriculum, 2005 WL 1075634, at *3.

129 Jessie Gilliam, Advocates for Youth, Respecting the Rights of GLBTQ Youth, A Responsibility of Youth-Serving Professionals, 14 Transitions, June 2002, at 16, available at http:// www.advocatesforyouth.org/storage/advfy/documents/transitions1404.pdf (last visited July 1, 2011).

130 Am. Psychological Ass'n, Report of the American Psychological Association Task Force On Appropriate Therapeutic Responses to Sexual Orientation 2 (2009), available at http:// www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (last visited July 1, 2011) [hereinafter the "Task Force Report"].

131 Id. at 2.

132 Id. at 18, 47, 50, 58, 60.

133 Id. at 76.

134 Id. at 12.

135 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)

136 See Letter from Tom Benton to School Superintendents (Mar. 31, 2010), available at http://factsaboutyouth.com/wp-content/uploads/Superintendent-LetterC_3.311.pdf (last visited July 1, 2011) [hereinafter the "Letter"].

137 Id. at 1.

138 Id. at 2 (quoting Francis Collins, The Language of God: A Scientist Presents Evidence for Belief 260, 263 (2007)).

139 Id. at 1.

140 Id. at 2 (quoting G. Remafedi, et al., Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 Pediatrics 869-75 (1991)).

141 Task Force Report, supra note 130.

142 Id. at 11 ("In the mid-1970s, on the basis of emerging scientific evidence and encouraged by the social movement for ending sexual orientation discrimination, the APA . . . affirmed that homosexuality per se is not a mental disorder.").

143 Am. Psychological Ass'n, Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality, available at http:// www.apa.org/topics/sexuality/orientation.aspx (last visited Apr. 23, 2011)

144 Task Force Report, supra note 130, at 42.

145 Id. at 2.

146 Id. at 79. In fact, the Task Force Report encourages licensed mental health providers to identify religious and worldview beliefs that negatively view same-sex attractions with the goal of therapy to "deconstruct [] dominant worldviews and assumptions with conflicted clients that enable them to redefine their attitudes toward spirituality and sexuality." Id. at 58.

147 Id. at 58.

148 NARTH stands for National Association for Research and Therapy of Homosexuality.

149 NARTH, What Research Shows: NARTH's Response to the APA Claims on Homosexuality, 1 J. Human Sexuality (2009) [hereinafter "NARTH Report"].

150 Id. at 7.

151 Id. at 7-8.

152 Id. at 37-38. In 2007, two leading researches released the results of a religiously-mediated change efforts, concluding that there was "empirical evidence that change of homosexual orientation may be possible . . . ." Stanton L. Jones and Mark A. Yarhouse, Ex-gays? A Longitudinal Study of Religiously Mediated Change in Sexual Orientation 364 (2007).

153 N.E. Whitehead, Latest Twin Study Confirms Genetic Contribution to SSA is Minor, available at http://www.narth.com/docs/isminor.html (last visited June 16, 2011).

154 Id.

155 NARTH Report, supra note 149, at 50; see also Task Force Report, supra note 130, at 42.

156 NARTH Report, supra note 149, at 55.

157 Id. at 57.

158 Id. at 58.

159 Id.

160 Ctr. for Disease Control & Prevention, HIV/AIDs and Men Who Have Sex With Men (2010), available at http:// www.cdc.gov/hiv/topics/msm/pdf/msm.pdf (last visited July 1, 2011).

161 Ctr. for Disease Control & Prevention, CDC Factsheet, HIV and Aids Among Men Who Have Sex With Men (2010), available at http:// www.cdc.gov/nchhstp/newsroom/docs/FastFacts-MSM-FINAL508COMP.pdf (last visited July 1, 2011).

162 Ctr. for Disease Control & Prevention, CDC Analysis Provides New Look at Disproportionate of HIV and Syphilis Among U.S. Gay and Bisexual Men (2010), available at http://www.cdc.gov/nchhstp/newsroom/msmpressrelease.html (last visited July 1, 2011).

163 Id.

164 NARTH Report, supra note 149, at 75-79; cf. Elizabeth Mertzal, Ties That Bind: Family Relationships, Biology, and the Law, 56 DePaul L. Rev. 997 (2007) (discussing the biological effects of homosexual behavior on human health); George A. Rekers, An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody By Any Person Residing in a Household that Includes a Homosexually-Behaving Member, 18 St. Thomas L. Rev. 325 (2005) (reviewing empirical

research to support his position that the state has a rational basis to preclude placing children in homes with an individual engaged in homosexual conduct).

165 Id. at 83.

166 See, e.g., Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 804 (Cal. Ct. App. 1976) (finding no claim of educational malpractice could be stated even though the student had graduated despite the fact he could not read above an eighth grade level); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979) (finding no claim of educational malpractice even though student lacked rudimentary skills to comprehend written English on a level that would permit him to obtain employment).

167 Cf. Elizabeth Arndorfer, Absent Abstinence Accountability, 27 Hastings Const. L.Q. 585, 592 (2000) ("Any government program that provides information-especially health information-should be required to provide medically and factually accurate and objective information."). Although this author believes Ms. Arndorfer, then Director of NARAL Foundation's Proactive Reproductive Health Policy Institute, this author believes Ms. Arndorfer reaches the wrong conclusion on the accuracy of abstinence education; she correctly states that schools should be required to prove that the information taught is medically and factually accurate.

168 Peter W., 131 Cal. Rptr. at 820.

169 Id. at 827.

170 Id. at 824.

171 Id. at 818.

172 Id. at 825.

173 Id.

174 Id. at 824.

175 New, New Math = Controversy, CBS Evening News, Feb. 11, 2009, available at http:// www.cbsnews.com/stories/2000/05/28/ eveningnews/main200272.shtml; Gail Robinson, The New New Math and Some Old Debates Renewed, Gotham Gazette, Sep. 29, 2005, available at http://www.gothamgazette.com/article/education/20050929/6/1603.

176 Dr. Jon Reyhner, The Reading Wars, N. Ariz. Univ. http:// jan.ucc.nau.edu/~jar/Reading_Wars.html (last updated July 1, 2011) (discussing effectiveness of whole language versus phonics).

177 Cf. Arndorder, supra note 167 (suggesting schools should be liable for allegedly providing inaccurate information in abstinence-based education); Michael Darflinger, Honesty is the Best Policy, 29 J. Legal Med. 81 (2008) (exploring legal liability for schools that allegedly provide inaccurate information in abstinence-based education).

178 Donohue v. Copiague Union Free School Dist., 391 N.E.2d 1352 (N.Y. 1979).

179 Id. at 1353.

180 Id.

181 Id. at 1354.

182 Id.

183 See, e.g., Sch. Bd. of Orange Co. v. Coffey, 524 So. 2d 1052 (Fla. Ct. App. 1988); Doe v. Cedar Rapids Cmty Sch. Dist., 652 N.W.2d 439 (Iowa 2002).

184 See, e.g., Wallmuth v. Rapides Parish Sch. Bd., 813 So. 2d 341, 346-47 (La. 2002); Doe v. Bd. of Educ. of Morris Cent. Sch., 780 N.Y.S.2d 198 (N.Y. App. Div. 2004).

185 3 Noah Webster, American Dictionary of The English Language 859 (1830).

186 Id. at 481. In fact, some states or school boards impose a duty on schools to review curriculum for factual accuracy. See, e.g., Prince William Cnty. Pub. Sch., Reg. 653-2, § (III)(A)(2) (Nov. 18, 2009) (listing factual accuracy as one of the criteria upon which to evaluate textbooks).

187 Wash. Rev. Code Ann. § 28A.300.475(2) (West 2007); see also Cal. Educ. Code § 51931(f) (citing federal Centers for Disease Control and Prevention as a proper source of information). Other statutes and regulations similarly require that the curriculum and instructional materials contain medically or factually accurate information. See generally Iowa Code § 279.5(9)(d)(1); Wis. Stat. § 118.019(b); Tex. Educ. Code Ann. § 31.035 (West 2007) (requiring publishers to certify that textbooks are "free from factual errors"); 14 N.M. Reg. 657 (Sept. 9, 2003) (establishing standards for teacher competency by requiring they communicate "accurately" in the subject area); Okla. Stat. Ann. 70, § 11-103.3 (West 2011) (mandating HIV/AIDS prevention curriculum "be limited in time frame to deal only with factual medical information"); Utah Admin. Code r.277-469-7 (2011) (requiring instructional materials be "accurate, factual and research-based").

188 Ctr. for Disease Control & Prevention, HIV/AIDS and Young Men Who Have Sex With Men, U.S. Department of Health and Human Services (2009), available at http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv_factsheet_ ymsm.pdf.

189 Id.

190 Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 804, 824 (Cal. Ct. App. 1976).

191 Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979).

192 Yet another hurdle to consider in an educational malpractice claim is the statute of limitations. Although they vary by state, for negligence or professional malpractice cases, most require a claim to be brought within one to six years. See, e.g., Ala. Code § 6-2-38 (2011) (two years); Ark. Code Ann. § 16-114-203 (2011) (two years); Fla. Stat. Ann. § 95.11 (LexisNexis 2011) (four years); Me. Rev. Stat. Ann., tit. 14, § 752 (2011) (six years); Tenn. Code Ann. § 28-3-104 (2011) (one year); Wis. Stat. Ann. § 893.54 (2011) (three years). Thus, the statute of limitations could toll even before a plaintiff discovers the injury. Many states toll the statute of limitations until the plaintiff knew or should have known of the negligent act, thereby creating the possibility that some plaintiffs could bring claims against schools once they are aware of the harm. See, e.g., Md. Code Ann. Cts. & Jud. Proc. § 5-101 (LexisNexis 2011); N.J. Stat. Ann. § 2A:14-2 (West 2004); Vt. Stat. Ann., tit. 12, § 512 (2009); Wyo. Stat. Ann. § 1-3-105 (2010).

193 See supra notes 92-107 and accompanying text.

194 Cole v. Maine Sch. Admin. Dist. No. 1, 350 F. Supp. 2d 143 (D. Maine 2004); see also Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (acknowledging broad discretion afforded schools in curriculum matters); Fleischfresser v. Dir. of Sch. Dist. 200, 15 F.3d 680, 688 (7th Cir. 1994) ("[W]e recognize broad discretion of a school board to select its public school curriculum.").

195 eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

196 Id.

197 Prospective plaintiffs should research relevant state laws and regulations that might require those challenging the accuracy of the curriculum to first proceed through administrative channels.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.