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# THE CHANGING FACE OF PARENTS' RIGHTS

*Ralph D. Mawdsley\**

## I. INTRODUCTION

Since the latter part of the nineteenth century, courts have recognized the right of parents to make educational decisions for their children. Courts and legislatures have sought to balance the states' authority to educate students<sup>1</sup> with the parents' natural authority to raise their children.<sup>2</sup> However, the legal basis for such balancing of interests has changed. Parents' rights have evolved over four historical periods and have been influenced in the past thirty years by changing perspectives concerning the rights of students, school boards, and justiciable causes of action.

During the first of the four historical periods, spanning the nineteenth century and the early twentieth century, various state courts fashioned common law to determine whether parents could make decisions contrary to the rules of local school boards. During the second period, beginning with the end of World War I, state legislatures took a more active role in

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1. Public education is primarily a province of the states because article I, section 8 of the U.S. Constitution does not designate education as one of the functions delegated to the national government. Although the federal government has enacted legislation involving various mandates for education, the primary responsibility for determining the content and implementation of education resides with states. See generally Mark Yudof, David L. Kirp, and Betsy Levin, *Educational Policy and the Law* 1-2 (3d ed., West 1992).

2. See *Meyer v. Neb.*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.").

designing compulsory attendance laws. Two prominent United States Supreme Court decisions during this period facially challenged the authority of states to prohibit the operation of nonpublic schools. In the third period, courts wrestled with the rights of parents to direct their children's education for religious reasons. This followed a prominent Supreme Court decision addressing the authority of states to apply facially neutral compulsory attendance laws to religious-based nonpublic schools. Finally, in the current and fourth period, Congress and state legislatures have attempted to restore some authority to parents. However, parents, frequently frustrated with such legislative efforts, have tried to assert a variety of legal claims against public schools.

This article will be divided into two parts to discuss the changing face of parent rights in directing their children's education. In the first part, the article will examine the four historical periods of development referenced above, focusing on relevant court decisions. This examination of time periods will show that as the rights of parents to direct the education of their children have evolved, so also have the rights of students, school officials, and others in the education process. The second part of the article will examine how parents' successes in asserting their rights against public schools have been affected by legal developments over the past thirty years. This section will analyze the extent to which the development of student rights and school board authority has affected claims by parents under new causes of action.

## II. HISTORICAL DEVELOPMENT OF PARENTS' RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION

### *A. Period One: Parents' Rights and the Common Law*

Before the Supreme Court created a right of parents to direct the education of their children through the liberty clause in *Meyer v. Nebraska*,<sup>3</sup> states used common law to resolve school-parent disputes concerning school-required curriculum or activities.<sup>4</sup> In *Hardwick v. Board of Trustees*,<sup>5</sup> a California

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3. *Id.* at 390.

4. See e.g. *Sch. Bd. Dist. No. 18, Garvin County v. Thompson*, 103 P. 578, 579 (Okla. 1909) ("At common law the principal duties of parents to their legitimate

court queried, "Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority?"<sup>6</sup> The court responded that compelling a student to participate in the social and folk dancing part of the school's physical education program violated the parent's right to control the education of their children.<sup>7</sup>

[T]o require [children] to live up to the teachings and the principles which are inculcated in them at home under the parental authority and according to what the parents themselves may conceive will be the course of conduct in all matters which will be the better and more surely subserve the present and future welfare of their children.<sup>8</sup>

*Hardwick* is representative of court decisions upholding objections to required courses either because of the strong interest parents have in their children<sup>9</sup> or because honoring the parent request would not be disruptive to the school.<sup>10</sup>

However, parents have not always succeeded in having their children excused from a required course. In such cases, courts relied on both the authority of state legislatures and school boards to set course requirements, and a fear that citizens should not be able to nullify reasonable legislation.<sup>11</sup> At

children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world."

5. *Hardwick v. Bd. of Trustees*, 205 P. 49 (Cal. 3d. Dist. App. 1921).

6. *Id.* at 54.

7. *Id.* at 49.

8. *Id.* at 54.

9. *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039 (Neb. 1914) (parent could make a reasonable selection among required courses and decide that his daughter would not take domestic science so as to have more time to practice her music); *Trustees of Sch. v. People ex rel. Van Allen*, 87 Ill. 303 (Ill. 1877) (school could not refuse to admit student to high school who was proficient in all required subjects except grammar where parent refused to permit his son to study grammar and grammar was not one of the subjects that student would study); *Garvin County*, 103 P. 578 (court ordered reinstatement of student expelled for refusal to participate in singing lessons as per instruction from parent); *Morrow v. Wood*, 35 Wis. 59 (Wis. 1874) (school teacher had no authority to use corporal punishment on a student whose parent had forbidden the child to participate in geography).

10. *State ex rel. Sheibley v. Sch. Dist. No. 1 of Dixon County*, 48 N.W. 393 (Neb. 1891) (school district could not expel student whose father refused to permit her to study grammar where there was no evidence that her refusal was insubordinate).

11. *See Sewell v. Bd. of Educ. of Defiance Union Sch.*, 29 Ohio St. 89 (Ohio 1876) (suspension of student for refusal to have rhetoric exercise prepared was upheld as

the heart of this support for schools was general desire to preserve the school's image as a symbol of authority deserving of respect from students and their parents. Whenever a school regulation was subjected to challenge, courts expressed the fear that an attack on the authority of school personnel to make and enforce rules would produce disrespect for that authority. As a result, some courts presumed school actions to be reasonable.<sup>12</sup>

The success of parents in advancing common law claims to control the education of their children not only varied among the states but represented a largely agrarian society where both the authority of schools boards and parents were significant local forces.<sup>13</sup> However, with the end of World War I, state legislatures became more active in education by enacting compulsory attendance laws. The shift to statewide legislation had a diluting effect on the common law authority of parents. While parental authority was a prominent force when balanced against the authority of local school boards, it was not as significant when balanced against state-legislated rules. Therefore, parents needed a constitutional right to assert equally against all states. Parents found just such a right in two U.S. Supreme Court decisions, *Meyer v. Nebraska*<sup>14</sup> and *Pierce v. Society of Sisters*.<sup>15</sup>

### *B. Period Two: Parents' Rights and the Constitution*

In *Meyer* and *Pierce*, the Supreme Court found within the liberty clause of the Fourteenth Amendment a right for parents to direct their children's education. This right created a more powerful force to balance against the authority of states to control education. In *Meyer*, the Court addressed the

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pursuant to a reasonable school board rule); *Kidder v. Chellis*, 59 N.H. 473 (N.H. 1879) (teacher acted appropriately in removing student from school who refused, pursuant to parent directive, to prepare a speech in public declamation class); *Samuel Benedict Meml. Sch. v. Bradford*, 36 S.E. 920 (Ga. 1900) (student who refused to prepare a paper for an assignment, but instead read a paper prepared by his parent, could be suspended).

12. See *Smith ex rel. Smith v. Bd. of Educ. of Oak Park*, 182 Ill.App. 342 (Ill. App. 1914) (student could be expelled for joining a secret society in violation of school board rule); *Bd. of Educ. v. Booth*, 62 S.W. 872 (Ky. 1901) (expulsion of student upheld for improper conduct).

13. See generally Lawrence Cremin, *The American Common School, An Historic Conception* (Columbia 1951).

14. *Meyer*, 262 U.S. at 390.

15. *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925).

constitutionality of a state compulsory attendance statute providing for a criminal penalty if any school subjects were taught in a foreign language.<sup>16</sup> When a teacher in a religious school was charged with teaching the subject of reading in German to a ten-year-old student, the Court responded by striking down the statute under the liberty clause. The Court reasoned that “[the teacher’s] right thus to teach and the right of parents to engage him so to instruct their children”<sup>17</sup> were protected by the Constitution. Not only did parents have a constitutional right<sup>18</sup> to direct their children’s education, but the right extended derivative protection to teachers. The Court found the right to be “within the liberty [clause] of the [Fourteenth] Amendment.”<sup>19</sup>

*Pierce* represented a different challenge for the Supreme Court. In *Pierce*, the Court addressed a state compulsory attendance statute that required all parents to send their children to public schools.<sup>20</sup> Two nonpublic schools, one

16. The court cited a statute providing that:

‘Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

‘Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

‘Section 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100), or be confined in the county jail for any period not exceeding thirty days for each offense.

‘Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.’

262 U.S. at 397.

17. *Id.* at 400.

18. The Court expanded the protected categories under the liberty clause to include parent choice of education:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. 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 common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399.

19. *Id.* at 400.

20. The court cited a statute that provided in substance that

religious and the other secular,<sup>21</sup> challenged the statute under the liberty and property clauses of the Fourteenth Amendment. In invalidating the state statute, the Court, relying on *Meyers*, opined that “we think it entirely plain that the [state statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children.”<sup>22</sup> In one of its clearest statements of parent rights, the Court proclaimed that “the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>23</sup>

In both *Meyer* and *Pierce*, the Supreme Court dealt with state statutes that were considered to be facially unconstitutional because they overstepped state legislative authority to control parent-directed education. Neither case addressed a facially constitutional statute that, when applied to parents, might be unconstitutional. This test came forty-seven years after *Pierce* in *Wisconsin v. Yoder* (*Yoder*).<sup>24</sup>

### *C. Period Three: Parents' Rights and Neutral Compulsory Attendance Laws*

In *Yoder*, the Supreme Court addressed the application of a state's compulsory attendance law to the Amish who, because of their unique religious beliefs and community,<sup>25</sup> wanted their

[E]ffective September 1, 1926, [the Act] requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor.

*Id.* at 530.

21. The two schools were Society of the Sister of the Holy Names of Jesus and Mary and Hill Military Academy.

22. *Id.* at 534.

23. *Id.*

24. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

25. The Court relates the Amish parents' objection to their children's attendance at public schools:

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to

children to attend school only through the eighth grade. Unlike the statutes in *Meyer* and *Pierce*, the statute in *Yoder* was neutral on its face; it simply required that all students attend school between the ages of seven and sixteen without specifying curriculum content or that the school be public.<sup>26</sup> However, the law in *Yoder*, as applied to the Amish, would have had a devastating effect on the Amish community. The Amish feared that requiring their children to attend public high schools for two or three years past their completion of the eighth grade in one-room Amish schools would cause a significant number of children to leave the Amish community.

In rejecting the reach of the state law to the Amish, the *Yoder* Court looked to *Pierce* "as a charter of the rights of parents to direct the religious upbringing of their children."<sup>27</sup> However, unlike *Meyer* and *Pierce*, which dealt with state statutes that were facially unconstitutional, the *Yoder* Court opined that the state law raised "no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."<sup>28</sup>

*Yoder* added a protectable parental interest to *Meyer* and *Pierce* under the free exercise clause<sup>29</sup> that required the

perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community.

*Id.* at 211-212.

26. Wis. Stat. § 118.15 (1969).

27. *Yoder*, 406 U.S. at 233.

28. *Id.* at 229. Both *Meyer* and *Pierce* also had recognized that the state could enact reasonable regulations. See *Meyer*, 262 U.S. at 402 ("The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned."); *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

29. The religion clause was not applied to the states through the Fourteenth



government to demonstrate a compelling interest in a literate and productive citizenry<sup>30</sup> before it could overcome the parents' interest.<sup>31</sup> Where parents' interests in directing their children's education was "one of deep religious conviction, shared by an organized group, and intimately related to daily living,"<sup>32</sup> *Yoder* strengthened parents' rights when balanced against state interests.

Although *Yoder* suggests a strengthening of *Meyer* and *Pierce* by combining a parent's right to direct education under the liberty clause of the Fourteenth Amendment with the free exercise clause, *Yoder* may also be a limitation because it restricted liberty clause protection to threatened religious beliefs. An even more restrictive interpretation of *Yoder* might suggest that liberty clause protection only applied to groups that "assert . . . an article of faith [and] their religious beliefs [and whose] 'life style' [has] not altered in fundamentals for centuries."<sup>33</sup>

Despite the euphoria of the moment regarding the *Yoder* decision, the Court's decision was unclear as to whether the case would be limited to parents like the Amish. The Court's declaration that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion"<sup>34</sup> did not define how the limits might apply as to the reach of state regulations.

In fact, subsequent state and federal courts wrestled with the application of the *Meyer-Pierce-Yoder* trilogy to state efforts to impose state laws and regulations that limited parent choices for their children. In *State of Ohio v. Whisner* (*Whisner*),<sup>35</sup> the Supreme Court of Ohio reversed the truancy

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Amendment until *Cantwell v. Conn.*, 310 U.S. 296 (1940).

30. The State's interests were that "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. Further, education prepares individuals to be self-reliant and self-sufficient participants in society." *Yoder*, 406 U.S. at 221.

31. *Id.* at 219-234.

32. *Id.* at 216.

33. *Id.* at 217. The Amish lifestyle was characterized as a consistent pattern over 300 years of preserving "their mode of dress, of speech, their habits of manual work" while rejecting modern conveniences such as "telephones, automobiles, radios, and television." *Id.* at 217, 219.

34. *Id.* at 220.

35. *Ohio v. Whisner*, 351 N.E.2d 750 (Ohio 1976).

conviction of parents who sent their children to a religious school that could not meet many of the state's public school requirements, including facility, credentialing, and curriculum "minimum standards". In relying on *Yoder*, the *Whisner* court "conclude[d] that the compendium of 'minimum standards' promulgated by the State Board of Education, taken as a whole, 'unduly burdens the free exercise of (appellants') religion."<sup>36</sup> In looking to *Meyer* and *Pierce*, the court concluded that

[u]nder the facts of this case, the right of [parents] to direct the upbringing and education of their children in a manner in which they deem advisable, indeed essential, and which we cannot say is harmful, has been denied by application of the state's 'minimum standards' as to them.<sup>37</sup>

However, where state efforts to regulate parents' educational choices were less pervasive, courts were less disposed to support the rights of parents. For example, in *Fellowship Baptist Church v. Benton*,<sup>38</sup> the Eighth Circuit Court of Appeals upheld the application of Iowa's teacher certification requirement to a religious school, even though the school might not have been able to find religiously acceptable certified teachers. Citing *Pierce* for support of the state's claim, the court noted that the state had "a compelling interest in the education of its children."<sup>39</sup> In addition, the court dismissed the parents' claim that they were entitled to be treated the same as the Amish in *Yoder*, reasoning that they would not suffer as much harm as the Amish would if the Amish were required to attend public school beyond the eighth grade.<sup>40</sup> In other words, while states were prohibited from legislating nonpublic schools out of existence in *Pierce*, states might be able to effect a similar result by applying a limited number of regulations that

36. *Id.* at 764.

37. *Id.* at 770.

38. *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987).

39. *Id.* at 490 (citing *Pierce*, 268 U.S. 510).

40. The court found "more dissimilarities than similarities" between the plaintiffs in *Fellowship Baptist* and the Amish. Plaintiffs lived "in ordinary residential neighborhoods," performed "ordinary occupations such as a nurse, lawyer, engineer, and accountant [and did not] object to the licensing of these occupations," used modern conveniences such as "radios, televisions, and motor vehicles," and had no "distinctive . . . dress or lifestyle." *Id.* at 489.

the schools would have difficulty complying with.<sup>41</sup>

In retrospect, *Yoder* is the high-water mark for parents' religious-based educational decisions on behalf of children. Following *Yoder*, courts tended to reduce their compelling interest test to one of reasonableness.<sup>42</sup> When the Supreme Court, in *Employment Division v. Smith* (Smith),<sup>43</sup> declared that "a neutral, generally applicable regulatory law"<sup>44</sup> does not implicate a free exercise claim, the free exercise clause largely lost its effectiveness as a separate and sole cause of action.<sup>45</sup> A brief post-*Smith* resurgence of the *Yoder* compelling interest test with Congress's passage of the Religious Freedom Restoration Act (RFRA)<sup>46</sup> met with failure when the Supreme

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41. See also *Sheridan Rd. Baptist Church v. Dept. of Educ.*, 348 N.W.2d 263 (Mich. App. 1984) (application of teacher certification upheld); *State ex rel. Douglas v. Faith Baptist Church of Louisville*, 301 N.W.2d 571 (Neb. 1981) (court upheld broad range of state requirements necessary for state approval); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) (state department regulations specifying the courses required to be taught held reasonable).

42. See *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311 (Mont. 1997) (court applied rational purpose test in denying student enrolled in Christian Day School permission to participate in public school sports); *Faith Baptist Church of Louisville*, 312 N.W.2d at 580 (court upheld application of state teacher certification requirement to church-controlled school because the requirement was neither "arbitrary nor unreasonable"); *Sheridan Rd. Baptist Church*, 348 N.W.2d at 274 (court upheld application of teacher certification to religious school as "reasonable means to give effect to a broader, compelling state interest - in this case the provision of education to all children.").

43. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (Court refused to recognize the claim of two plaintiffs, denied unemployment compensation benefits because of the use of a prohibited drug [peyote] during an American Indian ceremony, for an exemption based on their religious beliefs that required that they use the hallucinatory drug.).

44. *Id.* at 880.

45. For a discussion of the devastating effect of *Smith*, see Ralph D. Mawdsley, *Employment Division v. Smith Revisited: The Constriction of Free Exercise Rights Under the U.S. Constitution*, 76 Educ. L. Rep. 1 (1992). Free exercise is still a viable claim where government action demonstrates hostility toward religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Court struck down four city ordinances, ostensibly directed at preventing the death of animals, but with so many exceptions that the purpose was to prevent only the Santeria religion's practice of animal sacrifices.). *Smith* recognized that free exercise could be a valid claim when combined with another substantive right, such as parents' right to direct the education of their children. See *Peterson v. Mimidoka County Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (demotion of principal to a teaching position for home-schooling his children for religious reasons held to be a violation of the principal's free exercise rights and right to direct education of children).

46. 42 U.S.C. §§ 2000bb-2000bb-4 (2000) (RFRA had as one of its purposes "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* . . ." In *Sherbert v. Verner*, 374 U.S. 398, 407 (1963), the Supreme Court required that the government prove that its regulation was the least restrictive means

Court struck down RFRA as a violation of the separation of powers.<sup>47</sup>

#### *D. Period Four: Parents' Rights and Legislative Efforts*

With the demise of the free exercise clause as an effective restriction on government regulation of parent educational choices, only the liberty clause of the Fourteenth Amendment remained as a constitutional limitation on states and local school districts. However, parents' efforts since *Smith* to invoke the *Meyer* and *Pierce* liberty clause right to direct their children's education have been generally ineffective.<sup>48</sup>

Does the lack of success using the liberty clause mean that parents no longer have any legal basis for asserting their educational claims against school districts? With the exception of an emerging but generally unsuccessful effort by parents to assert free speech claims against public schools on behalf of their children,<sup>49</sup> parents have looked to Congress and state legislatures to protect their interests.

The two most prominent federal statutes asserting parental authority have been the Family Rights and Privacy Act of 1974 (FERPA)<sup>50</sup> and the Education for All Handicapped Children Act of 1975 (hereinafter referred to under its current title, IDEA).<sup>51</sup> For the first time under FERPA, Congress created a national right of unrestricted access by parents to the education records of their children, as well as a more limited right to control

of accomplishing its interest). See *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195 (Mich. App. 1995) (RFRA prohibited state religious discrimination claim by non-renewed protestant teacher in Catholic school).

47. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Court upheld local ordinance, neutral on its face, establishing historic landmarks, when applied to a church designated as an historic landmark, even though the effect of the application of the ordinance prevented the church from altering the façade of its church as it wanted in order to make room for a much-needed addition.).

48. Occasionally, a court relies on *Meyer* or *Pierce*. See *Veschi v. Northwestern Lehigh Sch. Dist.*, 772 A.2d 469, 473 (Pa. Cmmw. 2001) (court rejected public school district claim that it did not have to provide IDEA special education services to a child in a religious school unless the child enrolled in the public school by observing that the parents "have a constitutionally protected right to decide where [their son] goes to school under *Pierce v. Society of Sisters*.").

49. See e.g. *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (court upheld teacher's refusal to permit student to write biography on life of Jesus Christ where teacher mistakenly placed part of her decision on her factual error and on a misunderstanding of the legal relationship between religion and public schools).

50. 20 U.S.C. § 1232(g) (2000).

51. 20 U.S.C. § 1400 (2000).

disclosure of their children's education records. Under FERPA, parents have "the right to inspect and review the education records of their children,"<sup>52</sup> the right "to challenge the content of such student's education records,"<sup>53</sup> and the right to prevent disclosure of students' records (with specified exceptions) "without the written consent of their parents."<sup>54</sup>

IDEA went even further, declaring parents of special education students to be equal partners with public schools in determining the educational program for their children and the services necessary to achieve that program.<sup>55</sup> Congress declared as one of its findings in enacting IDEA that the "education of children with disabilities can be more effective by . . . strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."<sup>56</sup>

State legislatures have also strengthened parents' rights. For example, state statutes contributed to parents' selection of nonpublic school venues for their children by restricting the number of regulations. Extensive litigation in the 1970s and 1980s regarding the application of state compulsory attendance regulations to nonpublic schools<sup>57</sup> has given way to statutory exemptions from many of these regulations.<sup>58</sup> State legislatures have found ways to minimize state intrusion into curriculum, personnel, and student matters in nonpublic schools.<sup>59</sup>

52. 20 U.S.C. § 1232(g)(1)(A).

53. *Id.* at § 1232(g)(2).

54. *Id.* at § 1232(6)(b)(1).

55. For example, parents have the procedural right "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and to obtain an independent educational evaluation of the child. . . ." *Id.* at § 1415 (b)(1). The IEP is a "written statement of each handicapped child developed in any meeting by a representative of the local educational agency, . . . the teacher, the parents or guardians of the child." *Id.* at § 1401(19).

56. *Id.* at § 1400(5)(B).

57. For a discussion of this litigation, see generally Ralph D. Mawdsley, *Legal Problems of Religious Schools and Private Schools* 163-195 (Educ. L. Assn. 2000).

58. See e.g. the Iowa Code Ann. which exempts:

[R]eligious groups . . . from school standards when members or representatives of a local congregation of a recognized church or religious denomination established for ten years or more within the state of Iowa prior to July 1, 1967, . . . professes principles or tenets that differ substantially from the objectives, goals, and philosophy of education embodied in standards set forth in [the [the state code]. . . ."

Iowa Code Ann. § 299.24

59. Ohio requires that for every child who "attends upon instruction elsewhere

Although not all of these legislative accommodations come with a legislative history, the overall effect has been to facilitate parents' direction of their children's education by making the operation of nonpublic schools less onerous. All states now recognize home schooling as a permissible parent option, although some states exert more regulatory control than others.<sup>60</sup> For, some states permit students participating in nonpublic schools (including home schools) to take part in public school courses and extracurricular activities, including athletics.<sup>61</sup>

However, the accommodations made by states regarding parents' direction of their children's education apply largely to the choice of the place where the child will be taught. Most states do not permit parents to intrude into curricular matters in public schools. One prominent exception is the comprehensive Parents Rights and Responsibilities Act passed in Texas in 2000.<sup>62</sup> This act provides a parent access "to all written records of a school district concerning the parent's child."<sup>63</sup> In addition, parents can petition the school principal to add a course, to permit their child "to attend a class for credit

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than in a public school such instruction shall be in a school which conforms to the minimum standards prescribed by the state board of education," [Ohio Rev. Code Ann. § 3321.07 (West 2002)] which requires only that a nonpublic school be equivalent with area public schools. *See also State v. Hershberger*, 144 N.E.2d 693 (Ohio App. 1955) (a one-room school without artificial light and being taught by a teacher with less than an eighth grade education was not equivalent). Minnesota requires that "a child receiving instruction from a nonpublic school, person, or institution that is accredited by an accrediting agency, recognized according to [Minn. Stat. Ann.] § 123B.445, or recognized by the commissioner, is exempt from requirements" pertaining to teacher certification and curriculum. Minn. Stat. Ann. § 120A.22(11)(d) (West 2001).

60. *See e.g.* Ohio Rev. Code Ann. § 3321.04(A)(2) (West 2002) (A student is exempted from attending a public or nonpublic schools if "the child is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require."). *See generally* Christine Field, *Field Guide to Home Schooling* (Fleming H. Revell 1998).

61. *See Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151 (Mich. 1984) (student attending a religious school had right under "an accepted method of education in this state for over 60 years" to attend a course in the public school."). *Contra Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998) (home-schooled student did not have right to take foreign language, vocal music and science courses in public school).

62. Tex. Educ. Code Ann. §§ 26.003-26.010 (2002).

63. *Id.* at § 26.004 (The records are: attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and counselor evaluations, and reports of behavior patterns.).

above the child's grade level", and to permit the child to graduate early if all courses required for graduation have been completed.<sup>64</sup> The Texas statute states explicitly that such "request[s] will not be unreasonably denied." Finally, parents are entitled to review all teaching and test materials to be used by their children<sup>65</sup> and "to remove [their children] temporarily from a class or other school activity that conflicts with the parent's religious or moral beliefs."<sup>66</sup>

What the Texas statute does not provide, though, is a right for a student to substitute an alternative assignment when the original assignment is considered offensive on religious or moral grounds. In other words, a parent's right to remove a child from an objectionable course does not translate into a right to replace the assignment.<sup>67</sup>

At least one other state, Michigan, has declared that "it is [a] natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children."<sup>68</sup> However, the extent of parent rights is not nearly as great as in Texas and parent rights to affect curriculum are limited only to courses dealing with "sex education."<sup>69</sup>

Although federal and state statutes have increased parental authority in some areas, no broad sweeping constitutional protection exists such as might have been anticipated after *Meyer* and *Pierce*. Both cases sowed the seeds for their own limited effectiveness by recognizing that states could apply reasonable regulations to nonpublic schools. Parental efforts to direct their children's education today have gone far beyond the

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64. *Id.* at § 26.003.

65. *Id.* at § 26.006.

66. *Id.* at § 26.010. However, "a parent is not entitled to remove the parent's child from a class or other school activity to avoid a test or prevent the child from taking a subject for an entire semester," nor does this provision "exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the [state education] agency."

67. The law on the subject of replacement is still represented by *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (parent who objected on religious grounds to reading series for daughter was not entitled to have school substitute an alternate, acceptable reading series.).

68. Mich. Stat. Ann § 380.10 (Lexis L. Publg. 2002).

69. *Id.* at § 380.1507 (courses dealing with "family planning, human sexuality, and the emotional, physical, psychological, hygienic, economic, and social aspects of family life" must be an elective and parents must have the opportunity to review the contents of the course in advance and to have their children excused from the class.)

limited protection for nonpublic schools in *Meyer* and *Pierce* to seeking legislative support to effect changes in curriculum, activities or events within public schools.

However, legislative support has been limited. As a result, parents have asserted a variety of legal theories to compel public schools to accommodate the wishes of parents regarding their children's education. The next section considers the barriers to parent claims and the most recent legal theory used by parents based on Title 20 of the United States Code § 1983.

### III. PARENTS' DIRECTION OF THEIR CHILDREN'S EDUCATION WITHIN PUBLIC SCHOOLS DURING THE LAST THIRTY YEARS

The efforts by parents to rely on constitutional theories and state and federal legislatures in effecting changes within public schools have been patchwork at best. Parents' attempts to bring direct legal action against public schools under a variety of § 1983 claims have also not always been successful, largely due to various legal developments in public school law that have not been supportive of parent claims. Among the most significant of these developments has been the emergence of student rights. While parents' rights to make educational decisions for their children frequently overlap with their children's rights, the two sets of rights are not always so extensive.

#### A. *The Emergence of Student Rights*

Three years prior to *Yoder*, the Supreme Court, in *Tinker v. Des Moines Independent Community School District*,<sup>70</sup> declared that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>71</sup> Although *Tinker* was the wellspring for students' rights, the case can just as easily be identified as a parents' rights case since the views expressed by the students in *Tinker* in wearing black armbands to protest the war in Vietnam represented the views of their parents.<sup>72</sup> What *Tinker* did not address was how

70. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

71. *Id.* at 506.

72. *Id.* at 504. The court related these facts:

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by



a court should deal with students' rights where student views differed from those of their parents.

Justice Douglas, in his dissenting opinion in *Yoder*, opined that courts have a responsibility to determine whether the educational decisions made by parents for their children represent the views of the child. As he observed, while parents "normally speak for the entire family . . . , it is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be the masters of their own destiny."<sup>73</sup>

Justice Douglas's comment was the first recognition by the Supreme Court that children's interests may not always be represented by their parents. Three years after *Yoder*, in *Baker v. Owen*,<sup>74</sup> the Court affirmed, without opinion, a federal district court decision involving the use of corporal punishment that bifurcated the claims of a parent and a student. In *Baker*, a parent who objected to a school's use of corporal punishment did not have a constitutional right to compel a school to discontinue use of that punishment.<sup>75</sup> However, the student had a liberty clause interest in his own right to protect his bodily integrity.<sup>76</sup> For the first time, the Court gave tacit affirmation to the idea that a student's own rights do not have to be identical with, or a derivative of, those of the parent.

Although the Supreme Court in *Baker* did not author an opinion, its affirmation of the district court decision raises a tantalizing question regarding the balancing of rights between parents and children. Whose right is at issue in public schools – that of the student or that of the parent? Could students' interests be in conflict with those of their parents, and, if so, what might be the implications for public schools?

To date, courts (and legislatures) have taken steps to separate parent and child interests only in isolated situations such as child abuse reporting by school officials where the

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wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

73. *Yoder*, 406 U.S. at 244-245 (Douglas, J., dissenting).

74. *Baker v. Owen*, 423 U.S. 907 (1975).

75. *Baker v. Owen*, 395 F.Supp. 294 (M.D.N.C. 1975), *aff'd without opinion*, 423 U.S. 907 (1975).

76. *Id.* at 301.

alleged abuser may be a parent.<sup>77</sup> Should this bifurcation of parent and student interests be extended to other areas? If children's rights are independent from those of their parents, can (or, should) schools equate parents' views with children's views? If such equation occurs, do the children have a constitutional right to assert their views? A case in point is the use of parent consent forms.

Although parent consent forms can serve a number of purposes for schools,<sup>78</sup> the underlying assumption is that students will not be permitted to participate in a school function without parent permission. The use of parent consent forms raises two issues: whether a parent's right to consent translates into an enforceable claim against a school if consent is not sought; and whether a student has an enforceable claim against a school to participate even if the parent does not grant consent.

In *Brown v. Hot, Sexy, and Safer Productions, Incorporated*,<sup>79</sup> a high school principal's requirement that all students attend an assembly ostensibly dealing with AIDS awareness,<sup>80</sup> and the principal's refusal to use a parent consent form required for "instruction in human sexuality" did not translate into an actionable claim for violating parents' rights to direct the education of their children.<sup>81</sup> The First Circuit Court of Appeals reasoned that, even though the school had

77. See *J.B. v. Washington County*, 127 F.3d 919 (10th Cir. 1997) (court upheld county social services picking up a home-schooled seven-year-old child from his home and returning him seventeen and a half hours later in order to investigate alleged child abuse).

78. See e.g. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (parent consent form permitting elementary students to attend after-school religious club eliminated concern about students being coerced to attend the meeting). See also *Summers v. Slivinsky*, 749 N.E.2d 854 (Ohio App. 2001) (in a tort liability lawsuit, waiver and release forms signed by parents were questions of fact to be weighed by jury in determining whether cheerleader advisor had been reckless in pressuring injured student to participate).

79. *Brown v. Hot, Sexy, and Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995).

80. Among the activities at the assembly were the following:

[P]ropane, lewd, and lascivious language to describe body parts and excretory function; advoca[cy] and approv[al] of oral sex, masturbation, homosexual activity and condom use during promiscuous premarital sex; simulated masturbation; and hav[ing] a male minor lick an oversized condom with [the female presenter], after which she had a female student pull it over the male minor's head and blow it up.

*Id.* at 529.

81. *Id.* at 532.

ignored its own parent consent form requirement, the parents' claim under *Pierce* failed because the right to educate one's children does not encompass "a fundamental constitutional right to dictate the curriculum at the public school."<sup>82</sup>

Although this one-time refusal to seek parent permission in *Hot, Sexy, and Safer* did not give rise to a § 1983 claim under the liberty clause, what might have happened if the parent had denied permission, but the student wanted to attend the assembly? Does *Tinker's* right of private, student expression extend to students' rights to receive information against the wishes of their parents? In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,<sup>83</sup> a plurality of the Supreme Court recognized that, at least as to school libraries, "the right to receive ideas is a necessary predicate to the recipient's meaningful expression of his own rights of free speech. . . ."<sup>84</sup> Do school officials run the risk of litigation from students when they require parent consent forms before students can view "R" rated films or attend assemblies or other meetings? To what extent can both students' free expression rights and parents' rights coexist in the same schools?

To date, the notion that parents' rights can be separated from those of their children has not received general acceptance in the United States.<sup>85</sup> Although the temptation to justify upholding children's rights at the expense of parents' rights may seem politically expedient to some, separating the

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82. *Id.* at 533.

83. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (The Court struck down a school board's removal of eight books from the school library because the removal represented the political/religious views of the board members.).

84. *Id.* at 867.

85. For a source for student rights apart from parents, see the *Convention on the Rights of the Child*, ratified by U.N. General Assembly Nov. 20, 1989, but to which the U.S. along with Somalia are the only non-signers, which provides in Article 13:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Arguably, were the U.S. to become a signatory to the Convention, students might have the right to information independently from the views of parents.

rights of children from those of parents is a slippery slope that may well cause the fracturing of the family structure.

*B. The Reaffirmation of Public School Control Over Curriculum*

Local school boards' authority to control their schools was subjected to considerable challenges in the wake of *Tinker*.<sup>86</sup> In 1986 and 1988, the Supreme Court acted through two prominent decisions, *Bethel School District v. Fraser*<sup>87</sup> and *Hazelwood School District v. Kuhlmeier*,<sup>88</sup> to reassert public school district control over their schools.

In *Bethel*, the Court upheld the right of a school to discipline a student who made a speech with vulgar content and sexual innuendo to other students.<sup>89</sup> Despite the parents' support for their child, the Court upheld the right of a school to "inculcate the habits and manners of civility."<sup>90</sup> *Bethel* permitted public schools to project a set of values, even if the values disagreed with those of students and their parents. What *Bethel* did not determine, however, is how courts should apply the case to vulgar student expression that has the tacit or express support of parents.

While *Bethel* supports the efforts of school officials to create a more civil and respectful school environment,<sup>91</sup> not all vulgar student expression necessarily originates within the school environment. What options are available to school officials where words even more vulgar, lewd, and profane than those in *Fraser* are used to describe faculty or students on a student's Web page, created at home but accessible by students on school computers? Since lawsuits involving student expression are invariably brought by parents, how can such litigation be reconciled with parents' direction of their children's education?

86. See generally Ralph D. Mawdsley, *Constitutional Rights of Students*, in *The Courts and Education* 161-187 (Clifford P. Hooker, ed., Natl. Socy. for the Study of Educ. 1978).

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

88. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

89. 478 U.S. 675.

90. *Id.* at 681.

91. See *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir. 1998), where termination of a teacher was upheld for violating a public school board's policy prohibiting the use of profanity. The teacher who taught English and journalism had permitted the in-class performance and videotaping of student plays that included use of vulgar words violating the policy.

Do *Meyer* and *Pierce* extend to parental support of a child's use of vulgar and lewd language, especially when the language originated in the home?

Up to the present, courts have tended to protect off-campus student expression, even when that expression is hurtful, harmful, and damaging to others within the school.<sup>92</sup> However, such protection may contain the seeds of destruction for the credibility of parental direction of education. If *Bethel's* support for public school civility and good manners is to have any meaning, parents arguably cannot lay claim to both the high ground of directing their children's education and at the same time support their children's right to be vulgar, lewd, or profane. In *Bethel*, one can argue that the Supreme Court drew a line in the sand not only as to the expression of offensive students but also as to the influence of those students' parents.

In *Hazelwood*, the Supreme Court held that school officials have control over school curriculum.<sup>93</sup> In this case, brought by three students, the Court distinguished between "a student's personal expression that happens to occur on the school premises" and "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>94</sup>

Despite a school board policy that student free expression would not be restricted for student publications,<sup>95</sup> the Court opined that school officials were entitled to regulate publication contents "in any reasonable manner."<sup>96</sup> If school officials "do not

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92. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175 (E.D. Mo. 1998) (court granted preliminary injunction ordering reinstatement of student suspended for 10 days for creating a Webpage critical of school officials where no evidence offered that Webpage had caused disruption at school when accessed); *Emmett v. Kent Sch. Dist.*, 92 F.Supp.2d 1088 (W.D. Wash. 2000) (court injunction prevented enforcement of four-day suspension for creating Webpage with mock obituaries where no one was threatened on the Webpage). Cf. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmmw. 2000) (court upheld expulsion of student whose Webpage offered picture of teacher with head cut off and dripping blood, accompanied by a twenty dollar offer to pay a hit-man to kill her).

93. 484 U.S. 260.

94. *Id.* at 271.

95. *Id.* at 269 ("[T]he Statement of Policy published in the September 14, 1982 issue of *Spectrum* [school newspaper] declared that 'Spectrum, as a student-press publication, accepts all rights implied by the First Amendment.'").

96. *Id.* at 270.

offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns,"<sup>97</sup> what effect would *Hazelwood* have on parent efforts under *Pierce* to exact curricular changes for their children?

*Hazelwood* was understandingly welcomed by public school officials, but parents who have objected to curricular matters in public schools have not fared well in the wake of the decision. In *Settle v. Dickson County School Board*,<sup>98</sup> the Sixth Circuit Court of Appeals upheld a teacher's refusal to allow a ninth grade student to fulfill a research assignment by writing on "The Life of Christ." Even though the teacher's assertions that personal religion was not an appropriate subject for discussion in a public school and that the paper could not satisfy the assignment by having four sources were inaccurate,<sup>99</sup> the court held that "teachers have broad discretion in limiting speech when they are engaged in administering the curriculum."<sup>100</sup>

Similarly, in *Mozert v. Hawkins County Board of Education*,<sup>101</sup> the Sixth Circuit upheld the school board's refusal to accommodate a parent's request for an alternate reading series based on their religious objections to the one used in class.<sup>102</sup> In dismissing the parents' complaint because they had the option under Tennessee law of "either send[ing] them to church schools . . . or teach[ing] them at home,"<sup>103</sup> the court cited for approval to *Bethel* that "public schools serve the purpose of teaching fundamental values essential in a democratic society."<sup>104</sup>

In *Immediato v. Rye Neck School District*,<sup>105</sup> when parents objected to a high school's mandatory community service

97. *Id.* at 273.

98. *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

99. For a refutation of the teacher's claim that the student's only source would be the Bible, see R. Mawdsley & C. Russo, *Religious expression and Teacher Control of the Classroom: A New Battleground for Free Speech*, 107 Educ. L. Rep. 1 (1996).

100. *Settle*, 53 F.3d at 156.

101. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

102. The parent who identified herself as a fundamentalist Christian objected to such themes in the school's Holt Reading Series as "evolution and secular humanism, futuristic supernaturalism, pacifism, magic, and false views of death." *Id.* at 1062.

103. *Id.* at 1067.

104. *Id.* at 1068 (quoting *Fraser*, 478 U.S. at 683).

105. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996).

program, the Second Circuit Court of Appeals discounted the parents' rights under *Pierce* because the school district had a "rational basis" in "teaching students the values and habits of good citizenship, and introducing them to their social responsibilities."<sup>106</sup>

Finally, when a kindergarten student's thanksgiving poster with a religious theme was taken down from the school hallway and placed by the teacher in a less prominent place, the Third Circuit Court of Appeals, in *C.H. v. Oliva*,<sup>107</sup> cited to *Hazelwood* as governing

'[S]tudent expression that is part of a school curriculum,' including things that students say (or express by other means, such as artwork) when they are called upon by their teachers to express their own thoughts or views.<sup>108</sup>

*Bethel* and *Hazelwood* have had a substantial impact on public schools by permitting greater school control over the school learning environment. In the process of exerting control over their schools, school officials have found that those actions will be upheld even when contrary to the desires of parents. Case law suggests that, whatever the right of parents to direct their children's education may mean outside the public schools, parents have few, if any, protectable rights within public schools. Whether new § 1983 legal theories for damages will change parents' claims within schools remains to be seen.

### C. New Causes of Action Under § 1983

Although § 1983 of the Civil Rights Act of 1964 creates no substantive rights of its own, claimants can sue under § 1983 for damages for violations of the U.S. Constitution and federal laws.<sup>109</sup> § 1983 has long been a remedy for violations of constitutional rights, but the difficult issue involving federal law remedies is whether Congress, in enacting laws, intended that a remedy for damages be available for violations of those

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106. *Id.* at 462.

107. *C.H. v. Oliva*, 226 F.3d 198 (2000).

108. 226 F.3d at 205 (Alito & Mansmann, JJ., dissenting) (citing to *C.H.*, 195 F.3d at 171).

109. 42 U.S.C. § 1983 (2000). § 1983 permits lawsuits for damages for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ."

laws.<sup>110</sup> Prime examples are FERPA and IDEA. Neither statute expressly authorizes a remedy for damages; and, thus, courts have had to determine whether providing a remedy for damages would be inconsistent with Congress' intent.

The Tenth Circuit Court of Appeals held in *Falvo v. Owasso Independent School District No. I-011*<sup>111</sup> that parents can sue for damages under § 1983 for an alleged violation of FERPA involving confidentiality or student records. In *Falvo*, parents had a claim on behalf of their child when a teacher permitted students to announce students' grades out loud. Most courts have held that a private damages remedy for a violation of FERPA is available under § 1983.<sup>112</sup> Although the Supreme Court reversed the Tenth Circuit on statutory grounds,<sup>113</sup> it left open the question whether FERPA can support a § 1983 claim.<sup>114</sup> Even though the Supreme Court ruled in *Gonzaga University v. Doe*<sup>115</sup> that a FERPA claim under the nondisclosure part of the Act is not cognizable under § 1983, Congress could still amend FERPA to provide such a remedy.<sup>116</sup>

110. See *Wilder v. Va. Hosp. Assn.*, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987)). The court stated therein:

A plaintiff alleging a violation of a federal statute will be permitted to sue under section 1983 unless (1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself.

111. *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2001), cert. granted, 533 U.S. 927 (2001).

112. For cases supporting a § 1983 claim under FERPA, see *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F.Supp.2d 664 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F.Supp. 1104 (D.S.D. 1995); *Belanger v. Nashua N.H. Sch. Dist.*, 856 F.Supp. 40 (D.N.H. 1994); *Norwood v. Slammons*, 788 F.Supp. 1020 (W.D. Ark. 1991). For cases denying § 1983 claims, see *Gundlach v. Teinstein*, 924 F.Supp. 684 (E.D. Pa. 1996); *Norris v. Bd. of Educ. of Greenwood Community Sch. Corp.*, 797 F.Supp. 1452 (S.D. Ind. 1992).

113. *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002).

114. A § 1983 claim under *Falvo* is all that much more important because federal courts have consistently held that FERPA does not permit a private cause of action. See *Frazier v. Fairhaven Sch. Comm.*, 122 F.Supp.2d 104 (D. Mass. 2000); *Hatfield v. East Grand Rapids Pub. Schools*, 960 F.Supp. 1259 (W.D. Mich. 1997); *Belanger*, 856 F.Supp. 40; *Norris*, 797 F.Supp. 1452.

115. See *Doe v. Gonzaga Univ.*, 24 P.3d 390 (Wash. 2001), cert. granted, *Gonzaga Univ. v. Doe*, 534 U.S. 1103 (2002) rev'd and remanded 122 S.Ct. 2268 (2002).

116. For an example of Congress's ability to eliminate parent claims, see the 1997 amendments to IDEA where Congress removed a private cause of action for child in a private school to have services provided on-site at a private school if those services



However, should a § 1983 claim be justiciable using FERPA either through a Supreme Court decision or congressional amendment, the implications for public schools are troubling. If parents can sue for damages when students grade each others' papers and publicly recite their grades, will schools also be liable for other actions, such as posting the best student work on the assumption that the absence of it being posted is a negative commentary on a student's education record?

The possibility of a § 1983 lawsuit for damages for violations of IDEA is much more controversial. Three Circuits, (the Second, Third, and Fifth)<sup>117</sup> have held that an IDEA damages lawsuit is possible under § 1983, while three other Circuits (the Fourth, Seventh, and Eighth),<sup>118</sup> have ruled that plaintiffs may not ordinarily bring suit under § 1983 for statutory violations of IDEA. Damages under § 1983 for an IDEA violation have a significant impact on school districts already financially strapped to fund services for special education students. In addition to the cost of services required under IDEA, school districts that fail to meet IDEA's "free appropriate public education" and "least restrictive environment" requirements<sup>119</sup> can be compelled to pay attorney fees for prevailing parties in a due process dispute,<sup>120</sup> as well as the cost of compensatory education.<sup>121</sup> A § 1983 damages claim opens school districts to the possibility of yet another cost: that of a damages award. The difference between the two kinds of costs is that while those dealing with related services, (and even attorney fees,) may have an element of reasonable predictability in many cases, a damages award does not.

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would be provided at a public school. See 20 U.S.C. 1412(a)(10)(C)(i) and 34 C.F.R. § 300.454.

117. See *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987); *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (5th Cir. 1990). See also *Capillino v. Hyde Park Cent. Sch. Dist.*, 40 F.Supp.2d 513 (S.D.N.Y. 1999); *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 35 F.Supp.2d 1260 (D. Colo. 1999); *Zearly v. Ackerman*, 116 F.Supp.2d 109 (D.D.C. 2001).

118. See *Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996); *Sellers v. Sch. Bd. of City of Manassas, Va.*, 141 F.3d 524 (4th Cir. 1998); *Heidmann v. Rother*, 84 F.3d 1021 (8th Cir. 1996). But see *Westendorp v. Indep. Sch. Dist. No. 273*, 131 F.Supp.2d 1121 (D. Minn. 2000).

119. For a sample of cases, see Allan Osborne, *Students with Disabilities*, in *The Yearbook of Education Law 2000* 174-77 (C. Russo, ed., Educ. Law Assn 2000).

120. See e.g. *Angela L. v. Pasadena Indep. Sch. Dist.* 918 F.2d 1188 (5th Cir. 1990).

121. See e.g. *Big Beaver Falls Area Sch. Dist. v. Jackson*, 19 IDELR 371 (Pa. Cmmw. 1992); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990).

A split in the circuits on the issue of damages under a federal statute is always discomfoting. How school districts are affected depends solely on geography. For districts that are subject to § 1983 claims, school budgets already strained to meet the costs of special education services<sup>122</sup> under IDEA must accommodate another possible expense. Litigation involving FERPA is nowhere near as extensive as that involving IDEA, although a judicial or legislative decision upholding a § 1983 claim will very probably have the effect of increasing the number of lawsuits. Without a § 1983 damages claim, the only remedy under FERPA is the withholding of federal funds, a highly unlikely event.<sup>123</sup>

One can reasonably expect that the prospect of a damages award under FERPA and IDEA will provide parents with powerful leverage in addressing issues of education record confidentiality, special education services, and negotiating favorable settlements. Under FERPA, will school districts risk continuing practices that disclose identifiable information regarding a student's education record if a parent objects? Will even the most benign displays of student work be a discontinued practice because of a perception of the poor education record of those not displayed? Likewise, will school officials no longer have any incentive under IDEA to resist the requests for services by parents with special education students when an open-ended damages award is possible?

Congress has the authority to act regarding judicially permitted damages awards under its laws. At least three legislative actions are possible. Congress could simply amend FERPA and IDEA to prohibit the recovery of damages; Congress could permit damages but limit the amount of recovery; or, Congress could permit recovery but set a high standard for a statutory violation, such as conduct by school officials. Given Congress's reluctance generally to address tort

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122. See 20 U.S.C.A. § 1232g(a)(1)(A). It states that:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

123. For a discussion of legal issues related to hearings under FERPA, see Thomas Johnson, *Inaccurate and Misleading: Student Hearings Under FERPA*, 114 *Educ. L. Rep.* 721 (1997).

liability limits,<sup>124</sup> one can question whether Congress will address damages limitations for FERPA or IDEA.

#### IV. CONCLUSION

Since the rights of parents were first framed under common law in the nineteenth century, those rights have changed in large part because everything around them has also changed. When students were granted constitutional rights by the Supreme Court, the inevitable question, as indicated by Justice Douglas's dissenting comments in *Yoder*, was whose rights – the parents or the students – were school officials going to deal with. The answer to that question still seems to be the rights of the parents, but only because the legal history in the United States has supported the identifying of student interests with those of their parents.

However, if parents have preserved their rights vis-à-vis their children, those rights have not significantly impacted parents in their ability to effect changes within schools. As suggested by the reaffirmation of school authority under *Bethel* and *Hazelwood*, the rights of parents have diminished while those of school officials have been strengthened. New legal remedies suggest that, at least for certain areas within public schools, parent lawsuits for damages under § 1983 may significantly increase parent leverage on school officials. However, these § 1983 lawsuits will still not reach the curriculum areas where parents have been unsuccessful in effecting changes in the past.

Even though parents have not been successful in facing changes within public schools through litigation, parents have achieved many of their goals to select the educational venue for their children. Many of the purposes that parents sought to achieve using the *Meyer-Pierce-Yoder* trilogy have been achieved, not in the courtroom, but in the assemblies of state legislatures and Congress. Parents have greater freedom today in choosing nonpublic venues for their children with state relaxation of regulatory control over those schools. At least one

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124. Congress has yet to pass legislation limiting recovery in products liability litigation, despite congressional reports recommending such a limit. See Sen. Rpt. 103-203 (1993) (chronicles the abuse or compensation and client recovery in products liability litigation); H.R. Rpt. 104-63, at Part I, sec. 7 (1995) (proposed legislation limiting punitive damages recovery in products liability litigation to \$250,000).

state, Texas, has given parents considerable legislative authority within schools. The extent to which other states will follow remains to be seen.

Comparing the rights of parents today to those under common law in the nineteenth century is not easy. How one views the current status of rights of parents to direct the education of their children depends on where the children are being educated. For those who choose to educate their children outside public schools, the authority of parents is probably greater today if only because state statutory changes have limited the regulation of nonpublic schools. With fewer regulations of nonpublic schools, parents have more opportunities to select nonpublic school options for their children. For those children who stay within the public schools, the parents' rights to direct education are not as protected as under common law. This lack of protection is largely due to the greater authority that the Supreme Court has given to school officials in controlling curriculum.