

# STUDENTS' RIGHTS AND PARENTS' RIGHTS: A UNITED STATES PERSPECTIVE OF THE EMERGING CONFLICT BETWEEN THEM AND THE IMPLICATIONS FOR EDUCATION

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*The United States has an extensive history of encouraging and protecting the rights of parents to make educational decisions for their children. The notion that parents speak for their children has been a longstanding, important value undergirding the operation of American public schools and early courts developed common law principles in support of this concept. Beginning in Meyer v Nebraska (1923), the United States Supreme Court enshrined this common law concept that parents could make educational decisions for their children as a constitutional right under the liberty clause of the Fourteenth Amendment. In the intervening eight decades, the Supreme Court and other federal courts have wrestled with interpreting how this constitutional right should be balanced with the emerging post-Tinker v Des Moines Independent School District (1969) constitutional rights of students and the post-Hazelwood School District v Kuhlmeier (1988) right of school districts to make reasonable curriculum decisions even if they limit student expression. Complicating this constitutional balancing is how courts should address the rights of students where those rights may conflict with the educational choices of parents. To the extent that courts recognise the choices of students over those of their parents, the nature of the parent-child relationship as developed under common law and enshrined in the liberty clause has been dramatically altered.*

## I INTRODUCTION

The opportunity for, and expectation of, parent involvement in the education of their children is a staple of the American educational system.<sup>1</sup> The absence of parent participation in their children's education has been decried by educators as a contributing factor to a wide range of problems in schools, from poor academic performance to disciplinary infractions.<sup>2</sup> However, even this need for parent involvement has not prevented legal challenges by parents to school decisions considered detrimental to their children's best interests.<sup>3</sup>

Generally, the protagonists in most child-rearing litigation are the parents and the school district with the assumption that the interests of children are coextensive with that of their parents. The concept that parents speak for their children has been a longstanding, important value undergirding the operation of American public schools and early courts developed common law principles in support of this concept.<sup>4</sup> Even where schools prevailed over the demands of parents,

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courts did not engage in rhetoric as to whether education might be better served if the interests of students were separated from those of their parents.<sup>5</sup>

However, a sea change occurred in *Tinker v Des Moines Independent School District*<sup>6</sup> where the U.S. Supreme Court, without referring to the interests of parents, recognised that '[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'.<sup>7</sup> Whether the Supreme Court realised, or intended, it at the time, *Tinker* was to become a judicial benchmark for reevaluating the nature of the parent-child relationship in the context of American schools.

The purposes of this article are to examine the judicial and legislative development of students' rights in the United States, how changes in those rights have affected the parent-child relationship, and what the implications of such changes might be for school management.

## II *TINKER* AND ITS PROGENY: THE SEPARATION OF PARENT-CHILD INTERESTS

*Tinker* was a landmark case on the free speech rights of public school students. For the first time, the Supreme Court recognised that public school students had protected constitutional rights within a public school. However, while the case did apply only to the rights of students (as opposed to their parents), it was not quite the defining moment that it may facially appear to be. The black arm bands worn by the three students in *Tinker* were not expressions of speech in isolation, and in fact, the facts of the case are quite clear that the students were simply mirroring the views held by their parents.<sup>8</sup> Thus, while *Tinker* was the first Supreme Court decision to accord constitutional rights to students, it did so in the context of protecting students' views that were not in opposition to those of their parents. In effect, one could argue that *Tinker* merely placed a protective constitutional label on the kind of parent-initiated and -motivated conduct that had been supported by earlier courts under common law principles.<sup>9</sup> Nonetheless, *Tinker*, by recognizing student rights independent from their parents, opened the door to future judicial considerations of student views that might differ from, and perhaps be in opposition to, those of their parents.

*Tinker* represented a break in the well-established legal tradition in the United States that parents had a constitutional right under the liberty clause of the Fourteenth Amendment to direct the education of their children. This right had been framed in two prominent cases, *Meyer v Nebraska*<sup>10</sup> and *Pierce v Society of Sisters*,<sup>11</sup> decided over forty years prior to *Tinker*. Ironically, this right of parents to direct their children's education was formulated in cases where parents themselves were not parties. In *Meyer*, the Court reversed a criminal fine imposed on a parochial school teacher pursuant to a state statute prohibiting the teaching of a foreign language to students below the eighth grade<sup>12</sup> and, in *Pierce*, the Court held, in a lawsuit brought by two private schools, that the State of Oregon could not require that all students attend public schools.<sup>13</sup> However, in both cases, the Court considered the right of a parochial school teacher to teach (*Meyer*) and the right of private schools to exist (*Pierce*) to be derivative of the right of parents to make educational choices for their children.<sup>14</sup> Occurring as they did at a time when state courts were defending the common law rights of parents to make decisions for their children, even if in opposition to the requirements of public schools, *Meyer* and *Pierce*, arguably, did little more than add a constitutional capstone to a common law practice.

The seeds of separation of student and parent rights planted in *Tinker* first became evident in *Wisconsin v Yoder*,<sup>15</sup> a Supreme Court case decided three years after *Tinker*. In *Yoder*, the Court, in affirming the state supreme court's reversal of criminal convictions of three Amish parents for

refusing to enroll their children in public high schools until the compulsory attendance age of 16,<sup>16</sup> upheld the right of Amish parents to decide that their children would not attend school beyond the eighth grade. The Court, relying on the free exercise clause and the liberty clause right of parents to direct the education of their children, held that requiring children to attend public high schools could result in children exposed to secular influences in opposition to Amish religious community views.<sup>17</sup> Because the Amish were able to demonstrate that their children already satisfied the state's interests of being literate and law-abiding citizens, the Court agreed with the three Amish fathers (defendants) that the state had no further interest in imposing a secular high school enrolment requirement that might result in children leaving an Amish community that had remained religiously intact for three hundred years.

The *Yoder* Court majority considered only the views of the three Amish fathers regarding the appropriate educational choices for their children. In crafting its argument, the majority observed that the State of Wisconsin had not relied on 'any actual conflict between the wishes of parents and children'.<sup>18</sup> Furthermore, the Court noted that 'nothing in the record or in the ordinary course of human experience suggest[ed] that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parents' faith'.<sup>19</sup> Looking back to *Meyer* and *Pierce*, the Court opined that '[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition'.<sup>20</sup> The *Yoder* majority chose to ignore *Tinker*; Justice Douglas in his dissent did not.

*Yoder* is a memorable case because it represented the first time that a Supreme Court justice, albeit a dissenting justice, challenged the assumption that parents' and children's interests were coterminous. Although observing that parents 'normally speak for the entire family,' Justice Douglas added that, after *Tinker*, 'it is the student's judgment, not his parent's 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>21</sup> While one of the three children at issue in this case had testified that she did not want to attend public school because of her religion,<sup>22</sup> Justice Douglas would have remanded the case to determine what the views of the other two were. Anticipating the direst of outcomes, he prophesied that,

[i]t is the future of the student, not the future of the parents, that is imperiled by today's decision. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.<sup>23</sup>

In the end, the extent to which Justice Douglas' dramatic rhetoric has influenced the discussion of differences in the interests of parents and children is an open question. What is clear though is that this discussion has continued, albeit in a far more subdued manner than what Justice Douglas would have preferred.

Three years after *Yoder*, the Supreme Court, in *Baker v Owen*,<sup>24</sup> affirmed without opinion, a federal court decision, involving the use of corporal punishment in a public school. Even without an opinion, though, the Court's affirmation had the effect of bifurcating the constitutional claims of a child and his mother. In *Baker*, a public school administered two swats to a student for violating a school rule, despite a prior request by the boy's mother that he not be subjected to corporal punishment. The mother sued, alleging that the use of corporal punishment violated her liberty

clause right to determine disciplinary methods for her child. At the same time, the student's claim alleged that the administration of corporal punishment violated his procedural rights. Although acknowledging that the mother's right to determine discipline for her child fit within the Meyer-Pierce-Yoder right of parents to direct the education of their children, the district court rejected the claim, finding it overborne by the school's stronger countervailing interest in maintaining order.<sup>25</sup> However, although the mother lacked an enforceable constitutional claim, the court found that plaintiff's son '[had] a liberty or property interest, greater than de minimis, in freedom from corporal punishment such that the fourteenth amendment require[d] some procedural safeguards against its arbitrary imposition'.<sup>26</sup> This recognition that a child had a liberty clause interest enforceable separately from that of the parent represented the first time that the Supreme Court gave affirmation, albeit tacit, to the idea that a student's rights did not have to be identical with, or derivative from, those of the parent.<sup>27</sup>

The notion that a student's and parent's constitutional claims are separable received recent endorsement in *Hansen v Ann Arbor Public Schools*<sup>28</sup> where a federal district court upheld a high school student's right of free speech, while rejecting her parents' separate liberty clause claim to direct the education of their child. In *Hansen*, the court, relying on *Tinker*, found that a public high school which permitted a panel of clerics to present views favorable to homosexuality during Diversity Week violated the student's free speech by refusing to permit her or another cleric to present views as to why homosexuality was sinful.<sup>29</sup> However, the court rejected the parents' claim that the school's 'conveying a message of disapproval of the traditional Christian belief that homosexual activity is immoral and sinful'<sup>30</sup> violated their liberty clause right to direct the education of their child. Although recognizing that the right of parents to direct the education of their children is a fundamental constitutional right,<sup>31</sup> the court refused to extend that right to parent determination of curriculum, observing that,

[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to fashion a separate curriculum for each student whose parents had genuine religious or moral disagreements with the school's choice of subject matter. The Court does not believe that the framers of our Constitution intended to impose such a burden on this nation's public schools.<sup>32</sup>

As to denial of the parents' claims regarding curriculum, *Hansen* represented an application of existing federal case law that has refused to permit parents to assert their right to direct children's education to change school curriculum. In *Brown v Hot, Safer, and Sexy, Productions, Inc. (Hot, Safer, and Sexy)*,<sup>33</sup> the First Circuit Court of Appeals upheld a public school's requirement that all students attend an assembly with sexually explicit content,<sup>34</sup> even though school policy required a parental consent be approved for 'instruction in human sexuality' and no consent form had been sent home in this case. However, the assembly, as part of the school's AIDS Awareness week, was considered to be curricular in nature and the court refused to translate a school's procedural violation of its own policies into an actionable section 1983 claim for violation of the liberty clause. In disallowing the parents' claim, the First Circuit reasoned that *Pierce* does not encompass 'a fundamental constitutional right to dictate the curriculum at the public school'.<sup>35</sup>

Similar results to *Hot, Safer, and Sexy* had been reached earlier by the Sixth Circuit Court of Appeals in *Mozert v Hawkins County School District (Mozert)*<sup>36</sup> and *Settle v Dickson County School District (Settle)*,<sup>37</sup> by the Second Circuit Court of Appeals in *Immediato v Rye Neck School District (Immediato)*,<sup>38</sup> and by the Third Circuit Court of Appeals in *C.H. v Oliva (C.H.)*.<sup>39</sup> In all four cases, federal court of appeals rejected parent claims that would have required public school officials to alter discretionary decisions regarding the content or implementation of curricular

matters. In *Mozert*, the Sixth Circuit denied a parent request that her daughter be permitted to use an alternative reading series because the one used by the school contained content objectionable on the parent on religious grounds. The Sixth Circuit, in *Settle*, refused to overrule a ninth grade teacher's decision that a student could not fulfill an assignment to write a biography by selecting Jesus Christ. In *Immediato*, the Second Circuit upheld a public school's community service requirement that did not count service at churches. Finally, the Third Circuit, in *C.H.*, upheld a decision to relocate a student's art picture of Jesus Christ to a less prominent place in the school hallway.

In a later post-*Hot, Safer, and Sexy* Sixth Circuit decision, *Blau v Fort Thomas Public School District*,<sup>40</sup> the court upheld summary judgment for a middle school against a parents' claims that the school's dress code violated their due process right to make decisions for their child. The Sixth Circuit declared summarily that '[w]hile [parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teachers their child'.<sup>41</sup>

The Eleventh Circuit Court of Appeals, in *Bannon v School District of Palm Beach County*,<sup>42</sup> recently joined this list by finding that plywood divider panels blocking off school hallways, placed there as part of a long-term remodeling, constituted a nonpublic forum and, as such, permitted school officials to treat school- student comments on the panels (ostensibly authorised as part of a beautification project) as if they were curriculum pursuant to *Hazelwood School District v Kuhlmeier*.<sup>43</sup> Because the panels represented school-sponsored speech, school officials could require that a student representative of the Fellowship of Christian Athletes paint over a cross and references to 'Jesus' and 'God' without violating either the student's or parents' constitutional claims.<sup>44</sup>

*Hansen*, of course, takes *Mozert, Settle, Immediato, C.H., Blau*, and *Bannon* one step further by permitting a student's claim while denying that of the parent. However, *Hansen*, by taking this additional step, introduces a tantalizing conundrum as to what the disposition should be were a student's interest to be at odds with that of the parent. Clearly, a difference did not exist in *Hansen* since the substance of the objections by both the parents and the student were identical. If one looks at *Hot, Safer, and Sexy*, though, what might have been the outcome if parents had received a consent form and refused to permit their children to attend the assembly, but the children wanted to attend the assembly anyway despite their parents' expressed desire that they not attend? Does *Tinker's* right of private student speech extend to a student's right to receive information, even against the wishes of parents? In *Board of Education, Island Trees Union Free School District No. 26 v Pico*,<sup>45</sup> a plurality of the Supreme Court recognised 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>46</sup> While the litigation thus far has focused on parental consent, do public school officials run the risk of litigation from students when schools require parent permission, but students desire to view content or participate in activities objectionable to the parents?

Conflict between parents and their children has not been addressed directly on the merits by the Supreme Court but the Court recently flirted with the question in *Newdow v Elk Grove Unified School District (Newdow)*.<sup>47</sup> *Newdow* involved a dispute between divorced parents as to whether their child should participate in the pledge-of-allegiance as one of the patriotic exercises required by state statute.<sup>48</sup> The Supreme Court refused to address the merits of the noncustodial parent's (father's) challenge that California's statutory provision for teacher-led recitation of the pledge of allegiance, with its phrase 'under God,' in every public school violated the establishment clause. The custodial parent (mother) in *Newdow* did not object to her daughter's participation in the

pledge and, thus, was not a party to the lawsuit.<sup>49</sup> Ultimately, the Court determined that the rights of the father in making educational decisions were subordinate to those of the custodial mother according to the terms of the divorce decree as interpreted under state law. The Supreme Court observed that while ‘state law vest[ed] in Newdow a cognizable right to influence his daughter’s religious upbringing,’ the noncustodial father did not have ‘a right to dictate to others what they may and may not say to his child respecting religion’.<sup>50</sup> However, does such an observation mean that, if the father had been the custodial parent, that he could have prohibited his child from participating in the pledge?

In a recent Seventh Circuit Court of Appeals, *Crowley v McKinney*,<sup>51</sup> involving a noncustodial parent access rights to educational records and school facilities, the Seventh Circuit interpreted *Newdow* for the principle that at stake was not the father’s ‘right to try to argue his daughter out of believing in God’ but rather ‘her right to religious freedom ... that [the father] was suing to enforce’.<sup>52</sup> Whether the term, ‘her right,’ has particular substantive meaning needs to be juxtaposed with the Supreme Court’s observation in *Newdow* that the father did not have the right ‘to forestall his daughter’s exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning [the mother] disagree’.<sup>53</sup> In the end, though, while *Newdow* and *Crowley* clarified the matter of internecine disputes between divorced parents, they did nothing to clarify the constitutional rights of students who may want to assert their rights in opposition to the claims of parents.

The closest dispute to date involving direct conflict between parent and student rights occurred in the recent Third Circuit Court of Appeals decision, *The Circle School v Pappert (Circle School)*.<sup>54</sup> At issue in this case was a Pennsylvania state statute<sup>55</sup> that contained a provision requiring all public, private, and parochial schools to conduct the pledge of allegiance or national anthem and required notification to parents of students who declined to recite the pledge or salute to the flag.<sup>56</sup> While citing to *Newdow* for the principle that government officials have a valid interest in offering the pledge in schools, the Third Circuit found that the statute ‘clearly discriminate[d] among students based on the viewpoints expressed’.<sup>57</sup> The plaintiff student’s parents had also sued the school, alleging violation of their right under the liberty clause to direct the education of their child. However, while discussing briefly the seminal parents’ rights liberty clause cases of *Meyer v Nebraska*<sup>58</sup> and *Pierce v Society of Sisters*,<sup>59</sup> the Third Circuit declined to address the constitutionality of ‘[Parent] plaintiffs’ Fourteenth Amendment claim,’ reasoning that such was unnecessary since it had already found that the pledge statute violated the rights of the other two plaintiffs.<sup>60</sup>

The student plaintiff had objected to the constitutionality of the statute because its requirement of notification of his pledge nonparticipation violated his free speech rights. In a broad sense, *Circle School* involved both a student’s constitutional right of noncompliance and a parent’s statutory right to information about their child’s noncompliance. These two different rights represent the confluence of two separate lines of educational legal authority in the United States, one line represented by the post-*Tinker*<sup>61</sup> judicial development of student rights, and, a second line represented by statutory provisions assuring parents of access to and involvement in their children’s education. The Third Circuit’s decision in *Circle School* provides some tantalizing insights into what the effect of a conflict in these two lines of authority might have on the parent-student relationship.

Although *Tinker* declared that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’<sup>62</sup> the case has had, for two reasons, surprisingly

little impact until now on the relationship between students and their parents: (1) the courts continue to presume that parents represent the best interests of their children; and, (2) parents continue to be actively involved in their children's claims against schools, albeit as nominal plaintiffs in lawsuits.

With the exception of Justice Douglas's dissent in *Yoder*, the Supreme Court has seldom questioned the presumption that parents represent the best interest of their children in matters involving education. Arguably, the interests of the parents in *Circle School* were not adverse to their child because the parents were the nominal plaintiffs.<sup>63</sup> Yet, the Third Circuit's opinion in *Circle School* is significant because the court reached its decision that Pennsylvania's parent notification provision 'discriminate[d] among students based on the viewpoints they express[ed]',<sup>64</sup> without any discussion as to what the parents' interests might have been in having their children participate in the pledge. In abortion cases challenging statutory parent notification requirements, the Supreme Court has ruled that a court, in deciding whether a minor 'is entitled to court authorization [to an abortion under a judicial by-pass exception] without any parental involvement',<sup>65</sup> must weigh the minor's right to an abortion with the maturity of the minor, the effects of the abortion on third parties (e.g., parents), and the state's interest in protecting the fetus.<sup>66</sup> The silence of the Third Circuit in *Circle School* regarding any weighing of the parents' interest in their children's compliance with the pledge requirement in school is intriguing. The Third Circuit in *Circle School* emphatically determined that a balancing of interests such as occurs in abortion cases is not necessary in free speech cases involving education.<sup>67</sup> As a result, Third Circuit divined that the right of students to not have their parents notified of pledge noncompliance exists independently of whether the parents might have an interest in knowing about their children's noncompliance. Indeed, one could argue that the court's refusal to consider the parent-plaintiffs' liberty clause claim reinforces this position. Not only were the parent-plaintiffs in *Circle School* forestalled from preventing the pledge being conducted, but future parents not objecting to the pledge would likewise be forestalled from compelling schools to furnish notices of noncompliance. Once students have a constitutional right of noncompliance, *Circle School* effectually removes parents from the pledge statute equation and, as prophesied by Justice Douglas' in *Yoder*, students have become 'masters of their own destinies'.<sup>68</sup>

### A *Legislative Approaches to Determining Parent-School-Child Interests*

Notwithstanding this judicial debate regarding student rights, Congress and state legislatures have moved energetically in the direction of assuring active involvement by parents in their children's education. Such federal statutes as the Family Rights and Privacy Act of 1974 (FERPA),<sup>69</sup> the Protection of Pupil Rights Act (PPRA),<sup>70</sup> and the Education for All Handicapped Children Act of 1975 (hereinafter referred to under its current title, IDEA)<sup>71</sup> have had the effect of assuring that all parents will have access to their children's education records (FERPA), that parents can review data collection instruments paid for with federal funds (PPRA), and that parents of children with disabilities will be treated as equal partners in the design and development of their children's education (IDEA). In addition, some states have accorded parents rights regarding review of their children's curriculum.<sup>72</sup>

The Pennsylvania statute's parent notification provision in *Circle School* fits broadly within the statutes above in that it required schools to provide information to parents regarding their child's performance at school. However, the irony is not lost on the reader that the parties challenging this parent notification provision, albeit as nominal plaintiffs, were the parents themselves. Thus, the anomalous result is that the parents, by advancing their son's free expression claim to not

have his parents notified, were in effect also asserting a claim not to be informed. Were it not for the uncertain implications of the Third Circuit's *Circle School* opinion on parent-student relationships, this case might simply be passed off as an example of overzealous parent support on behalf of their child.

Whether *Circle School* presages a significant change in the legal relationship between parents and their children is not clear. The rationale for the parents' support of their child in *Circle School* was never clarified. Either they saw no conflict between the free expression and statutory notice claims because, presumably, they believed they should have no right to notice, or, they recognised the two claims as competing but decided in favor of their child's constitutional claim. However these parents chose to rationalise their support for their child, not all parents of public and private school students in Pennsylvania would have considered inappropriate or illegal the parent notification information required in the pledge statute. For these parents, the notice of noncompliance with the statutory pledge requirements would have been one more example of a legislative effort to maintain parent involvement in school matters. Thus, the effect of depriving other parents of the opportunity to know about their children's noncompliance, arguably, would prevent them from asserting parental control over their children at home to compel their children's compliance at school.

Moreover, when one considers that the Pennsylvania statute would have allowed parents to notify school officials directly that their child had permission not to participate in the pledge,<sup>73</sup> thus obviating any need for parent notification of noncompliance, the case speaks not only to the enhancement of the rights of students but also to the widening gap between parents' and students' interests. Once students have a free expression right not to have their parents notified of pledge noncompliance, that right can just as easily be asserted against parents who would like to be notified about other areas of noncompliance. While parents have generally served as nominal plaintiffs in challenges involving schools, students may well seek other representation where their interests differ from those of their parents. As has been evident in the challenges by minor children to abortion statute parent notification provisions, other persons or organizations have been willing to step forward to represent the interests of minor children.<sup>74</sup> Thus, the challenge to the Pennsylvania parent notification provision, arguably, could just as easily have proceeded without parental involvement, and presumably would have, if student-plaintiff's parents had not served as nominal plaintiffs.

The challenge with a case like *Circle School* is determining its application to other areas of parent involvement in schools. If students have a free expression right to deny their parents notice of pledge of allegiance noncompliance under a state statute, do they also have a privacy right to deny their parents access to their education records under FERPA? If state law or school board policy requires that parents consent to their children's participation in certain courses or activities (e.g., viewing 'R' rated films), do students have a free expression right to participate even if their parents refuse to grant consent? Under IDEA, do students have a privacy or free expression right to be represented by a person of their choice on the IEP team and to have their parents permanently removed from the team? Pursuant to NCLB where students are entitled to other school choices if their current school has failed to meet annual yearly progress requirements (AYP),<sup>75</sup> would the child have an enforceable right to stay in his/her current school even if the parents selected another school?<sup>76</sup> To date, these kinds of questions have received scant judicial attention. Whether *Circle School* will be instrumental in dramatically redefining the student-parent-school relationship remains to be seen.

To date, the notion that parents' rights can be separated from those of their children has not received general acceptance in the United States. Although the U.S. Supreme Court recently has demonstrated a limited interest in looking to international sources for authority in certain kinds of criminal cases,<sup>77</sup> nothing to date suggests that the Court might consider international sources that accord a broad range of education rights to children.<sup>78</sup> Separating the rights of children from those of parents is a slippery slope and the temptation to justify upholding children's rights at the expense of parent's rights may seem politically expedient to some, but the price may well come with the fracturing of the family structure.

Just such a challenge to parent-student relationships, though, may be a possibility under a proposed State of Georgia Department of Education rule requiring parental permission before a student can become involved in any school-sponsored extracurricular activity.<sup>79</sup> In a parent consent procedure viewed as applying to such activities as diverse as running for the homecoming queen, trying out for the spring musical, or working for Habitat for Humanity, the rule requires that parents be notified either annually or when a new group is formed and requires that the notification provide the 'mission or purpose' of the group, the faculty sponsor, the activities students will be involved in, any national affiliations for the group and any financial requirements, such as dues.<sup>80</sup> While parent permission has been considered a necessary 'circuit breaker' requirement to avoid establishment clause problems where elementary students participate in on-campus,<sup>81</sup> after-school religious clubs, courts have yet to determine whether such permission might be a free speech violation where high school students want to participate in after-school clubs without their parents' knowledge. Thus, might the reasoning in *Circle School* striking down notification of student noncompliance be applied just as easily to block what essentially amounts to school notification of student extracurricular participation? On the other hand, though, if parents have no liberty clause right to control the public school curriculum to which their children are exposed during the school day, how might their liberty clause right be enhanced where the school-sponsored activities at issue occur outside the school's compulsory attendance instructional day? One can argue that the Third Circuit's reasoning in *Circle School* may be inapposite because the pledge of allegiance in that case applied to an activity that occurred during the school day. However, as the Ninth Circuit has observed in several cases involving the Equal Access Act (EAA), many schools have opened up school lunch periods and designated activity periods during the school day to noninstructional and noncurriculum-related clubs (essentially, extracurricular groups).<sup>82</sup> Worth noting is that, while the EAA requires that all noninstructional and noncurriculum-related student-led clubs be treated the same by public schools, school districts cannot impose requirements that infringe upon the expressive rights of the student participants.<sup>83</sup> Thus, the question that still remains unresolved is whether students have an expressive right to meet in school-sponsored extracurricular activities without parent permission and, if so, how that right is to be balanced with parents' liberty clause right to direct the education of their children.

### III CONCLUSION

The United States has never adopted the United Nations' Convention on the Child in large part because the emphasis on children's rights might be perceived as disrupting the American historical common law, constitutional and statutory presumption in favor of parents acting in the best interest of their children. While the American legal emphasis on development of rights for students has not created in the past a rift between the constitutional substantive rights of students and the constitutional rights of parents to direct their children's education, one can speculate whether more recent American case law has moved the United States perceptibly in the direction

of creating children's rights. To the extent that individual rights of students can be asserted against the views of their parents, the American presumption in favor of the parental right to direct their children's education arguably is at risk. If students can assert their rights to expressive activities independently of their parents' views, the role of parents in their children's education will have to be reevaluated. Although the separation of the students' right to expression from the parents' right to direct their children's education is unlikely to produce any immediate systemic changes, the long term effect could very well alter the role of parent participation in children's education that American schools have come to expect.

## ENDNOTES

1. See, e.g., *Tex. Educ. Code* § 4.001. The first objective of the state's Public Education Mission and Objectives is that 'Parents will be full partners with educators in the education of their children'. See also, *Tex. Educ. Code* § 26.003(a) ('Parents are partners with educators, administrators, and school district boards of trustees in their children's education. Parents shall be encouraged to actively participate in creating and implementing educational programs for their children'). A more comprehensive statement can be found at *Mich. Comp. Laws* § 380.10 ('It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment'.)
2. See Joyce Epstein, *School, Family, and Community Partnerships: Preparing Educators, and Improving Schools* (2001) (comprehensive examination of impediments, challenges and solutions to parent involvement in their children's education). See generally, Ralph Mawdsley and Daniel Drake, *Involving Parents in the Public Schools: Legal and Policy Issues*, 76 *Ed. Law Rep.* 299 (1992) (suggesting that, because courts have been reluctant to mandate parent intervention with schools and because parent involvement is a greater problem in urban schools, urban schools must design unique collaborative opportunities to encourage parent involvement in their children's education).
3. See *Settle v Dickson County Sch. Bd.* 53 F.3d 152 [100 *Ed. Law Rep.* 32] (6<sup>th</sup> Cir. 1995) (upholding public school teacher's refusal to permit ninth grade student, in fulfillment of assignment to write a biography, to write a biography of Jesus Christ, even though the teacher was incorrect in her reasons for not granting the student's request: personal religion is not an appropriate subject for discussion in public schools; and, the student could not find four sources for her paper); *Mozert v Hawkins County Bd. of Educ.*, 827 F.2d 1058 [41 *Ed. Law Rep.* 473] (6<sup>th</sup> Cir. 1995) (upholding school board's rejection of parent's request for alternative reading series because of religious objections to content of current series). See generally, Ralph Mawdsley, *The Changing Face of Parents' Rights*, 2003 B.Y.U. EDUC. & L.J. 165 (chronicling the rights of parents to direct their children's education over the past century, contending that the rights of parents to address issues within public schools are not as extensive as under common law, despite intervening state and federal legislation affording some rights of access).
4. See, e.g., *Hardwick v Board of Trustees* 205 P. 49 (Cal. Ct. App. 1921). The court, in upholding the right of parents to remove a child from participation in the folk and social dancing part of a physical education program observed that,

to 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, 54.

See also, *State ex rel. Keley 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 Schools 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); *School Dist. No. 18, Garvin County v Thompson* 103 P. 578 (Okla. 1909) (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).

5. See *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; the court observed that, ‘the disintegrating principle of parental authority to prevent all classification and destroy all system in any school, public or private, is unknown to the law’); *Samuel Benedict Memorial Sch. v Bradford* 36 S.E. 920 (Ga. 1900) (student who refused to prepare a paper as per an assignment, but instead read a paper prepared by his parent, could be suspended; ‘although the school authorities may excuse and condone the preparation by the father of the paper actually read, and also its reading by the pupil, the latter may still be punished for her failure to herself prepare a paper in compliance with instructions’). See also, *State ex rel. Sheibley v School District* 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).
6. *Tinker v Des Moines Independent School District* 393 U.S. 503 (1969).
7. *Tinker v Des Moines Independent School District* 393 U.S. 503 (1969), 506.
8. See *Tinker v Des Moines Independent School District* 393 U.S. 503 (1969), 504, where the Court observed that the students ‘determined to publicize objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season’ after ‘[students] and their parents had previously engaged in similar activities’. See also, 516 (Black J., dissenting) (four of the seven students who wore armbands were children of a Methodist minister paid a salary by the American Friends Service Committee and the mother of another was an official in the American League for Peace and Freedom.)
9. See Ralph Mawdsley, ‘Constitutional Rights of Students’ in Clifford Hooker (ed), *The Courts and Education. The Seventy-Seventh Yearbook of the National Society for the Study of Education* (1978) 161, 176-177 (arguing that the majority in *Tinker* saw the conflict as a home-school conflict as opposed to a student-school one).
10. 262 U.S. 390 (1923).
11. 268 U.S. 510 (1925).
12. The statute enacted in 1919 provided as follows:
  - S 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.
  - S 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.
  - S 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.
13. The state statute enacted in 1922 is not reproduced in the Supreme Court decision but the Court summarises it: ‘effective September 1, 1926, [the statute] 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’. *Pierce* 268 U.S., 510.
14. See *Meyer* 262 U.S., 400 (‘[The teacher] taught [the German] language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment’); *Pierce* 268 U.S., 534535 (‘we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control’.)

15. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972).
16. The Wisconsin statute, similar to those in *Meyer* and *Pierce* had criminal penalties and provided in part:
  - (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age. ...
  - (5) Whoever violates this section ... may be fined not less than \$5 nor more than \$50 or imprisoned not more than 3 months or both.

*Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 207.
17. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 210, 211.  
Amish beliefs require members of the community to make their living by farming or closely related activities ... 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 perform the adult role of an Amish farmer or housewife.
18. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 232.
19. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972).
20. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972) citing to *Pierce* 268 U.S. 534-535 (referencing *Meyer*).
21. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 244, 245 (Douglas, J., dissenting).
22. *See Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 237 (Stewart, J., concurring)  
‘Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of your religion?  
A. Yes.  
Q. That is the only reason?  
A. Yes’.
23. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 245-246.
24. 395 *F.Supp.* 294 (M.D.N.C. 1975), affirmed without opinion, 423 U.S. 907 (1975).
25. Worth noting is that the *Baker* district court found the parental interests in *Meyer*, *Pierce* and *Yoder* to be ‘worthy of great deference due to [their] unquestioned acceptance throughout our history’, as opposed to the *Baker* ‘[plaintiff-mother’s] opposition to corporal punishment [which], on the other hand, enjoys no such universal approbation in our society even today, and certainly not historically’.  
*Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 300.
26. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972), 301.
27. Ironically though, while the district court cited to *Goss v Lopez* 419 U.S. 565 (1975), granting students procedural constitutional rights even as to suspensions for fewer than 10 days, the court did not cite to *Tinker*. However, this failure to cite to *Tinker* can be explained since *Tinker* addressed students’ substantive constitutional rights while *Goss* addressed procedural rights, and the latter rather than the former was at issue in *Baker*.
28. 293 *F.Supp.2d* 780 [183 *Ed. Law Rep.* 825] (E.D. Mich. 2003).
29. The court’s discussion of government versus private speech is well worth reading. In effect, public schools cannot camouflage viewpoint discrimination by claiming that permitting only one viewpoint constitutes furtherance of a pedagogical interest under *Hazelwood v Kuhlmeier* 484 U.S. 260 [43 *Ed. Law Rep.* 515] (1988). As the court noted in conclusion, ‘no matter how well-intentioned [a school’s] stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions’, 803.
30. *Hansen v Ann Arbor Public Schools* 293 *F.Supp.2d* 780, 810.

31. The fundamental constitutional status of a parent's right to direct their children was upheld by the Supreme Court as recently as *Troxel v Granville* 530 U.S. 57 (2000) (striking down Washington state statute permitting unrestricted grandparent visitation rights based on a court's determination that it would be in 'the best interests of the children' because such an interpretation infringed upon 'the fundamental right of parents to make decisions concerning the care, custody, and control of their children'), 65.
32. *Hansen v Ann Arbor Public Schools* 293 F.Supp.2d, 813.
33. 68 F.3d 525 [104 Ed. Law Rep. 106] (1<sup>st</sup> Cir. 1995).
34. *Brown v Hot, Safer, and Sexy, Productions, Inc. (Hot, Safer, and Sexy)* 68 F.3d 525, 529. The complaint alleged that the presenter during 1 hour assembly:
  - 1) told the students that they were going to have a 'group sexual experience, with audience participation';
  - 2) used profane, lewd, and lascivious language to describe body parts and excretory functions;
  - 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex;
  - 4) simulated masturbation;
  - 5) characterised the loose pants worn by one minor as 'erection wear';
  - 6) referred to being in 'deep sh--' after anal sex;
  - 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up;
  - 8) encouraged a male minor to display his 'orgasm face' with her for the camera;
  - 9) informed a male minor that he was not having enough orgasms;
  - 10) closely inspected a minor and told him he had a 'nice butt'; and
  - 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.
35. *Brown v Hot, Safer, and Sexy, Productions, Inc. (Hot, Safer, and Sexy)* 68 F.3d 525, 533.
36. 827 F.2d 1058 [41 Ed. Law Rep. 473] (6<sup>th</sup> Cir. 1987).
37. 53 F.3d 152 [100 Ed. Law Rep. 32] (6<sup>th</sup> Cir. 1995).
38. 73 F.3d 454 [106 Ed. Law Rep. 85] (2d Cir. 1996).
39. 195 F.3d 167 [139 Ed. Law Rep. 180] (3d Cir. 1999), reversed in part on procedural grounds, 226 F.3d 198 [148 Ed. Law Rep. 585] (3d Cir. 2000).
40. 401 F.3d 381 [196 Ed. Law Rep. 118] (6<sup>th</sup> Cir. 2005).
41. *Blau v Fort Thomas Public School District* 401 F.3d 381, 395 (emphasis in original).
42. 387 F.3d 1208 [193 Ed. Law Rep. 78] (11<sup>th</sup> Cir. 2004).
43. 484 U.S. 260, 273 [43 Ed. Law Rep. 515] (1988) (upholding a principal's decision not to permit publication of two pages of a newspaper prepared as part of a journalism course where two articles on the pages were not appropriate and the publication date did not allow time to make changes. In the two articles, a discussion of three pregnant students did not adequately conceal their identities, references to sexual activity and birth control were considered inappropriate for younger students in the high school, and a divorce story critical of a student's father had not allowed a response by the father. Because the newspaper was part of an academic journalism course, the school needed only a rational basis to excise the two pages and the concern about privacy and fair reporting met that standard).
44. For a scathing critique of the Eleventh Circuit's reasoning, see Ralph Mawdsley, 'The Profane, the Offensive, and The Religious: The Use of Hazelwood to Prohibit Religious Activity in Public Schools' (2005) 195 Ed. Law Rep. 425.
45. 457 U.S. 853 [4 Ed. Law Rep. 1013] (1982) (in *Pico*, the Court struck down a school board's removal of eight books from the school library because, rather than representing education-based criteria such as appropriateness for the age level, the removal represented political/religious views of the board members).
46. *Board of Education, Island Trees Union Free School District No. 26 v Pico* 457 U.S. 853, 867.
47. 542 U.S. 1, 124 S.Ct. 2301 [188 Ed. Law Rep. 17] (2004).
48. See *Cal.Educ.Code* § 52720 (Technically, the California statute does not require the recitation of the pledge of allegiance. The statute requires at the beginning of each school day 'appropriate patriotic exercises,' which can be satisfied by '[t]he giving of the Pledge of Allegiance to the Flag of the United States of America'.)

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of

the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

49. The mother's (Banning) motion to intervene based on her award of sole custody was denied where under custody order father retained rights with respect to child's education and general welfare and court determined that father had free speech right under state and federal constitutions to object to unconstitutional state action violative of the establishment clause and mother had no right to insist that her daughter be subjected to unconstitutional pledge requirements. However, the Ninth Circuit Court of Appeals reached this decision after finding that the noncustodial father had standing to object to unconstitutional action affecting his daughter. *Newdow v U.S. Congress*, 313 F.3d 500 (9<sup>th</sup> Cir. 2002), a finding invalidated on appeal to the Supreme Court. Subsequent to the court of appeals decision in *Newdow*, a California trial court, at a hearing on September 11, 2003, announced that the parents have 'joint legal custody,' but that Banning (the mother) 'makes the final decisions if the two ... disagree'. *Newdow* 542 U.S., 124 S.Ct. at 2310.
50. *Newdow* 542 U.S., 124 S.Ct., 2311.
51. 400 F.3d 965 [196 Ed. Law Rep. 50] (7<sup>th</sup> Cir. 2005).
52. *Crowley v McKinney* 400 F.3d 965, 970 (emphasis in original).
53. *Newdow* 542 U.S., 124 S.Ct., 2311
54. *The Circle School v Phillips* 270 F.Supp.2d 616 [179 Ed.Law Rep. 705] (E.D.Pa. 2003), *aff'd*, *The Circle School v Pappert* 381 F.3d 172 [191 Ed. Law Rep. 629] (3d Cir. 2004).
55. 24 Pa.Cons. Stat. Ann. § 7-771(c).
56. Section 7-771(c)(1) of the statute provided that,

[a]ll supervising officers and teachers in charge of public, private or parochial schools shall cause the Flag of the United States of America to be displayed in every classroom during the hours of each school day and shall provide for the recitation of the Pledge of Allegiance of the national anthem at the beginning of each school day. Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief. The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.

The statute also had two other provisions not relevant to this article, one that exempted private schools if participation with the statute would violate the their religious views [s 7-771(c)(2)], and another that required one period per week of instruction in 'affirming and developing allegiance to and respect for the Flag of the United States of America, and for the promoting of a clear understanding of our American way of life'. [s 7-771(d)].
57. *The Circle School v Pappert* 381 F.3d 172, 180.
58. 262 U.S. 390 (1923) (Court invalidated under the liberty clause of the Fourteenth Amendment a Nebraska statute prohibiting the teaching of academic courses in the German language and reversed the conviction of a parochial school teacher who had taught the Bible in German).
59. 268 U.S. 510 (1925) ( Court invalidated under the liberty clause of the Fourteenth Amendment an Oregon statute requiring attendance at public schools).
60. *The Circle School v Pappert* 381 F.3d 172, 183.
61. 393 U.S. 503 (1969).
62. *Tinker* 393 U.S. 503 (1969), 506.

63. See complete list of plaintiffs, *Circle School* 381 F.3d at 172 (‘Maxwell S. Mishkin, by His Parents and Next Friends Jeremy and Barbara Mishkin’).
64. *The Circle School v Pappert* 381 F.3d 172, 180.
65. See *Lambert v Wicklund* 520 U.S. 292, 296 (1997), quoting from, *Bellotti v Baird* 443 U.S. 622, 648 (1979) (*Wicklund* upheld a Montana by-pass provision allowing for waiver of the statute’s parent notification provision if a court determined that ‘parental *notification* is not in [the minor’s] best interests’ [520 U.S. at 297] (emphasis in original); in *Bellotti*, the Court struck down a Massachusetts statute requiring minors to secure parent consent before permitting an abortion, reasoning that if ‘a court determines that an abortion is in the minor’s best interests, she is entitled to court authorization without any parental involvement’. 443 U.S. at 648. See also, *Ohio v Akron Ctr. for Reproductive Health* 497 U.S. 502 (1990) (upholding by-pass exception to Ohio parent notification statute where juvenile court could determine ‘that the abortion is in the minor’s best interest’ and where the court’s procedure ‘insure[s] the minor’s anonymity’.), 511, 512.
66. See *Circle School* 381 F.3d, 179 for Third Circuit’s discussion of abortion cases where parental notification requirements have been upheld as long as there exists a judicial bypass provision.
67. The Third Circuit categorically rejected the Defendants’ reliance on the abortion cases to support their argument that parent notification is constitutional. To bolster its position that the free speech claim in *Circle School* was fundamentally different from the Due Process Clause claim in the abortion cases, the court found support in *West Virginia Bd. of Educ. v Barnette* 319 U.S. 624 (1943) [invalidating application of pledge-of-allegiance statutory requirement to Jehovah’s Witnesses as violation of free exercise of religion]:  
 In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake ... Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. (quoting from *Barnette* 319 U.S. at 639).
68. *Yoder* 406 U.S. at 245 (Douglas, J. dissenting).
69. 20 U.S.C. § 1232g. Under FERPA, parents with children in schools receiving federal funds have ‘the right to inspect and review the education records of their children,’ ‘to challenge the content of such student’s education records,’ and the right to prevent disclosure of students records (with specified exceptions) ‘without the written consent of their parents’. 20 U.S.C. §§ 1232g (1)(A) and (D), and (6)(b)(1).
70. 20 U.S.C. § 1232h. The PPRA requires parent notification of, and consent to, surveys, analysis or evaluation financed by federal funds that might reveal information as to,  
 (1) political affiliations or beliefs of the student or the student’s parent;  
 (2) mental or psychological problems of the student or the student’s family;  
 (3) sex behavior or attitudes;  
 (4) illegal, anti-social, self-incriminating, or demeaning behavior;  
 (5) critical appraisals of other individuals with whom respondents have close family relationships;  
 (6) legally recognised privileged or analogous relationships, such as those of lawyers, physicians, and ministers;  
 (7) religious practices, affiliations, or beliefs of the student or student’s parent; or  
 (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program). (20 U.S.C. § 1232h (b)).
71. 20 U.S.C. § 1400 et seq. Congress declared as one of its purposes in enacting IDEA to ‘strengthen the role of parents and ensure that families of such children have meaningful opportunities to participate in the education of their children at school and at home’. 20 U.S.C. 1400(5)(B).
72. See, e.g., *Parents Rights and Responsibilities Act* passed in Texas in 2000 that provides parents with the following rights: access ‘to all written records of a school district concerning the parent’s child; ‘petitioning the school principal, ‘with the expectation that the request will not be unreasonably denied,’ to add a course, to permit their child ‘to attend a class for credit above the child’s grade level’, and to permit the child to graduate early if all courses required for graduation have been completed;

and entitlement to review all teaching and test materials to be used by their children and ‘to remove the [their children] temporarily from a class or other school activity that conflicts with the parent’s religious or moral beliefs’. *Tex. Educ. Code Ann.* §§ 26.003-26.010. *See also, Mich. Stat. Ann.* § 380.1507 where 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 be the opportunity to review the contents of the course in advance and to have their children excused from the class.

73. See *Circle School* 381 F.3d, 175 where the legislative sponsor of the pledge statute suggested that parents had the option of directly notifying school officials that they did not want their child to participate in the pledge.
74. See, e.g., *Bellotti* 443 U.S. at 626 where several organizations and adult plaintiffs, in addition to representing themselves, also represented ‘an unmarried minor, identified by the pseudonym ‘Mary Moe,’ who, at the commencement of the suit, was pregnant, residing at home with her parents, and desirous of obtaining an abortion without informing them’.
75. See 20 U.S.C. § 6316 (b)(1)(E)(i). The choice exists for any elementary or secondary school that a school district finds for ‘2 consecutive years [has not made] adequate yearly progress as defined in the State’s plan.’ § 6316(b)(1)(A).
76. NCLB states the choice in terms of the student so the statute on its face creates the possibility of such a conflict.

In the case of a school identified for school improvement under this paragraph, the local educational agency shall, not later than the first day of the school year following such identification, *provide all students enrolled in the school with the option to transfer to another public school* served by the local educational agency, which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law. (emphasis added).

77. For an indication of the increasing prominence of international law on Supreme Court decisions, see *Roper v Simmons* 545 U.S. 551, 125 S.Ct. 1183, 1198-2000 (2005) (in finding a violation of the Eighth Amendment’s ‘cruel and unusual’ provision for the use of capital punishment for crimes committed by juveniles under age 18, the Court engaged in a lengthy discussion of the views of other nations and of the U.N.’s Convention on the Child, concluding that ‘it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty’); *Lawrence v Texas* 539 U.S. 558, 572-573 (2003) (in invalidating state statutes criminalizing homosexual conduct in homes as a violation of the liberty clause right of privacy, the Court found support in Britain’s Sexual Offenses Act of 1967 and the European’s Convention of Human Rights that had prohibited criminal prosecution for sodomy); *Atkins v Virginia* 536 U.S. 304, 316 n. 21 (2002) (in invalidating capital punishment for mentally retarded persons as a violation of ‘cruel and unusual punishment,’ the Court referenced only briefly in a footnote to the Brief for the European Union that ‘the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved’).
78. 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 and 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.

79. See NSBA Legal Clips, May 19, 2005.
80. See Bridget Gutierrez and Mary MacDonald, ‘After-school clubs could require a ‘Mother, may I?’ (2005) May 13 *The Atlanta Journal-Constitution*. (The article reveals that ‘the rule grew out of proposed legislation that sought to squelch participation in gay and lesbian clubs, which have been popping up in area high schools’.)
81. See *Good News Club v Milford Central Schools* 533 U.S. 98 [154 *Ed. Law Rep.* 45] (2001) (in finding that school district refusal to permit a religious club to meet after school like other community student groups, the Court dismissed the school’s concern about a coercive effect on students to participate in the religious club, noting that ‘[b]ecause the children cannot attend without their parents’ permission, they cannot be coerced into engaging in the Good News Club’s religious activities). The ‘circuit breaker’ concept was raised unsuccessfully in *Santa Fe Indep. Sch. Dist.* 530 U.S. 290, 305 [145 *Ed. Law Rep.* 21] (2000), as applied to student-initiated and student-led prayer before football games, in an attempt by a school district to justify the practice as not being school sponsored.
82. See *Ceniceros v Board of Trustees of Dan Diego School District* 106 F.3d 878 [116 *Ed. Law Rep.* 82] (9<sup>th</sup> Cir. 1997) (holding that the lunch period during the school day when students were free to leave campus constituted noninstructional time for purposes of the EAA as long as other student groups were permitted to meet); *Prince v Jacoby* 303 F.3d 1074 [169 *Ed. Law Rep.* 85] (9<sup>th</sup> Cir. 2002) (holding that a morning student/staff activity period constituted a noninstructional time even though attendance was taken and, as long as students had an option to meet with student clubs during this time period, religious clubs could not be excluded).
83. See *Hsu v Roslyn Union Free School District* 85 F.3d 839 [109 *Ed. Law Rep.* 1145] (2d Cir. 1996) (upholding free speech rights of student religious club that officers be ‘Christians,’ finding that school district’s nondiscrimination policy as pertaining to religion would violate the group’s expressive rights).

