Let's Talk about Sex: School Surveys and Parents' Fundamental Right to Make Decisions concerning the Upbringing of Their Children

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LET'S TALK ABOUT SEX: SCHOOL SURVEYS AND PARENTS' FUNDAMENTAL RIGHT TO MAKE DECISIONS CONCERNING THE UPBRINGING OF THEIR CHILDREN

I. INTRODUCTION

In a perfect world, school surveys asking students about sex, drugs, alcohol and suicide would introduce teenagers to topics and behaviors that they have never encountered before.1 The reality, however, is that junior high and high school students are having sex, using drugs, abusing alcohol and contemplating suicide.2 To combat these issues, schools across the country are administering surveys questioning students about their experience with these topics.3 While the surveys provide school boards and local governments with vital information concerning the youth of this country, parents are fighting to keep these surveys out of the classroom, arguing that schools are depriving parents of their fundamental right to make decisions concerning the upbringing of their children.4


2. See, e.g., Lisa Kim Bach, School Survey Finds Increase in Teen Sex, LAS VEGAS REVIEW-JOURNAL, Feb. 1, 2000, at 1B (detailing Nevada survey finding that high school students answered as follows during anonymous survey: 49.5% had used marijuana, 20% had considered committing suicide in past year and 53% had consumed alcohol in past thirty days); Ruma Banerji Kumar, Survey Finds Risky Behavior Among Students, The Com. Appeal (Memphis, Tenn.), Sept. 28, 2004, at B3 (outlining Memphis city high school survey showing more than 60% of students have had sex, more than one-quarter drank before age thirteen and almost half have smoked marijuana); Matt Viser, High School Survey Looks at Risky Behaviors; Finds 70 Percent of Local Students Consider Themselves Overly Stressed, BOSTON GLOBE, Oct. 24, 2002, at 1 (calculating that more than half of students have engaged in sex and have drank alcohol).

3. See George Archibald, Mrs. Ridge Promotes Survey on Sex, Drugs; Information Used to Gain Grants, WASH. TIMES, Feb. 18, 2003, at A01 (identifying Communities That Care, that developed “youth survey used in more than 400 communities nationwide to collect personal information from students to help local governments justify federal and foundation grant applications”).

Who has the responsibility—or privilege—of introducing children to the sensitive issues that surround them every day? Recently, the Third Circuit took on this balancing act, weighing parents' fundamental right to raise their children against a school's ability to control the curriculum and the school environment. Between their peers, media advertising and the Internet—all typically beyond the strict control of a parent—it is not hard for children to learn about drugs, sex and alcohol. Whether it is the community's or parent's responsibility to introduce students to these topics, one fact remains true, someone has to teach them because they are going to learn this information from other—often times less reliable—sources.

This Casebrief identifies the Third Circuit's preferred constitutionality analysis of school surveys challenged under the Fourteenth Amendment and serves as a guide to practitioners bringing or defending against these challenges. Part II reviews the Supreme Court and other circuit court decisions that shape the current boundaries of the right of parents to raise their children as they see fit. Part III analyzes setting forth the Third Circuit's holding that administering an involuntary survey did not violate the constitutional rights of parents. Part IV evaluates parents' right to raise their children as they see fit against


8. See generally HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH Us (Simon & Schuster 1996) (explaining that by looking honestly at condition of our children, by understanding wealth of new information research offers us about them, and by listening to children themselves, we can begin more fruitful discussion about their needs).

9. For an analysis of the Third Circuit's opinion in C.N. v. Ridgewood Board of Education, see infra notes 84-100 and accompanying text.

10. For a discussion of parental decision-making precedent, see infra notes 16-64 and accompanying text.

11. 430 F.3d 159 (3d Cir. 2005).

12. For an analysis of the Third Circuit's reasoning to deny the parents' Fourteenth Amendment claim, see infra notes 89-100 and accompanying text.
reality that children need to be educated about sensitive topics at a young age.13 This section also supports the prediction that the Third Circuit will continue to be lenient in its approach of policing school curricula.14 Part V concludes with suggestions for practitioners in the Third Circuit, identifying the relevant policy issues and recommending approaches for effective litigation of this issue.15

II. BACKGROUND

A. Historical Overview

"[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."16 In the 1920s, the Supreme Court recognized, in both Meyer v. Nebraska17 and Pierce v. Society of Sisters,18 that parents have a fundamental due process right to control the education and upbringing of their children.19 The Meyer-Pierce right, however, has changed substantially over the past thirty

13. For rationales on whether schools have the authority to survey students, see infra notes 116-22 and accompanying text.
14. For support of this author's prediction, see infra notes 101-33 and accompanying text.
15. For suggestions to Third Circuit practitioners, see infra notes 134-44 and accompanying text.
16. Troxel v. Granville, 530 U.S. 57, 66 (2000) (finding that visitation order was unconstitutional infringement on mother's fundamental right to make decisions concerning care, custody and control of her two daughters); see also Gruenke v. Seip, 225 F.3d 290, 303-04 (3d Cir. 2000) (acknowledging that "[t]he right of parents to raise their children without undue state interference is well established"). The Fourteenth Amendment also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." See Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (reasoning that Fourteenth Amendment's Due Process Clause "guarantees more than fair process").
17. 262 U.S. 390 (1923).
18. 268 U.S. 510 (1925).
19. See id. at 534-35 (acknowledging parents' right to direct upbringing and education of their children); Meyer, 262 U.S. at 400 (recognizing parents' right to control education of their children). The court often refers to this fundamental liberty as the Meyer-Pierce right because it was first enunciated in these two Supreme Court cases. See also Barbara Bennett Woodhouse, Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own", 11 CORNELL J.L. & PUB. POL'Y 481, 482 (2002) (acknowledging "power of parents to control the education of their own," as common-law power that was constitutionalized in Meyer and Pierce).

Before the Supreme Court acknowledged the Meyer-Pierce right, state courts used common law to resolve disputes between schools and parents concerning school-required curriculum or activities. See, e.g., Hardwick v. Bd. of Sch. Trs., 205 P. 49, 54 (Cal. Dist. Ct. App. 1921) (illustrating California court decision prohibiting schools from requiring student participation in social and folk dancing because it violated parents' right to control education of their children). Parents rarely were successful in advancing common law claims and, therefore, needed a constitutional right to assert to combat the state legislature shifting power to
years due to judicial and legislative attempts to balance the state’s authority to educate students against parents’ natural authority to raise their children. Parents’ fundamental right to raise their children as they see fit will give way in certain circumstances to a school’s ability to control curriculum and the school environment. Moreover, while the Supreme Court has never been called upon to define the precise boundaries of the parental right to control the upbringing of children, it is clear that this right is neither absolute nor unqualified.

The topic of sex in schools has been highly debated in recent years. In Brown v. Hot, Sexy and Safer Products, Inc., the First Circuit ruled that mandatory student attendance at a sexually explicit AIDS awareness assembly did not rise to an intrusion of constitutional magnitude on parents’ right to direct the upbringing and control of their children. Similarly, the Third Circuit rejected a familial right to privacy claim in the context of a voluntary high school condom distribution program accompanied by a parental opt-out provision in Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education. The debate in these cases is


20. See Mawdsley, supra note 19, at 165-66 (noting parents’ rights have evolved and have been influenced by changing perspectives concerning rights of students, school boards and justiciable causes of action). After the Meyer-Pierce period, the Supreme Court addressed state authority to apply facially neutral compulsory attendance laws to religious, nonpublic schools. See Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (rejecting application of state attendance law to Amish because their religious beliefs required that their children attend school only until eighth grade). Yoder was the high point of parents’ religious-based educational decisions. See Mawdsley, supra note 19, at 174-75 (describing transition into current judicial environment).


22. See Lehr v. Robertson, 463 U.S. 248, 256 (1983) (advancing constitutional protection for parent-child relationship in “appropriate cases”); see also Croft v. Westmoreland County Children and Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997) (noting parents’ right to manage children is “not absolute” and is “limited by a compelling government interest in the protection of children”).

23. See Woodhouse, supra note 19, at 490-91 (discussing dangers of lack of sex education). Courts have held that schools are not obligated to shield children of objecting parents from accessing condoms or obtaining information about sex. See id. at 491 (determining alternatively that no court has ever upheld child’s affirmative right to access information about sex education or condoms from school).

24. 68 F.3d 525 (1st Cir. 1995).

25. See id. at 533 (rejecting parents’ claims that assembly deprived privacy rights, substantive due process rights and their right to educational environment free from sexual harassment).

26. 148 F.3d 260, 274-75 (3d Cir. 1998) (finding Board’s policy of providing consent form contained adequate notice provisions designed to effectively inform parents of condom distribution program). Public junior high and high schools
fueled by the clash of constitutional rights: the minor’s right to information against parents’ right to authority over their child.27

Currently, the precise scope of a parent’s liberty interest remains unclear.28 The law acknowledging parental rights in the nineteenth century has changed in large part because everything around the law has changed.29 The lack of protection of parents’ right to direct education within the public school is largely due to the greater authority that the Supreme Court has given to school officials in controlling curriculum.30 Parents continue to maintain other avenues—such as home schooling and enrolling their children in private schools—as educational substitutes for public schools, but these avenues are often far more costly.31

B. Actions “Striking the Heart” of Parental Decision-Making Authority

Circuit courts strictly construe actionable violations of the familial privacy right to encompass only those instances where a state official’s action is aimed directly at the parent-child relationship.32 The Third Circuit, nationwide have begun distributing condoms to students to combat the growing number of teenagers infected with the HIV virus and teenage pregnancy. See Miranda Perry, Comment, Kids and Condoms: Parental Involvement in School Condom-Distribution Programs, 63 U. CHI. L. REV. 727, 727-28 (1996) (noting parents’ argument that schools to which they are legally required to send their children-implicitly condone sexual activity by distributing condoms).

27. See Catherine J. Ross, An Emerging Right for Mature Minors to Receive Information, 2 U. PA. J. CONST. L. 223, 251 (1999) (arguing importance of minors’ ability to obtain information on topics such as abortion and sex).

28. See Perry, supra note 26, at 735 (explaining activist government has recently given more rights to public schools while taking away parental rights).

29. See Mawdsley, supra note 19, at 190 (noting when students were granted constitutional rights by Supreme Court, “inevitable question . . . was whose rights-the parents or the students-were school officials going to deal with”). See generally C.H. v. Oliva, 226 F.3d 198 (3d Cir. 2000) (en banc) (ruling student expression is part of school curriculum). Alternatively, some courts have limited student expression in light of recent instances. See Katie Hammett, School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy, 55 ALA. L. REV. 393, 399-400 (2004) (recognizing school officials at Columbine High School-without justification-were allowed to regulate school-sponsored speech that discriminated based on viewpoint).


31. See Michael Smith, Complete Control over What Is Taught, WASH. TIMES, Nov. 28, 2005, at B04 (discussing alternatives to public schools for parents); see also Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) (establishing parents’ decision-making right lessens once they have chosen to enroll their student in public school rather than choosing private or home schooling). For a discussion on the problems with having private schools and home schooling as the only alternative, see infra note 142 and accompanying text.

32. See Pittsley v. Warish, 927 F.2d 3, 8-9 (1st Cir. 1991) (explaining that police threat to children that they would never see arrested family member again, and refusing to let them kiss him goodbye did not violate family’s privacy right); see also Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (finding liberty interest
however, does not hesitate to recognize a constitutional violation when a school deprives parents of their right to make vital decisions concerning their children.\textsuperscript{33} It is not educators, but parents, who maintain the primary right in the upbringing of children.\textsuperscript{34} Although students may not enjoy the same privacy rights as free adults, limitations still exist that protect students from all intrusions by school authorities.\textsuperscript{35}

In \textit{Gruenke v. Seip},\textsuperscript{36} a parent filed suit against a school swimming coach for violating her constitutional rights when the coach forced her daughter to take a pregnancy test.\textsuperscript{37} The swim coach believed the daughter—a seventeen year old member of the varsity swim team—was pregnant after he observed that she "was often nauseated, made frequent trips to the bathroom, and complained about having a low energy level."\textsuperscript{38} After witnessing those events, the swim coach talked to other students, faculty and parents—but not the student’s parent—about the student’s suspected condition.\textsuperscript{39} Finally, after multiple attempts, the swim coach required the student to take a pregnancy test.\textsuperscript{40} The student’s parent asserted that the swim coach’s action deprived her of the right to make decisions concerning family privacy was deprived without due process when children were not returned to mother).

\textsuperscript{33} See \textit{Gruenke v. Seip}, 225 F.3d 290, 306 (3d Cir. 2000) (recognizing distinction between actions that strike at heart of parental decision-making authority and those that merely complicate making and implementing parental decisions); see also \textit{Reno v. Flores}, 507 U.S. 292, 304 (1993) (finding so long as parent adequately cares for his or her children, there will normally be no reason for state to inject itself into private realm of family to further question ability of that parent to make best decisions concerning rearing of that parent’s children).

\textsuperscript{34} See \textit{C.N. v. Ridgewood Bd. of Educ.}, 430 F.3d 159, 183 (3d Cir. 2005) (noting school-sponsored counseling and psychological testing that pry into private family activities can overstep boundaries of school authority and impermissibly usurp fundamental right of parents to bring up their children). Further, the court explained that "[p]ublic schools must not forget that ‘in loco parentis’ does not mean ‘displace parents.’" \textit{Id.} (quoting \textit{Gruenke}, 225 F.3d at 307).

\textsuperscript{35} See \textit{Gruenke}, 225 F.3d at 302-03 (finding that school coach violated student’s privacy rights by disclosing results of her pregnancy test); see also \textit{Vernonia Sch. Dist. v. Acton}, 515 U.S. 646, 658 (1995) (holding that although Court approved drug tests at schools, it was also careful to indicate that tests were inappropriate to determine whether student is—for example-epileptic, pregnant or diabetic).

\textsuperscript{36} 225 F.3d 290 (3d Cir. 2000).

\textsuperscript{37} See \textit{id.} at 295-97 (outlining events occurring before positive pregnancy test was returned).

\textsuperscript{38} \textit{id.} at 295-96 (noting after coach confirmed with assistant coach that plaintiff’s daughter ("Leah") was exhibiting changes in behavior and physical appearance, coach “approached Leah and attempted to discuss sex and pregnancy with her”).

\textsuperscript{39} See \textit{id.} at 305-06 (acknowledging court found it was strange that guidance counselor, aware of situation, apparently did not advise coach to notify parents).

\textsuperscript{40} See \textit{id.} at 296-97 (providing that five days after coach required plaintiff’s daughter to submit to pregnancy test, Leah learned at doctor’s appointment that she was six months pregnant).
ing her child.\textsuperscript{41} The Third Circuit found that this case "present[ed] . . . another example of the arrogation of the parental role by a school . . . ."\textsuperscript{42}

In \textit{Arnold v. Board of Education},\textsuperscript{43} parents alleged that school officials coerced their child, a student in the school, to have an abortion and urged her not to discuss the matter with her parents.\textsuperscript{44} The Third Circuit in \textit{Gruenke} used \textit{Arnold} as an example of a school's violation of familial integrity.\textsuperscript{45} Similarly, the parent in \textit{Gruenke} argued that "this teenage pregnancy was a family crisis in which the state, through [the coach], had no right to obstruct the parental right to choose the proper method of resolution."\textsuperscript{46} The court in \textit{Gruenke} agreed, ruling that the parent "sufficiently alleged a constitutional violation."\textsuperscript{47}


Recently, the Ninth Circuit addressed the issue of surveying when a school questioned seven-to-ten-year-old students about controversial issues.\textsuperscript{49} In \textit{Fields}, parents gave permission for their elementary school students to take part in a survey that the school district conducted regarding

\begin{itemize}
\item \textsuperscript{41} See id. at 306 (summarizing that parents explained, "had not all the adverse publicity occurred as the result of [the coach's] actions, they would have quietly withdrawn [their daughter] from school, apparently after the state [swim] meet, and sent her to Florida to live with her married sister").
\item \textsuperscript{42} See id. (explaining majority's ruling). In a concurring opinion, Judge Roth agreed with the ultimate finding, but disagreed with the other two panel members that the parent had stated a valid claim because, in her view, defendant swim coach's behavior "merely complicated the Gruenkes' ability to make decisions concerning the pregnancy." See id. at 308-10 (Roth, J., concurring) (finding Gruenke "[was] free at all times to make whatever decision they pleased as to the outcome of [their child's] pregnancy").
\item \textsuperscript{43} 880 F.2d 305 (11th Cir. 1989)
\item \textsuperscript{44} See id. at 312-14 (declining to hold that counselors are constitutionally mandated to notify parents when their minor child receives counseling about pregnancy, but nevertheless indicated, "[a]s a matter of common sense . . . school counselors should encourage communication with parents . . . .")
\item \textsuperscript{45} See id. (explaining reason in finding violation of parental right). Unlike \textit{Arnold}, however, the court in \textit{Gruenke} noted that the appropriation of the parent's right was not as flagrant because the coach was not a counselor whose guidance the daughter sought. See \textit{Gruenke}, 225 F.3d at 307 (recounting coach was acting "contrary to [daughter's] express wishes that he mind his own business").
\item \textsuperscript{46} \textit{Gruenke}, 225 F.3d at 306 (noting daughter's "claim of deprivation of privacy . . . overlaps with, and is largely inseparable from, that of familial rights").
\item \textsuperscript{47} See id. at 307 (explaining that coach's claim for immunity was not defeated because "record must establish that the right violated was clearly established").
\item \textsuperscript{48} 427 F.3d 1197 (9th Cir. 2005).
\item \textsuperscript{49} See id. at 1200 (applying rational basis review instead of strict scrutiny to analysis because court did not find claim to assert fundamental right). Alternatively, government actions that infringe upon a fundamental right receive strict scrutiny. See also \textit{Carey v. Population Servs. Int'l}, 431 U.S. 678, 684-86 (1977) (holding state's restrictions on sale of contraceptives as unconstitutional intrusion on right to decide privately whether to have children).
\end{itemize}
psychological barriers to learning.\(^{50}\) After the survey, the parents learned—many from their children—that some of the survey questions were related to sexual topics.\(^{51}\) In response, parents brought suit claiming the school district violated their right to privacy and their right "to control the upbringing of their children by introducing them to matters of and relating to sex."\(^{52}\) The Ninth Circuit affirmed the District Court’s dismissal, finding that parents have no fundamental right to be the \textit{exclusive} provider to their children of information regarding sexual matters.\(^{53}\)

The Ninth Circuit concluded that the parents’ right to control a child’s education “does not extend beyond the threshold of the school door.”\(^{54}\) The court opined that parents possessed no constitutional right to prevent schools from providing information on sex to their students in the forum or manner selected by the school district.\(^{55}\) Rather, the court

\(^{50}\) See Fields, 427 F.3d at 1200 (announcing goal of survey was to establish “a community baseline measure of children’s exposure to early trauma” (internal quotations omitted)).

\(^{51}\) See id. at 1201 n.3 (outlining sexually explicit survey questions). The survey consisted of seventy-nine questions testing the frequency that the elementary school student experienced different sensations, emotions, thoughts and experiences. See id. at 1201 (commenting that school mental health counselor sat with students to ensure they read and responded to each question).

\(^{52}\) Id. at 1200 (explaining that survey asked students about sexual topics such as frequency of “thinking about having sex” and “thinking about touching other peoples’ private parts”).

\(^{53}\) See id. at 1209 (noting “education is not merely about teaching basic reading, writing, and arithmetic” but rather to serve “higher civic and social function” for children).

\(^{54}\) Id. at 1207 (discussing courts’ rationalization for denying application of \textit{Meyer-Pierce} right). Specifically, the court found that neither \textit{Meyer} nor \textit{Pierce} provided support for the view that parents have a right to prevent a school from providing any kind of information-sexual or otherwise-to its students. Id. at 1206 (noting that parents cited no cases to support argument that \textit{Meyer-Pierce} controls all matters relating to education and educational system); see also Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995) (explaining \textit{Meyer} and \textit{Pierce} do not encompass broad-based right to restrict flow of information in public schools).

This comment has been the subject of highly contested debate concerning whether the Ninth Circuit went too far. See Phyllis Schlafly, \textit{Activist Courts Protect Mental Health Screening of Children in Public Schools}, Copley News Serv., Nov. 15, 2005, http://www.eagleforum.org/column/2005/nov05/05-11-23.html (last visited Feb. 20, 2006) (claiming quote that parents’ rights over education of their children terminate at “the threshold of the school door” has stirred up tremendous backlash); see also Linda P. Campbell, \textit{Jurisprudence: Be Careful What You Wish for}, Fort Worth Star-Telegram (Texas), Nov. 11, 2005, http://www.dfw.com/mld/dfw/news/columnists/linda_campbell/13130908.htm (last visited Feb. 20, 2006) (implying Ninth Circuit’s comment would mean no more opting out of sex-ed program, no more optional reading assignments for controversial book and no mechanism for objecting to program that is clearly age-inappropriate).

\(^{55}\) See Fields, 427 F.3d at 1209 (rejecting parents’ curriculum argument by pointing out school is principle instrument in awakening child to cultural values and helping him or her adjust normally to environment); see also Brown v. Bd. of Educ., 347 U.S. 483, 691 (1954) (reminding parents of state’s compelling interest in broad ends of education extending far beyond “curriculum”).
agreed with the Sixth Circuit's finding in *Blau v. Fort Thomas Public School District*\(^{56}\) that "parents have a fundamental right to decide whether to send their child to public school, but they do not have a fundamental right to direct how a public school teaches their child."\(^{57}\) In *Blau*, the Sixth Circuit found that a school dress code did not violate a father's substantive due process right to control the dress of his child.\(^{58}\) In *Fields*, the court allowed the survey questions because they were rationally related to the school board's legitimate interest in the effective education and mental welfare of children.\(^{59}\)

Following the *Fields* decision, a heated debate commenced concerning the appropriate age to introduce children to sexually explicit material.\(^{60}\) Some commentators claim the Ninth Circuit allowed schools to "interrogate elementary school children about their assumed sexual activities."\(^{61}\) Other commentators took the opportunity to offer possible constructive solutions that would promote the idea that educators and parents should work together as partners rather than potential adversaries.\(^{62}\) Although *Fields* seemed to stretch the boundary of allowing public schools to create their own curriculum, extensive Supreme Court precedent supported this decision and acknowledged that "education serves higher civic and social functions, including the rearing of children into healthy, productive and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds."\(^{63}\) The *Fields* decision, however, left

\(^{56}\) 401 F.3d 381 (6th Cir. 2005)

\(^{57}\) See *Fields*, 427 F.3d at 1206 (quoting *Blau*, 401 F.3d at 395-96) (listing issues that are generally committed to control of state and local authorities).

\(^{58}\) See *Blau*, 401 F.3d at 388 (asserting daughter's substantive due process right to wear clothes of her own choice was not violated).

\(^{59}\) See *Fields*, 427 F.3d at 1210 (finding state's broad interest justified because of parents patriae (country as parent)).

\(^{60}\) See Trevor Bothwell, Judicial Activism No Better from the Right, Wash. Times, Dec. 11, 2005, at B05 (arguing *Fields* opinion was correct because court protected Constitution). But see Editorial, Undermining Parental Control, Chattanooga Times Free Press (Tenn.), Nov. 25, 2005, at B7 (expressing liberal judges took opportunity to create new law).

\(^{61}\) See Schlafly, supra note 54 (questioning how federal bureaucrats are going to identify children at risk). See generally Beth Garrison, Note, "Children Are Not Second Class Citizens": Can Parents Stop Public Schools from Treating Their Children Like Guinea Pigs?, 39 Vul. U. L. Rev. 147 (2004) (providing argument that public schools' right to control curriculum does not give schools right to use children in these surveys).

\(^{62}\) See Charles J. Russo, Sexually Explicit Survey Raises Concerns About How Far Schools Should Go in Directing Students’ Education, Your Sch. & L., Dec. 14, 2005, at Vol. 35, No. 22 (offering educators should consider following three points to help maintain good relationship with parents: (1) consult with parents; (2) choose age-appropriate material; (3) give parents choice).

\(^{63}\) See *Fields*, 427 F.3d at 1209 (citing Grutter v. Bollinger, 539 U.S. 306 (2003)) (validating law school admission policy that took race into account); see also Smith, supra note 31, at B04 (noting home schooling as alternative for parents who do not want to compete with public schools or courts for authority to educate their own children).
many critics questioning whether these civic and social functions are best served by asking first graders about touching themselves. 64

III. THE THIRD CIRCUIT TAKES ON SEX AND DRUG USE

A. The Survey: Content and Administration

In the Fall of 1999, school officials in the Ridgewood public school district administered a survey entitled “Profiles of Student Life: Attitudes and Behaviors” to students in grades seven through twelve. 65 The survey questioned students about their knowledge and experience with drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships, and views on matters of public interest. 66 Prior to the administration of the survey, the Superintendent sent a letter home to all of the parents outlining the purpose and details of the survey. 67 The letter stated that the survey itself was designed to be voluntary and anonymous. 68

The survey contained 156 questions with fill-in-the-circle style answer choices. 69 The content of the survey was undisputed; however, the parties differed in their characterization of the survey and its effect on the partici-

64. See Fields, 427 F.3d at 1203 (contending parents should have right to “determine when and how their children are exposed to sexually explicit subject matter”); see also Schlaffy, supra note 54 (same).

65. See C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 162 (3d Cir. 2005) (explaining that Human Resources Council of Village of Ridgewood in New Jersey-organization comprised of public and private social services agencies-decided “to survey Ridgewood’s student population to better understand their needs, attitudes and behavior patterns in order to use town programs and resources more effectively”).

66. See id. at 161-63 (identifying Search Institute of Minneapolis, Minnesota as designers of survey). The survey was designed to measure the strength of forty attributes and experiences known to promote a healthy and wholesome adolescence. See id. at 162 n.3 (recalling it was not entirely clear how this particular survey was chosen).

67. See id. at 164-65 (noting survey will “ask young people about attitudes and behaviors relating to themselves, their school, and their community” and offering opportunity for parents to review survey before administration). Prior to the administration of the survey, the parent-teacher association (“PTA”) held several meetings and reported that members expressed “several serious reservations and concerns” because the survey’s explicit content seemed to suggest such activity was within normal adolescent experience. See id. at 163 (describing preliminary objection made by parents).

68. See id. at 164 (referencing manual included with surveys from Search Institute of Minneapolis, Minnesota). The letter emphasized the following: [First], [t]he survey is voluntary. This means you do not have to take it and it is not a test that you take for school grades. Second, the survey is filled out anonymously. No one will know which survey booklet is yours . . . Please do not put your name on the survey.

Id.

69. See id. at 166 (detailing administration of survey).
Survey questions ranged from asking students “[h]ow many times” they “had used cocaine” in their lives, to questions such as “have you ever tried to kill yourself.” The survey also posed questions about drinking and driving, how many times a student had sexual intercourse, and whether students would feel comfortable speaking with their parents about drugs, sex or other serious issues. Students were instructed not to put their name on the survey. The completed surveys were placed in a large box and locked in an office until they were sent to Search Institute in early December 1999 for tabulation.

B. Constitutional Claims and Procedural Posture

Three students and their mothers (“Plaintiffs”) brought an action against the Ridgewood Board of Education (“School”) claiming that the survey had been administered so as to be involuntary and non-anonymous and had thus violated their rights under the United States Constitution. Specifically, Plaintiffs argued that requiring students to take this survey violated their First Amendment right to refrain from speaking. Further, Plaintiffs made claims based on the Fourth, Fifth and Fourteenth Amend-
ments for "unreasonable intrusion into the household" and a violation of the "right to privacy." Finally, Plaintiffs brought a substantive due process claim, arguing that the survey infringed on the parents' right to raise their child as they see fit.

The United States District Court for the District of New Jersey granted summary judgment for the School, finding no indication that a voluntary and anonymous survey, that was used to obtain data in the aggregate, would violate a parent's constitutional rights. Particularly, the district court found the School did not impinge on the Plaintiffs' right to raise their children in a manner of their choosing because "parents were provided ample notice of the administration of the survey" and were "informed that the survey was voluntary and anonymous." The Plaintiffs appealed and the Third Circuit affirmed in part, reversed in part and remanded concluding that it was disputed whether student participation in the survey was voluntary. On remand, the district court again dismissed the action, concluding that the Plaintiffs failed to identify any constitutional violations. On December 1, 2005, the Plaintiffs filed an appeal in the United States Court of Appeals for the Third Circuit.

C. Voluntary or Involuntary?

Due to the direct and indirect influences on students taking the survey, the Third Circuit determined that there was a reasonable inference

77. See id. at 539 (rejecting claims because district court interpreted record to show only that survey was voluntary and anonymous).
78. See id. (refusing to recognize claim because defendants' conduct "d[id] not rise to the level of a constitutional violation" and did not actually infringe on right).
79. See id. at 535 (holding no cause of action for constitutional violations lay against Board under 42 U.S.C. § 1983 because "the official policy of the Board was that the survey be administered voluntarily and anonymously"). To impose individual liability on school board members under 42 U.S.C. § 1983, the parents were required to show that each member individually participated in or approved the alleged constitutional violation. See Ridgewood, 430 F.3d at 173-74 (explaining school board members may be entitled to qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").
80. See Ridgewood, 146 F. Supp. 2d at 539-40 (quoting Gruenke v. Seip, 225 F.3d 290, 309 (3d Cir. 2000)) (recognizing substantive due process claim parents alleged only arises where state attempts to "eliminate a parent's role in the custody or nurture of the child").
81. See Ridgewood, 430 F.3d at 172 (explaining that Third Circuit dismissed Fifth Amendment self-incrimination claim because survey was deemed anonymous).
82. See id. (citing district court's conclusion that "even assuming the survey had been involuntary, no constitutional violations had occurred").
83. See id. (detailing procedural history).
that the survey was involuntary.\textsuperscript{84} Rather than looking only at the School Board's intent for administering the survey, the Third Circuit determined that the administration of the survey would leave many students feeling as though they had no choice but to take the survey.\textsuperscript{85} Particularly, the court looked at the factors surrounding the administration of the survey and determined that the survey instructions were similar to what students might hear before mandatory state testing.\textsuperscript{86} Moreover, the court noted that it was peculiar that 100\% of students took the survey.\textsuperscript{87} While the court disagreed with the district court and found that the survey had a disputed issue as to the material fact of voluntariness, it did agree with the district court's finding that the survey was anonymous.\textsuperscript{88}

D. The Ridgewood Survey: Constitutionally Protected

Despite finding the survey involuntary, the Third Circuit affirmed summary judgment for the School Board, reasoning that the survey's interference with parental decision-making authority was not a constitutional violation.\textsuperscript{89} While the Supreme Court has extended constitutional protection to parental decision-making regarding matters such as visitation and the decision to enroll a child in a private school, the right to introduce children to sensitive topics was not a matter of comparable gravity.\textsuperscript{90} The

\textsuperscript{84} See id. at 175 (noting that by "involuntary" court means only that students were required to participate in survey). As the court notes, it is difficult to summarize the administration of the survey because it was given in multiple classrooms in two different schools. See id. (identifying one teacher who told students that they were required to take survey).

\textsuperscript{85} See id. (listing factors that helped court determine survey was involuntary). Further, the schools made absent students "make up" the survey when they returned. See id. (implying record suggests school officials attempted to guarantee fullest participation).

\textsuperscript{86} See id. (acknowledging inference of test environment during survey administration).

\textsuperscript{87} See id. at 175-76 (explaining court further identified that school board should have distributed consent form to parents instructing how to avoid their child's participation). Lack of consent was one of the main factors that went into New Jersey passing the "Protection of Pupil Rights" law. See N.J. STAT. ANN. § 18A:36-34 (West 2006) (requiring "prior written informed consent" before school administers survey like one in Ridgewood).

\textsuperscript{88} See Ridgewood, 430 F.3d at 177 (deeming evidence that one student had teacher look over his shoulder and requiring students to retake survey in one-on-one setting did not establish cause for lack of anonymity).

\textsuperscript{89} See id. at 183-84 (reasoning that Third Circuit did not "base . . . rejection of familial right to privacy claim on characterization of record that assumes voluntariness"). Compare id. with Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 274-75 (3d. Cir 1998) (rejecting familial right to privacy claim because parental opt-out provision for voluntary high school condom distribution program).

\textsuperscript{90} See Ridgewood, 430 F.3d at 185 (explaining Third Circuit was not rejecting Supreme Court precedent); see also Troxel v. Granville, 530 U.S. 57, 66 (2000) (finding visitation is fundamental right); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (acknowledging parent's right to direct upbringing of child). By not following Pierce or Meyer, the court has been highly criticized for ignoring dom-
court in *Ridgewood*, however, recognized that introducing a child to sensitive topics could potentially complicate and undermine parental authority.91

Unlike the *Gruenke* decision, the Third Circuit rationalized that asking students survey questions about sensitive material did not intrude on parental decision-making authority in the same sense as a forced pregnancy test.92 The court recognized *Gruenke* and *Ridgewood* as "the distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that—although unwise and offensive—are not of constitutional dimension."93 While parents maintain the primary responsibility to teach their children about these sensitive topics, the court identified numerous influences surrounding students that are beyond the strict control of parents.94 Instead of ignoring the reality that their children have already been exposed to these topics, parents should use this survey as an opportunity to discuss the sensitive material and place it in the context of the family's moral values.95

The court, however, pointed out that they were not following the rationale from *Fields*.96 Instead of closing a parent's rights under *Meyer-Pierce* at the "threshold of the school door," the Third Circuit acknowledged that instances similar to *Gruenke* would still be possible constitutional violations.97 The court also was careful to note that this case was unlike Parents United for Better Schools—which contained a parent opt-out provision to a condom distribution program—because the *Ridgewood* survey was involun-

91. *See Ridgewood*, 430 F.3d at 185 (urging parents remain free to discuss these matters with their children and to place these topics in family’s morals or religious context).

92. *See id.* at 185 n.26 (citing *Gruenke* rationale); *see also* Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (quoting Wisconsin v. Yoder, 406 U.S. 205 (1972)) (noting court stressed that it is primarily “parents’ responsibility ‘to inculcate moral standards, religious belief and elements of good citizenship’”).

93. *Ridgewood*, 430 F.3d at 185 (stressing school officials in no way indoctrinated students in any particular outlook on these sensitive topics); *see also* Hodge v. Jones, 31 F.3d 157, 163 (4th Cir. 1994) (recognizing similar distinction to familial privacy right).

94. *See Ridgewood*, 430 F.3d at 185 (promoting theory that students already have knowledge on these sensitive topics from peers).

95. *See id.* (acknowledging parents argument that survey intruded upon parental authority “to decide when and how to introduce their children to sensitive topics”).

96. *See id.* at 185 n.26 (rejecting *Fields* conclusion that right of parents under *Meyer-Pierce* “does not extend beyond the threshold of the school door”).

97. *See id.* (denying application of categorical approach to this right taken by *Fields* court, where *Meyer-Pierce* claim is only triggered concerning whether or not parent chooses to send their child to public school).
Although the legitimacy and strength of the parental interest at stake had been recognized by the New Jersey Legislature, the court found it did not follow that the survey violated the Constitution. The *Ridgewood* decision did not specifically follow any precedent; instead the court reasoned that the survey’s interference with parental decision-making authority merely did not amount to a constitutional violation.

IV. Changing Times and the Remedial Measures Afforded to Parents

A. Let’s Talk About Sex and Drugs: Are Surveys the Problem or the Solution?

The Third Circuit’s opinion in *Ridgewood* is important to the current legal landscape because it recognizes the importance of familial integrity while focusing on the influences surrounding children today. It is undisputed that parents legally remain the sole decision makers for their children. This right, however, is neither absolute nor unqualified. *Ridgewood* is another example of the judicial trend shifting parental authority over to schools. Accompanying this judicial trend is a cultural...
shift that exposes children to drugs, sex, alcohol and violence at a younger age.\textsuperscript{105} Ignoring the court's ability to evolve with the current societal landscape disregards the fact that the law and education are historically intertwined through the evolution of this country and Supreme Court precedent.\textsuperscript{106}

Perhaps the greatest obstacle in determining whether a school survey violates a parent's constitutional rights is the differing characterizations of the result of the survey.\textsuperscript{107} The school characterized this survey as the solution—or a step towards the solution—to a better understanding of the Ridgewood youth.\textsuperscript{108} Alternatively, the parents in \textit{Ridgewood} argued that the surveys contributed to the problem with today's society; the survey introduced students to sensitive material, which, in effect, took over the parents' role.\textsuperscript{109} Instead of the surveys remedying the problem, the parents argued that the surveys put new ideas in a child's head, therefore causing the problem.\textsuperscript{110} This argument, however, is suspect because parents are not only fighting against schools for the right to socialize their children, they are fighting against the Internet, mass-media advertising and their child's peers.\textsuperscript{111}

\textsuperscript{105} See Joseph Lintott, \textit{Teaching and Learning in the Face of School Violence}, 11 \textit{Geo. J. on Poverty L. & Pol'y} 553, 554-56 (2004) (commenting that schools have been confronted with growing problem of violence in school in recent years); \textit{see also} James McGrath, \textit{Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional}, 38 U.S.F. L. Rev. 665, 670 (2004) (dispelling myth that abstinence-only sexual education reduces teen sex by noting that while teenage pregnancy is down, rate of HIV is constant and soon to rise).

\textsuperscript{106} See Angela G. Smith, \textit{Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity}, 74 Neb. L. Rev. 255, 291 (1995) (recognizing law is continually evolving in schools by noting Supreme Court decisions that promoted vision of desegregating schools).

\textsuperscript{107} See generally \textit{Ridgewood}, 430 F.3d at 159 (noting arguments made by both parties for validity, effect and proposed result of administering survey).

\textsuperscript{108} See \textit{id.} at 164 (providing letter Superintendent Frederick Stokely sent to parents on September 1, 1999 explaining "[t]he information from the survey will be used to identify the strengths and needs required to support youth and families in the Village of Ridgewood"); \textit{see e.g.,} Kladko, \textit{supra} note 4, at B1 (explaining state and local school districts claim surveys are meant to "help public health specialists and educators learn more about student behavior").

\textsuperscript{109} See \textit{Ridgewood}, 430 F.3d at 185 (summarizing parents' argument that survey intruded upon parental authority to decide when and how to introduce children to sensitive topics); \textit{see also} Schlafly, \textit{supra} note 1 (claiming result of survey is exposing children to new material and conveying that this behavior is normal).

\textsuperscript{110} See Schlafly, \textit{supra} note 1 (noting argument that surveys introduce children to understanding that taking drugs and having sex is common); \textit{see also} Perry, \textit{supra} note 26, at 728 (indicating parents argue that sexual programs in school and providing students with sexual protection promotes sexual activity). In essence, Perry claims that parents are arguing that students would not be having sex if they were not given condoms. \textit{See id.} (same).

\textsuperscript{111} See Woodhouse, \textit{supra} note 7, at 96 (exploring mass-media culture's effect on children); \textit{see also} \textit{Ridgewood}, 430 F.3d at 185 (reasoning that argument that surveys should not be medium to expose children to these topics is flawed because students are surrounded by numerous influences).
Children are going to know about sex whether or not the school or their parent gives them a condom. Children are going to know about school violence because they watch it unfold on the news with instances such as Columbine. Ignoring these trends has proven to have deadly consequences. Childhood innocence is a wonderful belief; unfortunately, given the survey results and changes in society, this concept has long been outdated.

B. Remedial Measures for Parents

In spite of the information derived from these surveys—including statistics showing substantial teen drug and alcohol use and recent school violence—parents continue to claim these survey questions introduce students to new topics and suggest that drug use is normal behavior.

112. See McGrath, supra note 105, at 676-81 (commenting that “Abstinence-Only” sex education programs fail to provide students with necessary information about HIV prevention education, condoms and sexually transmitted diseases). The author contends that abstinence-only sexual education wastes valuable public resources because they deny adolescents access to potentially lifesaving information. See id. at 699 (arguing funding for these programs does not agree with nation’s morals but rather furthers goals that were formerly seen as “coinciding” with religious ideals).


114. See McGrath, supra note 105, at 665 (explaining abstinence-only programs are dangerous because they fail to protect nation’s youth against serious diseases).

115. See generally Gary A. Debele, A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard, 15 J. AM. ACAD. MATRIMONIAL L. 75, 86 (1998) (commenting that up until 1960s, media paid homage to notion of childhood innocence, but this has been replaced by increasingly sexualized images of younger childlike models and ads for various products).

116. For a discussion of school survey results, see supra notes 2 and 3 and accompanying text. A recent Illinois survey reported that 60% of high school juniors and seniors admitted that they had been passengers in cars piloted by drunk drivers during the past year. Paula M. Davenport, Sobering New Statistics on Teenage Drunk Driving, May 7, 2002, http://news.siu.edu/news/May02/050702p2055.html (last visited Feb. 20, 2006) (acknowledging “drunk driving is leading cause of death among young Americans”).


118. See Schlafly, supra note 1 (explaining surveys are offensive, privacy-invading interrogation of children in public schools); see, e.g., Jim Tankersley, Parents Question Survey Content Distributed to Seventh-Graders, THE OREGONIAN (Portland, Or.), Oct. 25, 2001, at 1 (noting that parents argue surveys asking their children about drug use, sexual activity and suicide should not be administered in schools).
Recent circuit court opinions have confirmed that courts are probably not willing to extend the Constitution to find that school surveys interfere with parental decision-making authority. Because it does not seem as though parents are going to be able to get the surveys out of schools, they seek the next best option, consent. In reaction to Ridgewood and Fields, parents have taken their battle to the legislators, lobbying to pass new laws that require parental consent for these surveys. Laws like New Jersey’s Protection of Pupil Rights Bill provide parents with a remedy to keep control over whether their child will have to take these surveys.

C. Circuit Differences and the Future

While many circuit courts agree that the surveys do not violate parents’ right to raise their children, the courts disagree as to the extent to which the parents’ right exists. In Gruenke, the Third Circuit stressed that schools need to be cognizant of the line between educating children and completely usurping parents’ right to raise their children. The

119. See C.N. v. Ridgewood Bd. Of Educ., 430 F.3d 159, 186 (3d Cir. 2005) (denying parents’ claim for constitutional violation of parents’ right to raise child as they see fit); see also Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1208 (9th Cir. 2005) (refusing to extend parents’ right to control education into classroom).

120. See Fields, 427 F.3d at 1202 (commenting parents claimed lack of consent for elementary school children to take survey because school gained consent without disclosing that sexually explicit questions would be asked).

121. See Cheryl Wetzstein, All That Schools Survey; Questionnaires Stir Debate over Privacy Rights Versus Research, WASH. TIMES, Jan. 29, 2002, at A2 (explaining legitimacy and strength of parental interest was recognized by New Jersey Legislature, that enacted state’s “Protection of Pupil Rights” law). A law was passed in New Jersey in 2001 requiring written parental consent before giving surveys or tests asking for information about political affiliations, potentially embarrassing mental and psychological problems, sexual behavior and attitudes. See N.J. STAT. ANN. § 18A:36-34 (West 2006) (prohibiting students from taking such surveys administered in New Jersey’s public schools without parental consent obtained two weeks prior to survey); see also Lisa Friedman, House Takes on Court Stance; School Sex-Survey Decision Enrages Reps, THE DAILY NEWS OF LOS ANGELES, Nov. 17, 2005, at AV1 (noting lawmakers in U.S. House overwhelmingly denounced Fields decision).

122. See Robert G. Seidenstein, Alito Agrees: School Survey Doesn’t Violate Parental Rights, N.J. LAWYER, Dec. 5, 2005, at 2 (recognizing survey controversy led to state law requiring parental written consent). Recently, parents have looked to Congress and state legislatures to reassert their parental authority. See Mawdsley, supra note 19, at 178 (commenting that while federal and state statutes have increased parental authority, no wide-ranging constitutional protection exists as anticipated after Meyer and Pierce). Further, Mawdsley notes that state legislature has mainly been limited to a parent’s choice of whether to send their child to public or private school. See id. at 177 (declaring most states continue to prohibit parents from intruding into curricular matters in public schools).

123. See Fields, 427 F.3d at 1208 (drawing line of parents’ right to raise their child at school door). Compare id. with Ridgewood, 430 F.3d at 185 n.26 (refusing to follow strict law of Fields).

124. See Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (maintaining parents have primary right to inculcate moral standards in determining whether parental decision alleged to have been usurped is of comparable gravity of those protected by Supreme Court precedent).
Third Circuit places great weight on the reality of youth; these surveys do not indoctrinate students with any particular outlook on these sensitive topics. At most, they introduce a few topics unknown to certain individuals. Unlike *Fields*, however, the Third Circuit did not throw out the *Meyer-Pierce* rubric and find that this right “does not extend beyond the threshold of the school door.” Alternatively, the *Ridgewood* opinion left open a judicial avenue—albeit a small one—for parents to challenge the content of their child’s education.

Considering *Ridgewood* and *Fields*, it is difficult to determine whether an anonymous school survey could ever violate parents’ right to raise their children. Public schools need the flexibility to develop the curriculum so to best structure it to serve today’s youth. Although this need for flexibility might impinge on parents’ plans to discuss drugs and sex with their children, it seems as though the Supreme Court is going to continue to side with the schools. Schools are not only a place where students learn about academics; they are educational institutions that teach stu-

125. See *Ridgewood*, 430 F.3d at 185 (observing that school survey did not advocate any particular viewpoint on topics).

126. See id. (acknowledging surveys could potentially make parental role more difficult). For a discussion of the parents’ argument, see *supra* notes 109-10 and accompanying text.

127. See id. at 185 n.26 (rejecting *Fields* court decision finding that claim grounded in *Meyers-Pierce* will only trigger inquiry into whether or not parents chose to send their child to public school).

128. See id. (allowing constitutional claims when school takes away parental right of gravity similar to *Gruenke*); see also Arnold v. Bd. of Educ., 880 F.2d 305, 314 (11th Cir. 1989) (prohibiting guidance counselors from coercing minors to abstain from communicating with their parents). While the holdings of *Gruenke* and *Arnold* recognize that parental rights are diminished in public schools, they refuse to categorically deny any rights of parents in public schools. See *Ridgewood*, 430 F.3d at 185 n.26 (determining only that, on facts presented, parental rights claim did not meet Supreme Court precedent standard to amount to constitutional violation).

129. See *Fields* v. Palmdale Sch. Dist., 427 F.3d 1197, 1208 (9th Cir. 2005) (commenting parental rights are diminished in school environment); see also *Ridgewood*, 430 F.3d at 185 (refusing to find survey to rise to constitutional violation).

130. See *Brown* v. Bd. of Educ., 347 U.S. 483, 691 (1954) (explaining education extends beyond curriculum); see also *Mawdsley*, *supra* note 19, at 186 (same). Mawdsley suggests that recent case law enhancing schools’ control over the learning environment could mean parents have lost any protectible right to direct their child’s upbringing inside a public school. See id. at 190 (implying recent lawsuits brought by parents alleging violation of 42 U.S.C. § 1983 will continue to not reach curriculum).

131. See *Ridgewood*, 430 F.3d at 185 (siding with school board in finding survey did not take away parents’ right to raise their children as they see fit); see also *Perry*, *supra* note 26, at 728-29 (arguing courts should use strict scrutiny review when determining if school has usurped parental right). Perry argues that strict scrutiny would be satisfied for condom distribution programs and sexual education in schools because states have a compelling interest to protect children from sexually transmitted diseases and sexual education is both a necessary and narrowly tailored means to meeting the goal. See id. (noting parents’ argument that sexually explicit programs encourage sex and cross line between complementing parental
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V. CONCLUSION

The decision in *Ridgewood* instructs practitioners litigating parental rights issues in the Third Circuit that certain key factors may be necessary to a successful litigation strategy. For example, it is important to distinguish the particular parental rights claim from Supreme Court precedent. The Supreme Court has granted schools great leeway to design and enforce the curriculum. Moreover, litigators should focus on arguing that the particular parental right that is being taken away "strikes the heart" of the parental decision-making authority.

Decisions that strike the heart of parental decision-making authority have been difficult to prove in the Third Circuit. The Third Circuit's preferred analysis seems to provide the school with great deference in questioning students about sensitive material. Although the Third Circuit did maintain an avenue for parents to challenge the content of their child's education, it is likely that this avenue will probably not include school surveys.

Guidance and displacing it). *Compare id. with Fields*, 427 F.3d at 1208 (applying rational basis review for school survey).

132. See generally *Fields*, 427 F.3d at 1209 (explaining school has responsibility to teach children not only about academics, but about cultural and social values).

133. See *Ridgewood*, 430 F.3d at 182 (acknowledging Supreme Court has no precise boundaries of parent's right to control child's upbringing and education but holding surveys would not fall under this right).

134. For a discussion of important litigation factors, see *infra* notes 135-44 and accompanying text.

135. For a discussion of the Supreme Court precedent, see *supra* notes 16-31 and accompanying text.

136. For a discussion of the Third Circuit's allowance of school power over the curriculum in *Ridgewood*, see *supra* notes 84-100 and accompanying text.

137. For a discussion of the Third Circuit's distinction of matters striking the heart of the parental decision-making authority, see *supra* notes 32-47 and accompanying text.

138. For a discussion of the Third Circuit's comparison of *Gruenke* and *Ridgewood*, see *supra* notes 89-95 and accompanying text.

139. For a discussion of the Third Circuit's finding that the survey did not violate the parents' right even though the survey was involuntary, see *supra* notes 84-100 and accompanying text.

140. See *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005) (implying avenue for parental rights claims will be constrained to claims similar to *Gruenke*). Moreover, it is already apparent how one of the Justices on the Supreme Court will rule on this issue because Samuel Alito—the most recent Supreme Court appointee—was one of the judges in the *Ridgewood* case. See *Longman*, *supra* note 90 (acknowledging Alito was on Third Circuit at time of *Ridgewood* decision).
Those challenging a school action should look to the *Gruenke* analysis to support their claim.\textsuperscript{141} Further, they should argue that the right to challenge educational content must contain more than the options of private school or home schooling because of the expense and viability of these options.\textsuperscript{142} Those defending against school survey challenges should focus on the Supreme Court precedent and the school’s recent control over the curriculum, as did the defendant school board in *Ridgewood*, arguing that the survey does not remove the parent’s constitutional rights.\textsuperscript{143} Given the Supreme Court and Third Circuit precedent, the environment surrounding teenagers today and the fact that the Third Circuit is protecting the Constitution, it seems school surveys are here to stay.\textsuperscript{144}

Robert Kubica

\textsuperscript{141} See *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (explaining family crisis in which State had no right to obstruct parental right to choose proper method of solution).

\textsuperscript{142} See *Woodhouse*, supra note 19, at 500 (promoting that states using public money to fund private religious schools will lead to marginalization of state public education). Woodhouse argues that education is beginning to move from a public commitment to a private good. See id. (claiming “free public education as each child’s stepping stone to equality has been replaced by a new privatized vision based on parents’ rights of control”).

\textsuperscript{143} For a discussion of the Third Circuit’s dependence on history in *Ridgewood*, see supra notes 85-96 and accompanying text.

\textsuperscript{144} For a discussion of the Third Circuit’s rationale in finding no parental right was violated, see supra notes 85-96 and accompanying text.