UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID PARKER et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 06-CV-10751-MLW
TOWN OF LEXINGTON, et al.,	)	
Defendants.	)	

[PROPOSED] MEMORANDUM AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, LEXINGTON C.A.R.E.S, LEXINGTON TEACHERS ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, RESPECTING DIFFERENCES, GAY & LESBIAN ADVOCATES & DEFENDERS, HUMAN RIGHTS CAMPAIGN, AND THE HUMAN RIGHTS CAMPAIGN FOUNDATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The *amici* listed above (see statements of interest attached in the Addendum to this Memorandum) represent a diverse group of Lexington parents, teachers, and religious and community leaders, as well as civil rights organizations who share common interests in the creation of a safe learning environment for all children, where they may be taught to grapple with a wide variety of ideas and information needed in a complex, democratic, and pluralistic society. The amici organizations urge this court to grant the school defendants' motion to dismiss because the scope of the rights of religious freedom and parental control over the upbringing of children, as asserted by the plaintiffs, would undermine teaching and learning in the Lexington public schools. These rights have never meant that a parent can demand prior notice and the right to opt a child out of mere exposure to ideas in the public schools that a parent disapproves of, whether based on religious or other principles.

Alternatives exist for parents who wish to limit their children's exposure to ideas which they find offensive, and to educate their children about their chosen religious values and beliefs. These parents are free to supplement their children's public education with religious programs and training, to instruct their children at home about moral and religious matters, to enroll their children in parochial or religious schools, or even to home school their children. What individual parents may not do, however, is demand control over the ideas to which their children will be exposed.

Factual Background

The plaintiffs are two sets of parents, the Parkers and the Wirthlins, and their minor children. They allege that the various Lexington public school Defendants violated the parents' due process rights to direct the moral upbringing of their children, and their First Amendment right to free exercise of religion by exposing their children to the subject matter of several books which were either read aloud, included in a book bag that was sent home, or otherwise made available in the children's elementary school classrooms. For the most part, plaintiffs' Complaint centers on two such books: Who's in a Family, by Robert Skutch, and King and King, by Linda de Haan and Stern Nijland. The Lexington Superintendent of Schools described Who's in a Family to parents as showing "illustrations of children accompanied by various parent figures, including two individuals of different genders, two individuals of the same gender, grandparents, bi-racial couples, as well as a one-parent family." Complaint, ¶ 40. See also Steven Hicks, "Books for Teaching About Families" (Scholastic Inc.) ("This book shows a variety of diverse families and compares them with families in the animal kingdom.") http://content.scholastic.com/browse/article.jsp?id=3121 (accessed on September 17, 2006). [1]

[1] Although the general rule is that courts evaluating motions to dismiss under Fed. R. Civ. P. 12(b)(6) may take into account only the pleading itself, there is a well settled exception to this rule. When a civil action is based on a

According to plaintiffs' complaint, the Parkers' son, Jacob, brought home a "Diversity Book Bag" which contained Who's in a Family. Complaint, ¶ 26. In addition, the Complaint alleges that Who's in a Family and Molly's Family, a book depicting a child in a family headed by same sex parents,[2] are also available in the "reading center," a "mini-library," in Jacob Parker's classroom, without parental notification or the right to deny their child the ability to look at this book off the library shelf. Complaint, ¶ 27.

King and King is a fairytale about a prince who is ordered by his mother, the queen, to find a princess to marry. The prince is resistant at first and rejects each of the princesses that come to see him, until finally the last princess arrives with her brother - another prince. At this point, it is love at first sight and the two princes are eventually married and live happily ever after as "King and King." See Sharon Levin, Book Corner, Children's Lit.com found at http://www.childrenslit.com/th_bookcorner1002.html (accessed on 9/17/2006).

The Wirthlins complain that their son's teacher selected this book from the library for a class unit on "weddings" and read the book aloud to the students. Complaint, ¶¶ 52-53. They

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writing or publication and the plaintiff fails to attach a copy to the complaint, "the defendant may introduce the exhibit as part of his motion attacking the pleading." Wright & Miller, Federal Practice and Procedure: Civil 2d § 1327, n.6 and accompanying text (1990). This exception is particularly viable when the writings are "sufficiently referred to in the complaint," *Watterson v. Page*, 987 F.2d 1, 2 (1st Cir. 1993). Here, the defendants have not attached copies of the books which the plaintiffs condemn, but it is fair to cite public references that describe the books. To be sure, the plaintiffs' descriptions of the books alone can be accepted for purposes of the motion to dismiss without changing the analysis below.

[2] The publisher of Molly's Family describes the story line as follows: "The members of Ms. Marston's kindergarten class are cleaning and decorating their room for the upcoming Open School Night. Molly and Tommy work on drawing pictures to put on the walls. Molly draws her family: Mommy, Mama Lu, and her puppy, Sam. But when Tommy looks at her picture, he tells her it's not of a family. "You can't have a mommy and a mama," he says. Molly doesn't know what to think; no one else in her class has two mothers. She isn't sure she wants her picture to be on the wall for Open School Night. Molly's dilemma, sensitively explored in words and art, shows readers that even if a family is different from others, it can still be happy, loving, and real." (http://www.fsgkidsbooks.com/search.htm with search under author or book title; last accessed September 17, 2006).The book has been recommended by Booklist, American Library Association, Horn Book, Kirkus Reviews, Publishers Weekly, and School Library Journal. *Id.*

contend that the reading of this book in their son's class contravened their "deeply-held faith" and interfered with their right to direct the moral upbringing of their child. Complaint, ¶ 56.

ARGUMENT

I. STANDARD OF REVIEW

In considering a motion under Rule 12(b)(6), the general rule is that the court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. This, however, does not mean that the court must accept the complaint's "unsupported conclusions or interpretations of law." *Washington Legal Found. v. Massachusetts Bar Found*., 993 F.2d 962, 971 (1st Cir. 1993). Nor must a court accept every allegation made by the complainant, however conclusory or generalized. A court is not obliged, for instance, "to credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation . . . nor to honor subjective characterizations, optimistic predictions, or problematic suppositions." *United States v. AVX Corp*., 962 F.2d 108, 115 (1st Cir. 1992) (citations omitted). To survive a motion to dismiss, the complaint must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. *See Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997) (citations omitted), *cert. denied*, 523 U.S. 1023 (1998). See also *Kyricopoulos v. Rollins*, 1995 WL 598946 (D.Mass. 1995), *aff'd* 89 F.3d 823 (1st Cir. 1996), *cert. denied*, 519 U.S. 1062 (1997) ("[t]he plaintiff is surely entitled to a fair consideration of his pleading [but] [t]he defendants, too, are entitled to a fair reading of the plaintiff's complaint so that they are not compelled, unfairly, to endure the burdens of defending meritless claims").

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF CONSTITUTIONAL RIGHTS

Although the plaintiffs attempt to minimize the relief they seek, calling it "modest" or "minimal," (Plaintiffs' Opposition to Defendants' Motion to Dismiss at 3, 6), the reality is that the constitutional principles that the plaintiffs wish to establish are far from minimal and would apply to every parent who sees an idea expressed in the schools which offends his or her religion, morals, philosophy, political views or ideas about what they want their child to know about. But far before one reaches the question of relief, on a motion to dismiss, it is appropriate to note that the plaintiffs simply do not state facts to support a claim for which relief may be granted. In a long line of decisions, several on motions to dismiss, courts have rejected similar claims made by plaintiffs in the same context as here – whether parents' constitutional rights of religious freedom and parental control are violated when their children are exposed in public school to ideas the parents disapprove of.[3]

The plaintiffs' efforts to distinguish their situation from those cases all rest on flawed assertions. First, they claim that the Supreme Court ruling in *Troxel v. Granville,* 530 U.S. 57 (2000), involving the right of a parent to decide with whom their children may visit, calls into question the ruling in *Brown v. Hot Sexy & Safer Productions, Inc., supra,* 68 F.3d 525 (1st Cir.

[3] These decisions include: *Fields v. Palmdale School District*, 447 F.3d 1187 (9th Cir. 2006), *amending on denial of rehearing, Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005) (motion to dismiss affirmed, no violation of constitutional rights to parental control or privacy from exposure of public school students to survey questions relating to sex), *petition for cert. filed* 8/28/2006; *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 182-183 (3rd Cir. 2005) (no constitutional right of privacy or parental control violated where school's ability to control "curriculum and the school environment" is at stake; even student exposure to sensitive topics in noncurricular survey did not rise to level of constitutional violation); *Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003) (refusal to allow student opt out from health education class did not violate parental or religious rights); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied* 516 U.S. 1159 (1996) (affirming grant of motion to dismiss and rejecting claims of infringement of parental and religious rights in exposing children to mandatory AIDS awareness assembly); *Fleischfresser v. Directors, School Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994) (rejecting parental claims that reading series "indoctrinates children in values directly opposed to their Christian beliefs); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987) (no violation of religious freedom from exposure of children to ideas in school, no right to opt out), *cert. denied,* 484 U.S. 1066 (1988).

1995), *cert.* denied, 516 U.S. 1159 (1996), the definitive statement in the First Circuit that has been widely approved of in subsequent rulings across the country for the proposition that mere exposure of students to ideas offensive to a parent for religious or moral reasons does not violate the constitutional rights of parental control over the upbringing of a child or of religious freedom. There is nothing in *Troxel* that alters the First Circuit's ruling.

Second, the plaintiffs assert their case is different because the schools are intentionally "indoctrinating" their children, seizing on that one word in *dicta* in *C.N. v. Ridgewood Bd. of Education, supra,* 430 F.3d at 185. [4] But "indoctrinate" means "1. *trans*., to imbue with learning, to teach." Shorter Oxford English Dictionary (1973). The distinction between teaching and some kind of insidious "indoctrination" is not explained by the plaintiffs, but if they mean that with indoctrination, no other views are permitted to be voiced, that is not this case and they have not pleaded facts to demonstrate that, nor could they. *See, in contrast, Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 800 (E.D. Mich. 2003) (exclusion of student speaker from panel because of viewpoint violated free speech rights). The complaint does not allege any facts to show that any child has been stopped from expressing his or her views on any topic, nor any facts demonstrating that any child has been forced to affirm any belief or engage in conduct which would violate his or her religion.

Third, the plaintiffs attempt to avoid a motion to dismiss by resting on what is essentially a flawed syllogism: 1) they have religious beliefs which are disapproving of people who are gay or families headed by gay people; 2) the Lexington schools teach principles of equality, diversity of society, and welcoming of all to the schools, including children who are gay or

[4] This "intentional indoctrination," the plaintiffs say, "is carefully pled and supported by hard facts," Plaintiffs' Opposition to Motion to Dismiss at 10. Despite the assertion, there are no "hard facts" pleaded to support anything other than a claim that the school system introduces children to civic values recognizing the diversity of the society both within and without the Lexington Schools and concepts of equality and the worth of each child.

whose parents are gay; and therefore, 3) the school defendants are intentionally targeting the plaintiffs' religious views and "campaigning to teach" the plaintiffs' children "that the family's religious faith was incorrect." Complaint, ¶ 25. There are no well pleaded allegations that any defendant has singled out plaintiffs' religious beliefs for attack and developed a curriculum aimed at carrying out that attack. Indeed, the assertions to that effect in the complaint are frivolous and should be subject to Rule 11 examination. The mere lack of congruence between plaintiffs' religious beliefs and what the Lexington schools have chosen to teach, along with a refusal to exempt children from being exposed to state-mandated encouragement of "respect for the human and civil rights of all individuals regardless of race, color, sex, religion, national origin or sexual orientation," 603 Code of Massachusetts Regulations § 26.05, does not state a claim that the defendants have intentionally denigrated the plaintiffs' religion and are engaged in a campaign to teach the children that the parents' religious beliefs are wrong.

A. Exposure of a child in public school to ideas offensive to a parent does not rise to the level of a constitutional violation of parental rights.

While the Supreme Court has recognized, in both *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that the Due Process Clause of the Constitution protects a parent's right to control their children's upbringing, this right does not stretch as far as plaintiffs contend in this case. Specifically, the *Meyer-Pierce* right, and closely related privacy rights, do not bring along with them the "right to restrict the flow of information in the public schools." *Brown v. Hot, Sexy, & Safer Productions Inc.*, 68 F.3d at 534. Indeed, parents "do not have a fundamental [due process right] generally to direct how a public school teaches their child." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), *rehearing denied and amended by Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190-1191 (9th Cir. 2006), As the Ninth Circuit recently stated, "the *Meyer-Pierce* due process right of parents

to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions. . ." *Fields*, 447 F.3d at 1190-1191. *See also Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (emphasis added) ("*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child *will and will not be taught*").[5]

Thus, while parents have a right to control the upbringing of their children, that right does not require schools to give prior notice before children can be exposed to ideas that might be at odds with their parents' values. Here, the suggestion of such a requirement is all the more pernicious in its consequences in that the idea to which the plaintiffs object is the simple recognition of the existence of gay people and their families who are part of the public school community.

If a parent chooses to have his or her child attend the public schools, that child has a right to a broad and high quality public education, not one constrained by individual parental beliefs. The question of how this is best achieved for children at varying ages is a professional pedagogical question. The First Circuit's decision in *Brown v. Hot, Sexy, & Safer Productions Inc.*, 68 F.3d 525, 530-534 (1st Cir. 1995), is directly on point in this context and should be treated as controlling precedent for purposes of the plaintiffs' claims. In *Brown*, the plaintiffs were two Chelmsford High School students and their parents who brought an action following the students' attendance at a mandatory, school-wide assembly consisting of a ninety-minute AIDS awareness program. The AIDS program consisted of several sexually explicit monologues

[5] The plaintiffs' assertion that they do not seek to dictate curriculum but only require an "opt out" is a distinction without a difference. See, e.g., Plaintiffs' Opposition at 3. Opting a child out of material being taught is determining what the child "will and will not be taught."

and involved other students participating in sexually suggestive skits on stage which the plaintiff students (seated in the audience) found humiliating and intimidating. The students' parents were not given advance notice of the content of the program or an opportunity to excuse their children from attendance. The Brown plaintiffs brought suit alleging, *inter alia*, that the school sponsored program deprived them of: (1) their privacy rights under the First and Fourteenth Amendments; (2) their substantive due process rights under the First and Fourteenth Amendments; (3) their procedural due process rights under the Fourteenth Amendment; and (4) their First Amendment rights under the Free Exercise Clause (in conjunction with a deprivation of the parent plaintiffs' right to direct and control the upbringing of their children). The district court dismissed the plaintiffs' claims in their entirety, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief could be granted, and the First Circuit affirmed.

The First Circuit in *Brown* began by acknowledging the existence of a right to direct the upbringing of one's minor children, which is grounded in the *Meyer* and *Pierce* decisions of the 1920's. The court then went on to distinguish the parental rights recognized by those decisions from the situation presented in *Brown*:

> "The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private school or instruction in a foreign language…We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' [referencing Meyer and Pierce respectively] than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me.' The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools

> would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems..."

68 F.3d at 533-534 (internal citations omitted) (emphasis added).

The Plaintiffs maintain that *Brown* does not control here because it involved high school age children as opposed to elementary school children, and because it was decided before the subsequent decision of the U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000), concerning parental rights over decisions about child visitation. Plaintiffs' Opposition to Motion to Dismiss at 10. There is no merit to either of these contentions. *Brown* and each of the cases discussed above found that the burden on parents' religious and parental rights from exposure of their children in the public schools to objectionable ideas did not rise to the level of a constitutional issue. That principle does not vary based on the age of the children. Furthermore, in *Leebaert v. Harrington*, the Second Circuit explicitly rejected the argument that *Troxel* offers anything new to the analysis of parental rights in regard to control over information to which children are exposed in the public schools.

> …[T]here is nothing in *Troxel* that would lead us to conclude from the Court's recognition of a parental right in what the plurality called 'the care, custody and control' of a child with respect to visitation rights that parents have a *fundamental* right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.

Leebaert, 332 F.3d at 141-142. *See also Fields*, 427 F.3d at 1204.

B. Exposure of a child in public school to ideas offensive to a parent does not rise to the level of a cognizable burden on freedom of religion.

What the Free Exercise Clause protects in the context of the present case is a student's right to be free from coercion to renounce his or her sincerely held religious beliefs or act in a manner contrary to those beliefs in order to satisfy the curricular requirements at a public school. Merely being exposed to ideas with which they may disagree, however, does not violate the Free

Exercise Clause. The law could not be clearer on this point. In *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), the Sixth Circuit rejected a free exercise challenge brought by a group of students and their parents based on the use of a particular reader that included views contrary to the students' religious beliefs. The court reasoned that "the requirement that students read the assigned materials and attend reading classes, and the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion." *Mozert* at 1065.

A decision rendered in the Eastern District of Kentucky earlier this year, *Morrison v. Bd. of Educ. of Boyd County*, 419 F. Supp. 2d 937 (E.D. Ky. 2006), is also instructive in this area. *Morrison* grew out of a related lawsuit in which a group of high school students sought to enjoin their local school board from denying their organization, the Boyd County High School Gay Straight Alliance, club status at their school. Following the issuance of a preliminary injunction in that case, the parties entered into a consent decree which required, among other things, that the school put into effect written anti-harassment policies and conduct mandatory staff and student diversity training aimed at issues of sexual orientation and gender harassment. Prior to the student training, however, the parents of several students submitted "opt out" notices to the schools and their children failed to participate in the training. Those students who did not participate received unexcused absences.

The *Morrison* plaintiffs filed an action alleging that the school's polices and practices violated their constitutional rights of free speech, equal protection, and free exercise, as well as their right to direct the ideological and religious upbringing of their children. *See Morrison*, 419 F. Supp. 2d at 940. Specifically, the plaintiffs stated that they had sincerely held religious

beliefs that homosexuality is harmful to those who practice it and harmful to society as a whole. Id. In sustaining the school's motion for summary judgment, the court noted that: "[f]ollowing *Mozert*, it is not enough that plaintiffs' claim that…mandatory student training offends their religious beliefs. They must establish that it created a burden upon the exercise of their religion." Id. at 943. According to the *Morrison* court, the plaintiffs' claims fell short because there was "no evidence that the student-Plaintiff, or any other student, was compelled to disavow his or her religious beliefs. Nor [was] there evidence that the student-Plaintiff, or any other student, was called upon to endorse homosexuality, bisexuality or transgendered persons." *Id.* at 943-944. Based on this evidence, "the inculcation alleged by plaintiffs simply does not exist…[and they] have failed to demonstrate a burden upon their free exercise rights." *Id.* at 945.

With respect to the *Morrison* parents' claims based on the right to direct the ideological and religious upbringing of their children, the court was similarly unpersuaded. Relying in large part on *Brown v. Hot, Sexy and Safer Productions, Inc*., 68 F.3d 525 (1st Cir. 1995), the court held that the school's training to address the issue of harassment at school, "was rationally related to a legitimate educational goal, namely to maintain a safe environment." *Morrison* at 946. As such, the court found that the plaintiff parents had no right, constitutional or otherwise, "to impede the Board's reasonable pedagogical prerogative," or to opt-out of the training. *Id.* at 946.[6]

The United States Court of Appeals for the Second Circuit reached the same conclusion in a case filed by a parent seeking to exempt his seventh grade son from mandatory attendance in

[6] The issue of whether strict scrutiny applies in a "hybrid" rights case need not be reached where there is no cognizable burden on free exercise of religion. See *Brown*, 68 F.3d at 539. In any event, the state has a compelling interest in providing students with an education aimed at preventing unlawful discrimination and conveying the skills for students to live in a diverse, democratic society. *See Fleischfresser*, 15 F.3d at 690 (assuming a cognizable burden on religion from exposure to reading series, government had compelling interest in development of student skills).

a health education class. *See Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003). There, the plaintiff-parent (Leebaert) maintained that certain materials and discussions in the school's health curriculum, including pre-marital sex and drug and tobacco use, conflicted with his sincerely held religious beliefs. Additionally, Leebaert took issue with the school's position that his son could only opt out of the "family life instruction" and "AIDS education" classes, while still being required to attend the other health curriculum classes. Leebaert brought suit, alleging that the school defendants had deprived him of his right to direct the upbringing and education of his minor child and his right to the free exercise of his religion in violation of the First and Fourteenth Amendments.

In ruling in favor of the defendant school board, the court found that the mandatory health education class was rationally related to the legitimate goal of educating children regarding health and, thus, that Leebaert's son was not exempt from the school's attendance requirements. Further, the *Leebaert* court explicitly agreed with the decisions of the First and Tenth Circuits in *Brown v. Hot, Sexy and Safer Productions, Inc*., 68 F.3d 525 (1st Cir. 1995) and *Swanson v. Guthrie Independent Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998), respectively, in holding as follows:

> "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school *what his or her child will and will not be taught*. As the *Brown* and *Swanson* courts correctly perceived, recognition of such a fundamental right…would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children."

Leebaert at 141 (emphasis added).

Similarly, in *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d at 690, the Seventh Circuit described any free exercise burden stemming from a school's use of a particular reading

series as "minimal" because its use did not "compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened." The same analysis applies to the plaintiffs' claims in this case – where the Lexington Defendants have not compelled the plaintiffs or their children to do or refrain from doing anything of a religious nature, any alleged burden on their free exercise rights is legally insignificant.

The Supreme Judicial Court of Massachusetts reached a similar conclusion when confronted with analogous issues in *Curtis v. School Comm. of Falmouth*, 420 Mass. 749, 754, 652 N.E. 2d 580, 584 (1995), *cert. denied*, 516 U.S. 1067 (1996), where a group of parents challenged a program of condom availability (with no parental opt out) in the Falmouth junior and senior high schools on the basis that such a program ran afoul of the parents' constitutional rights and was contrary to the religious beliefs and morals they intended to teach their children. In siding with the school board, the court held that "[a]lthough the program may offend the religious sensibilities of the plaintiffs, mere exposure at public schools to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their individual religious or moral preferences." *Curtis* at 589, *citing Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

As demonstrated by the cases discussed above, the law in this area is very well established and could hardly be more clear. The Constitution provides no right, under either the First or Fourteenth Amendments, that would allow the plaintiffs to restrict the ideas to which their children are exposed in the public schools, or entitle them to their requested relief - and no federal court has ever found to the contrary.

C. Recognition of a claim based on exposure of children in the public schools to ideas at odds with parental belief would disrupt public education, chill teachers, and cut off discussion in the classroom.

Expanding the scope of the rights of religious freedom and parental control to encompass a right of prior notice and the right to opt children out of exposure to information is effectively a demand that parents be able to tailor the curriculum for their child according to their own moral, religious and political views. Despite plaintiffs' assertion that they are not asking to limit or control the curriculum, public education as we know it would grind to a halt.

> If the opt-out remedy were implemented, teachers in all grades would have to either avoid the students discussing objectionable materials …or dismiss appellee students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to appellees. This would either require that appellees review all teaching materials or that teachers review appellees'extensive testimony. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they woud have to dismiss appellee students from these classes. The dismissal of appellee students from the classes would result in substantial disruption to the public schools.

Mozert, 827 F.2d at 1072 (Kennedy, J., concurring).

The subject matter to which a student or his parents may object on religious grounds is potentially limitless. While plaintiffs do not want their children to be exposed to any discussion that mentions gay people or gay parents, prior to and during the civil rights movements, some opponents of desegregation couched their opposition in terms of religious belief. It is easy to imagine those parents objecting to their children reading or discussing any book showing children of various races together at a swimming pool. Parents have also objected to curricula covering subjects like health effects of tobacco use, *Leebaert v. Harrington, supra*, 332 F.3d 134, and literary references to mental telepathy, *Mozert v. Hawkins County Bd. of Education, supra*, 827 F.2d 1058. Even the use of Harry Potter books in school has been the target of efforts by parents to protect children from ideas deemed at odds with their religion. *See* People for the

American Way, "Back to School With the Religious Right, accessed at

http://www.pfaw.org/pfaw/general/default.aspx?oid=3655

Given the wide variety of religious views in this country, there are many curricular choices made by public school administrators that potentially conflict with a parent's or student's religious beliefs. As Justice Jackson noted over fifty years ago:

> "Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as the plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."

People of Illinois v. Bd. of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

Recognition of a parental right to sanitize the ideas presented to a child in public school according to individual parental mores would create a tremendous administrative burden. Assuming a teacher knows with some certainty exactly what each parent does not want his or her child to see or hear, the teacher would have to prepare alternative class space, educational materials, and teaching staff for those who wish to be excused from a given unit of study or particular materials.

Acceptance of plaintiffs' allegations as stating claims for which relief may be granted will also have a chilling effect on both students and teachers in their ability to have discussions in the classroom. Teachers surely will be uncertain whether plaintiffs will assert that any given classroom discussion or lesson has "the intent" to "have children accept the validity of, embrace, affirm, or celebrate views of human sexuality, gender identity, and marriage constructs." Complaint, ¶ 23. Even use of the story of Cinderella could be deemed to have an intent to affirm

views of gender identity and marriage constructs. If a teacher were forced to silence children's discussion of their families if they have gay parents because other students' parents had not been given prior notice and the right to opt out, the teacher's conduct would clearly convey to such children the terrible message that their families were unworthy of recognition, indeed unmentionable.

Recognition of such rights would also harm the state's interest in having the public schools teach various civic values, e.g.: "(1) All public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, religion, national origin or sexual orientation." 603 Code of Mass Regulations § 26.05. This is a compelling interest, assuming heightened scrutiny is even applicable as plaintiffs urge, in maintaining a safe and nondiscriminatory educational atmosphere and in preventing violations of the right to equal protection. *See Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1137-38 (9th Cir. 2003) (failure to protect students from harassment can violate Equal Protection Clause). *See also Mozert*, 827 F.2d at 1071 (Kennedy, J., concurring) ("Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.")

Finally, a parental right to demand prior notice of ideas that children are exposed to in public school would also jeopardize longstanding principles about freedom to read and access to materials in school libraries. Plaintiffs' Complaint indicates that two of the books to which they object, Who's in a Family and Molly's Family (Complaint ¶ 27) are in a "mini-library" in the classroom, as is the book, King and King (Complaint ¶¶ 52-53). If this Court recognizes the Plaintiffs' assertion of a constitutional right to prevent a child from being exposed to ideas in

school to which the parent objects, that would mean removing these books from the shelves of the in-class library so that plaintiffs' children could not browse and select them without parental permission. As the courts have recognized, in a library, "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum…. Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." *Right to Read Defense Committee v. School Committee of Chelsea*, 454 F.Supp.703, 715 (D. Mass.1978), *quoted approvingly in Bd. Of Education, Island Trees Free School Dist. v. Pico*, 457 U.S. 853, 869 (1982).

III. PLAINTIFFS' DO NOT STATE A CLAIM UNDER THE MASSACHUSETTS "OPT OUT" LAW REGARDING SEX EDUCATION.

The Massachusetts Parental Notification Law, Mass. Gen. Laws ch. 71, § 32A, provides, in relevant part, that:

> Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexuality issues shall adopt a policy ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal. No child so exempted shall be penalized by reason of such exemption.

Shortly after the passage of this statute, the Commissioner of the Massachusetts Department of Education issued an Advisory Opinion intended to guide school administrators, school boards and superintendents in compliance with the new law. The Advisory Opinion also indicates the curriculum covered by § 32A:

> notice and opt-out provisions apply to any courses (typically, sex education or portions of a health education or science course), school assemblies or other instructional activities and programs that *focus* on human sexual education, the biological mechanics of human reproduction and sexual development, or human sexuality issues." In addition, Section 32A covers only the portion of a

> course or curriculum that "*primarily* involves human sexual education or human sexuality issues." According to the Advisory Opinion, "[t]he word 'curriculum' used in § 32A refers to a planned course of study that is part of the school's instructional program for all or some students.

Massachusetts Department of Education, Advisory Opinion on the Parental Notification Law (1997), available at http://www.doe.mass.edu/lawsregs/advisory/c7132adv.html (emphasis added).

None of the books objected to by the plaintiffs here are part of a curriculum "primarily about "sexual education" or "human sexuality issues" for purposes of the statute, and thus fall outside of its scope. The books about which plaintiffs complain are simply stories that contain gay characters – a far cry from the type of content implicated by the statute. The argument that depictions of gay characters constitute sex education or "sexual" content would mean that depictions of families with a husband and wife as parents are also about sexuality education, a plainly absurd notion. The promotion of tolerance, acknowledgement of diversity, and discussion of equal treatment and rights of gay people in society is not "sex education." *Cf. Colin v. Orange Unified School District*, 83 F. Supp. 2d 1135, 1144-45, 1148 (C.D. Cal. 2000) ("you can talk about being gay without talking about having sex, just as you can talk about being heterosexual without talking about sex").

CONCLUSION

For the reasons set forth above, the Defendants' Motion to Dismiss should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 20, 2006. /s/ Sarah R. Wunsch

ADDENDUM

STATEMENTS OF INTEREST OF AMICI

The **American Civil Liberties Union of Massachusetts (ACLUM),** an affiliate of the American Civil Liberties Union, is a non-partisan organization of more than 20,000 members dedicated to defending the principles embodied in the Bill of Rights. Since its founding in 1920, the ACLU has participated, as direct counsel and as *amicus curiae,* in numerous civil liberties cases in the federal and state courts involving the rights of free expression, free association, and religious freedom, and the nature of these rights in the public school context. For example, ACLUM successfully represented a parent and a pediatrician who were sued in Brown v. Hot, Sexy, & Safer Productions, Inc., 68 F.3d 525, 533-34 (1st Cir. 1995), which helped establish one of the main principles at stake in this case: that exposing students to ideas their parents abhor is not a violation of the constitution.

Lexington C.A.R.E.S. (Lexington Community Action for Responsible Education and Safety) is a group made up of approximately one hundred concerned parents and other citizens from the town of Lexington who seek to help keep the town's classrooms safe and welcoming for children from all families and backgrounds. Lexington C.A.R.E.S. was formed in the spring of 2005, following the arrest of David Parker and the subsequent media publicity surrounding the town and its school system. Initially, as the story of the Estabrook School incident appeared on radio, television and in the press, almost all of the information presented by the media represented Mr. Parker's point of view and that of the Article 8 Alliance. This coverage was clearly the result of an extended and well-coordinated media campaign and Lexington C.A.R.E.S. was formed in order to present the other side of the story.

The **Lexington Education Association (LEA)** is the professional association and union of 680 licensed, professional educators; 130 instructional assistants; and 6 technology

employees. As the sole, authorized collective bargaining agent for the largest organized group of Lexington Public Schools employees, the LEA is legally bound to represent the interests of its members. With two of its members named as defendants in this suit, the LEA and its state affiliate, the Massachusetts Teachers Association, are deeply concerned that such an action could place a significant chill on its members' academic freedoms. The LEA embraces the diversity that this lawsuit finds objectionable. An inclusive and welcoming school system for all students and all families is a fundamental premise of the public school mission.

The **Massachusetts Teachers Association (MTA**) is the largest union in Massachusetts, representing more than 102,000 educators in more than 400 local associations. MTA's members constitute most of the teachers, faculty, administrators and education support professionals in our public schools, community colleges, state colleges and the University of Massachusetts. The MTA's mission focuses on the professional and economic interests of its members, the protection of human and civil rights and the preservation of public education. In accordance with its mission, MTA is deeply concerned about efforts to limit the critical role of our public schools in exposing students to the full array of ideas that will enable them to develop into effective participants in our democracy.

Respecting Differences was established in 2000 in Lexington to advance the understanding of the community on issues related to the safe and respectful treatment of all people, regardless of their sexual orientation or gender identity. It is a coalition sponsored by nine churches and synagogues in the town. Supporting the Lexington public schools in creating and maintaining an environment in which all staff, students, and families are safe and welcome, regardless of sexual orientation or gender identity, and regardless of religious denomination, is a critical goal for Respecting Differences.

Gay & Lesbian Advocates & Defenders ("GLAD") was founded in 1978 and is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. In the First Circuit, GLAD's litigation has included: Largess v. Sup. Jud. Ct. for the State of Mass., 373 F.3d 219 (1st Cir. 2004), cert. denied 543 U.S. 1002 (2004); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997), cert. granted 522 U.S. 991 (1997), Bragdon v. Abbott, 524 U.S. 624 (1998), opin. after remand Abbott v. Bragdon, 163 F.3d 87 (1st Cir. 1998) cert. denied 526 U.S. 1131 (1999); as well as Brown v. Hot, Sexy and Safer Product., Inc., 68 F.3d 525 (1st Cir. 1995), which addressed issues critical to the present case and in which GLAD represented two of the named defendants.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 600,000 members, including nearly 32,000 in the Commonwealth of Massachusetts, all committed to making this vision of equality a reality. HRC supports the ability of defendants to provide students with a diversity of viewpoints, regardless of religion, sexual orientation, or gender identity.

Human Rights Campaign Foundation ("The Foundation") is an affiliated organization of the Human Rights Campaign. The Foundation's cutting-edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender

individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project provides gay, lesbian, bisexual and transgender parents, and the parents of GLBT children, with resources to find safe and welcoming schools. The Foundation supports defendants' efforts to provide such an educational environment for all students.