In Loco Parentis, Tyrannis!

By Paul Engel

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- Who has the final decision about the education of your children, you or the state?
- Can state entities deprive parents of their right to opt their children out of objectionable curriculum.
- When government schools act *in loco parentis*, are they acting as tyrants?

Who is in charge of your children? That has been a perennial question that has grown in importance over the last few years. When I was a child, it was understood that, with rare exceptions, parents were in charge of a child's upbringing. This included medical, religious, and educational decisions. Over the last few decades though, the role of the parent in these decisions has been replaced by experts. What happens when the goal of the experts differs from those of the parents? Who decides the future of the rising generations? It was understood that the state acted in loco parentis-in place of the parents-only for the safety of the child. A recent case in U.S. District Court shows that it can also be health departments, child services, schools, or even the courts. Government not only believes they know better than the parents, but are more than willing to act in loco parentis tyrannis.

In Loco Parentis

Who decides what is best for your child? This is a fundamental question, and is often referred to as parental rights. For

most of human history, the answer was simple and straightforward: The parents decide. With the advent of governments, opportunities were cerated for state intervention in parental rights, but they were limited to protecting the safety of the child. Of course, it didn't take long for Lord Acton's warning to enter the picture:

Power tends to corrupt and absolute power corrupts absolutely.

Lord Acton

We've probably all heard the stories about some overeager Child Protective Services (or their counterparts), taking children away from parents for the flimsiest of reasons. Sometimes, all it took for CPS to get involved is for a neighbor who didn't like the decisions the parents have made, to file a complaint. It didn't take long before schools were to get involved as well.

There's a saying I've heard often enough, "Bad facts make bad laws." Put another way, when you write general laws based on the exception rather than the rule, the often unintended consequences can be catastrophic. For example, many states and localities, in an attempt to protect children from abuse, empowered faculty and staff at schools to report incidents of suspected child abuse. Rare but terrible incidents of abuse not only morphed the ability to report into a duty to report, but also changed the standards of reporting from evidence of physical abuse to suspicion of mental abuse. The problem is two-fold. First, "mental abuse" is not well defined, and second, suspicion is not necessarily based on anything real. This has led to an attitude that the schools are ultimately responsible for the physical and mental welfare of a child, including determining what they need for an education. Whereas school boards used to work with parents and parental groups to determine educational standards, today they are being decided by "experts", completely devoid of parental involvement, and with little if any concern for the individual needs of the

child. A recent case out of the U.S. District Court of Maryland seems to be a perfect example.

Mahmoud v. McKnight

The premise of the case is fairly simple.

In this lawsuit, parents whose elementary-aged children attend Montgomery County Public Schools ("MCPS") seek the ability to opt their children out of reading and discussion of books with lesbian, gay, bisexual, transgender, and queer characters because the books' messages contradict their sincerely held religious beliefs about marriage, human sexuality, and gender.

Mahmoud v. McKnight

The Montgomery County Public Schools (MCPS) was using material in the classroom that several parents found objectionable. In this case the objections revolved around the parent's religious belief and the faith they wished to instill in their children. Why did these parents feel the need to sue MCPS in federal court? Because their right to opt their children out of offensive material was being denied by MCPS.

Last school year, MCPS incorporated into its English language arts curriculum a collection of storybooks featuring LGBTQ characters (the "storybooks" or "books") in an effort to reflect the diversity of the school community. Initially, parents could opt their children out of reading and instruction involving the books, as they could with other parts of the curriculum. In March of this year, the defendants—the Montgomery County Board of Education, the MCPS superintendent, and the elected board members (collectively, the "School Board")—announced that parents no longer would receive advance notice of when the storybooks would be read or be able opt their children out.

Mahmoud v. McKnight

When MCPS initially incorporated into their curriculum material of a sexual nature, the parents could opt their children out. In March of this year, leadership in MCPS decided that the material they wished to expose to children attending their schools was more important than the concerns of the parents and their religious instruction. Ironically, the attempt by MCPS to reflect diversity, denied the diverse ideas of these parents. This action led to some concerned parents filing the lawsuit.

Following the announcement, three families of diverse faiths filed suit against the School Board, claiming the no-opt-out policy violates their and their children's free exercise and free speech rights under the First Amendment, the parents' substantive due process rights under the Fourteenth Amendment, and Maryland law. …

The plaintiffs contend state law requires MCPS to provide opt-outs from the storybooks because, in their view, the books concern family life and human sexuality. The School Board's position is that the storybooks are part of its English language arts curriculum and opt-outs are required only for the family life and human sexuality unit of instruction, a separate curriculum.

Mahmoud v. McKnight

As part of the suit, in order to protect their children from the exposure to, and potential damage from, these books, the parents requested a preliminary injunction against MCPS to prevent them from implementing the no-opt-out policy.

Opt Out Laws

Most states recognize, at least on paper, that parents ultimately have the power to control the education of their children. For this reason, states that require education in sensitive areas have laws allowing parents to opt their children out of that specific instruction.

Like most other states that require or permit instruction on human sexuality in public schools, Maryland allows for opt-outs from such instruction in certain circumstances and requires schools to adopt "policies, guidelines, and/or procedures for student opt-out" and to provide alternative learning activities.

Mahmoud v. McKnight

I say that states recognize parental rights on paper because these laws mean nothing if they are not logically enforced. By that I mean that the laws allow parents to opt their children out of instruction they find objectionable, even over the objections of the school or district.

Hazel??? states the new no-opt-out policy was the result of meetings with a small group of principals in March 2023, during which the School Board determined that principals and teachers "could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment and undermining MCPS's educational mission."

Mahmoud v. McKnight

Sadly, this is a sentiment I've heard all too frequently before. From politicians to bureaucrats and, yes, even school boards and principals, it seems more often than not these groups prefer to force others to comply with their failure rather than learn from it themselves. The School Board for MCPS found that a lot of parents were opting their children out of the classes with these objectionable books. Rather than asking themselves, "Hey, if so many parents object, do we need to look again at these books we've chosen?" Instead, their response is to prevent parents from opting their children out.

The School Board had three concerns. First, high student absenteeism. In one instance, for example, parents sought to excuse dozens of students in a single elementary school from

instruction. Second, the infeasibility of managing numerous opt-outs. Teachers would have to track and accommodate opt-out requests for their students, and other staff who spent time in multiple classrooms would have to do so across an entire school. Finally, the School Board was concerned that permitting some students to leave the classroom whenever books featuring LGBTQ characters were used would expose students who believe the books represent them and their families to social stigma and isolation. The School Board believed that would defeat its "efforts to ensure a classroom environment that is safe and conducive to learning for all students" and would risk putting MCPS out of compliance with state and federal nondiscrimination laws. Based on these concerns, the School Board decided to disallow opt-outs from the storybooks, regardless of the reason, after the 2022–2023 school year.

Mahmoud v. McKnight

Did you see that? The School Board was more concerned about their lives than those of the children. They were concerned with high student absenteeism, but not why the students were absent. They were concerned about the workload of the teachers, but not the impact on the students. And finally, while claiming they were concerned about the social stigma of the students who believe the books represent them, the Board showed absolutely no concern for the significant number of students who might be uncomfortable, even stigmatized, by being exposed to such topics at their age.

Constitutional Issues

My heart breaks to see people who have such a powerful grievance receive unconstitutional advice from their legal counsel.

The plaintiffs claim the School Board's decision to disallow opt-outs from the storybooks likely violates their rights under the Free Exercise Clause of the First Amendment and the

Due Process Clause of the Fourteenth Amendment. The School Board argues the plaintiffs have not established a likely constitutional violation.

Mahmoud v. McKnight

The plaintiffs claim that the School Board's policy violates the Free Exercise of the First Amendment. Faithful readers of The Constitution Study probably know what I'm going to say next. This cannot be a violation of the First Amendment to the Constitution of the United States, since the first five words of that amendment are:

Congress shall make no law

Constitution of the United States, Amendment I

Congress had nothing to do with this policy, so it cannot be a violation of the First Amendment. Furthermore, even if this case violated the First Amendment, it plainly is not a violation of the Free Exercise Clause.

The First Amendment, applicable to the states through the Fourteenth Amendment, provides in part that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The Free Exercise Clause "protects against laws that discriminate against or among religious beliefs or that restrict certain practices because of their religious conduct." … To violate the Free Exercise Clause, a law, regulation, or government policy must "burden religious exercise."

Mahmoud v. McKnight

The fact that a government school is teaching something that does not comport with your religious beliefs, doesn't prevent you from exercising your religion. It does not even prevent a parent from teaching their children that the instruction they

receive from the government school is wrong because it's contrary to their belief. What we have here is not a violation of plaintiff's free exercise right, but an establishment of religion. By claiming that plaintiffs' religious beliefs are superseded by the state's beliefs about diversity and sexuality, the MCPS School Board has effectively established the tenants of faith that all public school children must adopt.

While this case is not a violation of the First Amendment to the Constitution of the United States, it is a violation of Article 36 of the Declaration of Rights in Maryland's Constitution.

no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice,

Maryland Constitution, Article 36

By forcing children to be taught a form of belief contrary to their parent's desire, they are molesting both the parents and the children for the professions of their faith.

As noted before, Plaintiffs also claim MCPS's violate their rights protected under the Due Process Clause of the Fourteenth Amendment.

The plaintiffs assert that the School Board's refusal to allow parents to opt their children out of reading and discussion of the storybooks infringes their right to direct their children's upbringing in violation of the Due Process Clause of the Fourteenth Amendment. They claim this due process right is fundamental, triggering strict scrutiny.

Mahmoud v. McKnight

What is the Due Process Clause of the Fourteenth Amendment?

nor shall any State deprive any person of life, liberty, or

property, without due process of law;

U.S. Constitution, Amendment XIV, Section 1

So does the School Board's policy violate this right?

[T]he Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. When the parents' interest includes a religious element, however, the Court has declared with equal consistency that reasonable regulation by the state is permissible, even if it conflicts with that interest. That is the language of rational basis scrutiny.

Mahmoud v. McKnight

Once again we see courts placing their opinions above the supreme law of the land. The Supreme Court recognizes that parents have a liberty interest in directing their children's schooling, but then they add a religious exception that does not exist in the text of the Constitution. The court is effectively saying, "You have a right to due process, unless there is a religious element." In fact, it's the Supreme Court that's prohibiting the free exercise of religion by creating a religious test for due process.

Conclusion

So where does that leave our plaintiffs and their request for a preliminary injunction?

The plaintiffs have not established the requirements for a preliminary injunction. Their motion is denied. Their request for an injunction pending appeal is denied. A separate Order follows.

Mahmoud v. McKnight

In other words, "No injunction for you!" I can understand the First Amendment argument against the injunction, but not the

Fourteenth Amendment one. Yes, the court states that the Supreme Court has placed a religious exemption on a parent's liberty to direct their child's education, but the judge took oath to support the Constitution of United States, not the opinions of judges. Which brings me back to my opening question. Who ultimately guides the education of your child? If the schools, with the support of the courts, are able to take their role as in loco parentis, and use it for whatever agenda they decide, then their actions are tyrannical in deed.

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