

Condom Availability in the Schools: Lessons from the Courtroom

By Karen Mahler

On January 8, 1996, the United States Supreme Court, without comment or recorded dissent, declined to review the case of *Curtis v. School Committee of Falmouth*, in which the Massachusetts Supreme Judicial Court upheld the Falmouth School District's condom availability program.¹ The Massachusetts court had rejected a constitutional challenge to the program, which provides students in grades 7–12 with access to condoms upon request, without a procedure through which parents could refuse to allow their children to participate. The High Court's refusal to hear the case is an encouraging signal for school districts interested in developing comprehensive programs for human immunodeficiency virus (HIV) and AIDS prevention. Moreover, as the growing body of legal precedent makes clear, claims that such programs infringe on parental rights are increasingly regarded as without legal merit.²

The Falmouth Case

The condom availability plan in the Falmouth School District enables high school students to request free condoms from the school nurse or to purchase them from vending machines located in school lavatories. Trained staff members provide counseling for students upon request, and informational brochures are obtainable in the nurse's office. Students at the district's junior high school also have access to condoms. However, counseling is mandatory before these younger students can receive the requested condoms.³

The Falmouth school superintendent has instructed district staff to stress abstinence as the only infallible method of avoiding infection with a sexually trans-

mitted disease. Most significantly, the plan does not include an "opt-out" alternative whereby parents of eligible students in the district can deny their children access to condoms.*

Parents opposed to the program, however, brought suit against the Falmouth School District. The plaintiffs claimed that the program usurped their parental rights and denied their religious liberties, and requested that the court prevent the continued operation of the program. Moreover, they argued that the schools should have a system of notification in which parents would be informed each time their child requested a condom.

The Massachusetts Supreme Judicial Court, upholding a lower court ruling, rejected the parents' claims that the program violated their rights. Concluding that the program was "in all respects voluntary," the Massachusetts high court found no evidence that the lack of an opt-out provision represented a "coercive burden" on parents' constitutional rights. While the plaintiffs argued that the program's "infringement" of their rights was sufficient to spur court action, the court held that a legal remedy is available only when the government's actions are coercive. The court rebuffed the plaintiffs on all claims: "[T]he students are free to decline to participate in the program. No penalty or disciplinary action ensues if a student does not participate...[and] the plaintiff parents are free to instruct their children not to participate. The program does not supplant the parents' role as advisor in the moral and religious development of their children."⁴

The court noted that the program may indeed be offensive to the religious codes of parents in the district. Nonetheless, the five-judge panel ruled unanimously that, in the absence of any obligation to utilize the program, its existence did not pose a threat to constitutionally guaranteed rights.

Disagreement in New York

The Falmouth decision clearly supports the existence of school-based condom availability plans. However, in a 1993 New York case, a state appellate court, faced with similar complaints, ruled in the opposite direction of the Massachusetts high court.⁵

In 1991, the New York City Board of Education developed a program to make condoms available to all high school students upon request. The plan was the first in the nation to make condoms available without parental consent.⁶ The program was opposed both by a group of parents and by the Catholic Archdiocese, which encouraged concerned parents to fight the program and offered free legal services for court challenges.⁷ Parents opposed to the plan joined forces with a dissenting member of the New York City Board of Education and filed suit against the schools chancellor and the board, challenging the condom availability plan on three fronts.⁸

First, the petitioners in the case of *Alfonso v. Fernandez* argued that making condoms available to students was a health service. Therefore, they reasoned, condom provision fell under the rubric of state public health law. Under the plaintiffs' reading of these laws, except for a limited and definitive set of exemptions, parental consent is required whenever a minor seeks health services.

In addition, plaintiff parents claimed that the condom plan infringed upon their right to raise their children without undue interference from the state. Finally, the petitioners argued that the program interfered with their First Amendment right to free religious practice. The board argued

*An opt-out procedure provides parents with a means of passive consent. If parents wish to exclude their children from the condom availability program, they must take the initiative to notify the school, in writing, that they do not wish their children to take part. In contrast, active consent requires that schools take the initiative in collecting express, written consent from parents, allowing their children to participate in the school's program.

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that the condom plan did not constitute a medical service, but was instead one aspect of an educational program that did not require direct parental oversight.

While a lower court found the petitioners' claims unwarranted, a mid-level appellate court ruled in their favor. Specifically, the appellate court determined that New York's condom availability program was indeed a health service; moreover, the court ruled that it did not fall under any exception to the parental consent requirement of the state's public health laws.⁹

The appellate court also disagreed with the lower court's ruling on the issue of parental rights. The appellate court found that by instituting the condom availability plan in the public schools, the school had in effect forced parents to surrender their rights, compelling them to send their children into an environment where they could gain access to condoms without restriction. Neither court found any violation of the right to free exercise of religion.

Implications for Schools

How might school districts concerned with providing appropriate health and sexuality education programs interpret the seemingly contradictory rulings of the Massachusetts and New York courts? Donna Lieberman, director of the Reproductive Rights Project at the New York Civil Liberties Union (NYCLU), and counsel for the *amici* in the New York case, suggests that the Massachusetts decision is the bellwether case. "Massachusetts is the most significant," Lieberman says. "It is the highest court to address the issue, and it rejects, in no uncertain terms, the claim that condom availability interferes with parental liberties."¹⁰

Furthermore, Lieberman notes that the Massachusetts ruling was a unanimous decision, whereas the New York panel decision was a divided 3–2 majority. Moreover, she says, the New York situation may signify more about the vagaries of local politics than about the rule of law. The ruling by the appellate division corresponded with several shifts in the political landscape of the city. By the time *Alfonso* had reached the appellate court, a moderate conservative had won the mayoral election of 1993, and the schools chancellor who had proposed making condoms available without parental consent had been ousted by the board of education. The new schools chancellor readily instituted a parental opt-out alternative when the appellate court overturned the lower court decision.¹¹ At that point, the New York City Board of Education de-

clined to appeal the case to a higher court.

Had the case been heard by New York's highest court, there are some indications that the program would have survived intact. Lieberman notes that the New York appellate decision was inconsistent with both of the Massachusetts court rulings. In fact, Judge Paul Liacos, who penned the Massachusetts opinion in *Curtis*, found fault with the reasoning of the New York court, and called erroneous their decision to designate the provision of condoms a "medical service for which parental consent was required."¹²

Indeed, there exists a firm history of legal precedent supporting a minor's right to consent to the receipt of medical services related to sexuality and reproductive health. In 1977, the Supreme Court struck down a New York State law that prohibited the sale or distribution of nonprescription contraceptives to minors under the age of 16. In doing so, the court explicitly stated that a minor's access to contraceptives is part of a right to privacy that is constitutionally protected.¹³ Furthermore, in every state but South Carolina, minors are authorized to consent to treatment for sexually transmitted disease infection, and in 24 states, including New York, minors are explicitly allowed to consent to contraceptive services.¹⁴

Given the rising concern about levels of adolescent sexual activity and rates of STD infection (including HIV infection) among school-age youths, school districts are often eager to develop effective programs that will enhance the health and safety of the students they serve. Thus, schools continue to make condom availability a part of their comprehensive HIV/AIDS curricula.

At the same time, public schools are concerned about their vulnerability to costly legal challenges. In a recent national survey of school superintendents, 64% acknowledged that they wanted to obtain legal counsel regarding the development of condom availability programs.¹⁵

It is as yet unclear how schools should navigate in the current environment. NYCLU's Lieberman believes the clearest path is through involvement with grassroots community groups. To her, successful implementation of comprehensive programs will depend upon the capacity of "educators and parent organizations [to] communicate and iron out the difficult emotional issues that go along with sex education." By failing to make small compromises in order to forge a broad community consensus (a pitfall of the New York approach), Lieberman feels that schools leave themselves vulnerable to the

tactics of the most radical dissenters.¹⁶

Alice Radosh, director of AIDS Evaluation Projects at the Academy for Educational Development, is less sanguine. Radosh voices skepticism that parental and community engagement, while necessary, are sufficient to inoculate these programs against attack.¹⁷ Indeed, the Falmouth plan was implemented after considerable involvement with the community, and the judge noted that the plaintiffs were satisfied with the process that led to the approval of the program. Rather, Radosh believes that objective evaluation findings and a growing body of judicial precedent may be necessary to firmly establish the legality of condom availability as part of a school's comprehensive AIDS education program.

A Current Court Challenge

A challenge currently under way in the Philadelphia public schools is likely to make just such a contribution to the body of legal precedent. As described by Catherine Weiss, an attorney with the Reproductive Freedom Project of the American Civil Liberties Union (ACLU) and counsel to a consortium of Philadelphia students, parents and family planning groups, the case raises concerns that reach beyond the provision of condoms in school settings.¹⁸

The Philadelphia case is noteworthy because the condom program was implemented with an opt-out provision for parents who wished to exclude their teenage children.¹⁹ The plaintiffs—a group of parents of high school students teamed with Parents United for Better Schools, a parent advocacy group—claim that the opt-out provision of the district's plan is insufficient to guarantee parental rights. Rather, these parents are demanding the right to affirm or deny students' participation in the program through explicit written permission.

The case was initially dismissed for lack of legal standing. Since plaintiffs had denied their children access to the program, it could not legally be deemed harmful. An appeals court decided the plaintiffs had cause to sue, however, on the grounds that parental consent is necessary for some medical services. The court did not decide, however, whether the provision of condoms in schools is a medical service that triggers a parental consent requirement. Rather, the appellate court sent the case back to the trial court for further proceedings.²⁰

When the case was returned to the trial court, the ACLU requested that their clients become parties in the lawsuit. As defendants in the case, the group can pursue litigation independent of the school

district. (In the New York case, parents and community members who supported the condom program were not parties to the lawsuits; when the board of education choose not to appeal to the state's highest court, advocates of the program had no legal standing to pursue further litigation.) This will prove an important mechanism to counter what Weiss sees as the plaintiffs' potentially serious threat to minors' access to contraceptives. This threat, she states, is embodied in their "extremely broad" definition of what constitutes "medical services" subject to a parental consent requirement.²¹

The Philadelphia case is also noteworthy because the plea filed by the plaintiffs offers evidence of what the NYCLU's Lieberman refers to as the "most effective tool" used by opponents of comprehensive sexuality education—the "misrepresentation" of research on sex education and its impact on sexual activity.²²

The plaintiffs charge the school district with endangering the welfare of minors through the provision of condoms, which, they claim, "encourages abstinent children to engage in sexual activity" and "increases the sexual activity of sexually active children."²³ However, the preponderance of published studies demonstrate no significant relationship between sexuality and HIV education programs and earlier onset of sexual behavior or increases in its frequency among sexually active youth.²⁴ Additionally, the plaintiffs' charges strongly imply that condoms carry a significant risk of failure as a prophylactic. Yet, published estimates of failure rates for condoms are between 2% and 14%,²⁵ with inexperienced users accounting for a larger percentage of condom failures²⁶ and higher failure rates being due largely to incorrect or inconsistent use.²⁷

Searching for Balance

In Lieberman's view, "it is the beauty—and the frustration" of our society that every jurisdiction is different. The resulting unpredictability of school districts and local governing bodies makes uncertain the success of implementing comprehensive school-based AIDS education programs. In New York City, the AIDS curriculum has encountered obstacles ever since its inception; although condom availability continues, the city's board of education recently banned demonstrations on correct use of condoms from the classroom.²⁸ In contrast, the Los Angeles Unified School District has operated a condom availability program in its high schools, without legal challenge, since April 1992.²⁹

In refusing to hear the Falmouth case, the Supreme Court has, for now, left resolution of these issues in the hands of the states, each of which may have a unique history of regulations, statutes and court decisions regarding sexuality education and parental consent. Recent legal rulings provide strong support for schools to afford their students access to condoms, without parental consent, as part of a comprehensive program of health and sexuality education. However, adolescent sexuality is an enduring emotional issue, and as more school districts elect to take an active role in reducing the risk of HIV infection among the students they serve, it is likely that legal disputes will continue to flare up.

School districts aiming to resolve the often-conflicting interests of parents, students and the community in developing effective health education and disease prevention programs are advised to become familiar with local statutes regulating the adoption of health-related or sex education programs.³⁰ In this way, schools will find guidance in deciding whether setting up their programs as health-related or education-related services provides them with greater legal protection.

Despite the preponderance of judicial opinion and the encouraging sign from the U.S. Supreme Court, some parents and conservative advocacy groups will continue in their efforts to stop condom availability programs. In all likelihood, parental consent will continue to be a thorny issue that school districts will have to tackle. The most conservative option of requiring explicit written consent from parents may end up excluding such large numbers of students (due to inaction rather than opposition) as to make the program pointless. Moreover, while such "active" consent may mollify conservative opponents, supporters of full access might respond to such restrictions with their own legal challenges.

As the Philadelphia matter makes clear, allowing parents a means to exclude their teenage children does not guarantee legal protection, although it may provide a buffer against some court challenges.³¹ In this, the New York case may be most instructive. When the legal battle died down, the public high schools implemented the condom availability program with the opt-out provision. Fewer than 1% of parents of high school students in New York City public schools have selected that option.³²

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