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## Legality of High School Condom Distribution Program to Prevent HIV Infection: Alfonso v. Fernandez

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LEGALITY OF A HIGH SCHOOL CONDOM  
DISTRIBUTION PROGRAM TO PREVENT HIV INFECTION:  
*ALFONSO v. FERNANDEZ*

**INTRODUCTION**

As of June 1992, the U.S. Centers for Disease Control (CDC) estimated that over one million Americans will have been infected with Human Immunodeficiency Virus (HIV), the virus which causes Acquired Immune Deficiency Syndrome (AIDS). The CDC also reported that in the U.S., new cases linked to heterosexual intercourse increased 40% in 1990, compared with only a 12% increase in overall incidence of AIDS. (Telephone interview with CDC, Sept. 1, 1992.) These figures imply that HIV is now spreading rapidly through heterosexual intercourse. Because a significant number of teens are sexually active with multiple partners, their sex habits could substantially impact the number of individuals affected by AIDS in years to come. In light of this possibility, the CDC conducted a nationwide survey on youth sex.

The survey included more than 11,000 students, grades nine through twelve, in all 50 states, Washington D.C., Puerto Rico, and the U.S. Virgin Islands. Released April 9, 1992, the youth survey reported that 19% of high school students surveyed and 29% of high school seniors surveyed claimed they had four or more sex partners. Only 41% of the students who reported sexual activity in the three preceding months reported using condoms. Accordingly, many teenagers face the possibility of HIV infection.

This article considers the controversial issue of providing condoms to high school students in order to help reduce the risk of HIV infection and focuses on *Alfonso v. Fernandez*, 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992). *Alfonso* considers whether a student condom distribution program infringes upon 1) law requiring parental consent for health services, 2) parents' rights to free exercise of religion, and 3) due process rights of parents to raise their children and teach them doctrines of their religious beliefs.

**Condom Distribution Program**

In *Alfonso*, a high school made condoms available to its students as part of a program designed to control the spread of HIV. Students could request condoms from health resource rooms located in the school building. Trained personnel provided optional counseling on the use of condoms and related health matters. Students receiving condoms were not required to obtain parental consent or identify themselves. Even if parents objected to the condom distribution program, they could not prohibit their children

from participating. Based on statutory and constitutional grounds, concerned parents sought declaratory and injunctive relief to prohibit the school's distribution of condoms.

### Law Requiring Parental Consent for Health Services

The parents argued that the condom distribution program violated a statute that requires parental consent prior to the administering of health services to minor children. New York Public Health Law § 2504 requires parental consent for "health services." The school responded that the parents' interpretation of "health services" was overbroad.

Since § 2504 did not specifically define health service, the court examined N.Y. Comp. Codes R. Regs. tit. 8, § 136.1(d) (1992). The regulations define health service as including annual medical examinations, dental inspections or screenings, vision screenings, and audiometer tests. The court, however, was unable to find any clear statutory definition which might designate the distribution of condoms as a health service.

New York case law also provided little guidance in defining health services. The cases focused on parents' right to consent to, control or refuse medical treatment for their children. The parents cited *In the Matter of Thomas B.*, 574 N.Y.S.2d 659 (N.Y. Fam. Ct. 1991), in which a mother petitioned the court to order her fifteen-year-old son to undergo diagnostic surgery for a tumor, despite the child's vigorous personal objection. The court held that "[a]n implicit corollary of (Sec. 2504) is that a person under 18 years of age may not give effective consent [or refusal] for such services." *Id.* at 661. The *Alfonso* court found the holding in *Thomas B.* irrelevant. Although *Thomas B.* centered on what level of control a parent has over the health services administered to a minor child, the case did not address the primary issue of whether a condom distribution program might be considered a health service. *Alfonso* at 409. In summary, the court was unable to find a clear case law definition of health service that might include the distribution of condoms.

Absent any case law or statutory law to the contrary, the court reasoned that the condom distribution program was not a health service. The court noted that New York law does not regulate condom distribution in the same manner as it does prescription drug distribution. Furthermore, condom sales to minors may not be prohibited by law. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). So, although the condom distribution program was health-related, it could not be classified as a "health service," because minors have a right to acquire condoms without parental consent. Thus, the court concluded that the condoms distribution program was not a "health service" as defined by § 2504.

### Parents' Rights to Free Exercise of Religion

The parents also argued that the condom distribution program violated their First Amendment right to free exercise of religion. The parents cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Ware v. Valley Stream Sch. Dist.*, 550 N.E.2d 420 (N.Y. App. Div. 1989) to support their position.

In *Yoder*, two Amish groups claimed that enforcement of Wisconsin's compulsory education law would gravely endanger and possibly destroy their ability to freely exercise their religious beliefs. The Supreme Court agreed and held that the respondents were not required to comply with the law. In *Ware*, a religious group challenged a New York regulation requiring all primary and secondary school students to receive AIDS instruction. Again the court found that the group should not be required to comply with the law. The court in *Alfonso*, however, ruled that the conclusion reached in *Yoder* and *Ware* did not apply in this case.

*Yoder* and *Ware* embraced a two-pronged test set out by the United States Supreme Court (see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). First, the claimant must show that the state requirement burdens a sincerely held religious belief. If the first requirement is satisfied, the state is then allowed to demonstrate that the requirement nonetheless serves a compelling state interest, and that an exemption to the requirement substantially impedes fulfillment of that goal.

Regarding the first prong of the test, the court found that the parents' religious beliefs were sincere. However, the court held that the condom distribution program did not unduly burden such beliefs even though it might be offensive to them. Since the condom distribution program was optional (as were the programs in *Yoder* and *Ware*), it only exposed the children to other ideas on the subject. The court remarked that *Ware* made it clear that exposure to other ideas found in school curriculum did not rise to the level of a free exercise claim.

Moreover, the court cited *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990), which stated "[t]he central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices." Despite the arguments made by the parents that peer pressure and the school's promulgation of the condom program were coercive, the court found that the effects of the voluntary program were incidental at best. *Alfonso* at 411.

Hence, the court concluded that the parents' free exercise claim could not stand because the parents failed to meet the "burden" requirement for the first prong of the *Lyng* test.

## **Due Process Rights of Parents to Raise Their Children or Teach Them Doctrines of Their Religious Beliefs**

Finally, the parents argued that the condom distribution program violated their due process right to raise their children or teach them doctrines of their religious beliefs. The parents requested that an opt-out provision to the condom distribution program be provided to protect these rights.

The court commented that, while an opt-out provision might well be constitutionally permissible, the judiciary should not usurp an administrative function by directing the Board of Education to proceed in a particular manner. *Lipsman v. New York City Bd. of Educ.*, 520 N.Y.S.2d 190 (N.Y. App. Div. 1987). A court may not substitute for a program adopted by school officials one that it might find to be more desirable or acceptable. In order to compel the school to implement an opt-out provision, the parents needed to show some right to such a provision as a matter of law.

The court cited *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), a case that held that a constitutional right of parents to raise their children as they see fit is not absolute. Children are also protected by the Constitution and have constitutional rights that must be protected by all, including parents. *Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982). Specifically, the right of privacy regarding decisions affecting procreation and, in particular, the right to obtain contraceptives extends to minors as well as adults. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977).

The court also noted the case of *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, 449 U.S. 829 (1980), wherein parents sued a family planning center. The center was open to minors as well as adults, and contraceptives were distributed free of charge without parental consent after consultation on birth control methods, the responsibilities of sexual activity, and concerns about communicating with parents. An expert witness testified for the parents, stating that, in his opinion, "adolescents do not have sufficient maturity to utilize contraceptives" and that the center's approach "is viewed as a green light for the use of contraceptives." *Id.* at 1164-65. Another expert testified that "most adolescents do not have the capacity to make decisions on birth control and to understand what is involved in choosing or using a contraceptive" and added that the center would be viewed by the teenagers as an authority figure "condoning fornication." *Id.* Despite this expert testimony, the court of appeals held that the voluntary nature of the center left the parents free to exercise tradi-

tional care, custody, and control over their children. Therefore, it was not necessary for the court to determine whether the rights of the parents outweighed those of the minors; nor was it necessary to determine whether the parents' rights were burdened by some compelling state interest.

Following the same line of reasoning, the court in *Alfonso* found that, because the school's condom distribution program was voluntary in nature, it left parents free to exercise control over their children. As such, the program did not violate the parents' due process rights to raise their children or teach them doctrines of their religious beliefs.

### Conclusion

From a legal standpoint, *Alfonso* states that the high school condom distribution program (1) did not require parental consent for student participation, (2) did not violate the parents' rights to free exercise of their religion, and (3) did not infringe upon due process rights of the parents to raise their children or teach them the doctrines of their religious beliefs. It may be inferred that similar programs would most likely be legally permissible in other jurisdictions as well. Now, from a social standpoint, this case may suggest something else.

*Alfonso* suggests that many parents do not effectively teach their children sexual morality or responsibility. The large number of teens practicing unsafe sex stands as proof. As a result, today's high schools may see fit to provide condoms and counseling to help protect sexually active teens from HIV. While high schools may be able to provide free condoms and counseling, they cannot replace the role of parents in teaching responsibility and morality. Of course, changing the family's role with regard to sexual ethics and sexual responsibility will likely be a slow process.

In the meantime, high school condom distribution programs may reduce the threat of HIV infection in teens and save lives. It should be noted, however, that such programs may have a reverse effect. For example, the programs may encourage sexual activity in teens without significantly increasing the use of condoms, thus furthering the spread of HIV. It follows that such programs must be implemented with caution. It is to be hoped that parents, their children, educators, and administrators will join together to explore new approaches and strengthen efforts to combat the spread of AIDS.

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