SB

354

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
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ANCHORAGE, ALASKA 99501
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JUNEAU, ALASKA 99811
PHONE: (907) 465-3600
465-3603

January 23, 1984

The Honorable Mae Tischer
Alaska State House
Pouch V
Juneau, AK 99811

Re: CSHB 514 (HESS)

Dear Representative Tischer:

You have asked that we indicate whether CSHB 514 (HESS) remedies the equal protection problems which we identified last year during consideration of HB 357. We believe that it does. For additional detail, please refer to our review of SCS CS HB No. 357 (Rls) am S, a copy of which is enclosed.

If you have other questions, do not hesitate to contact this office.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: [signature]
Thomas H. Robertson
Assistant Attorney General

THR:jal

Enclosure

03-C5LH

July 19, 1983

The Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Re: SCS CSHB 357(Rls) am S -- state regulation of religious schools
Our file: 388-095-83

Dear Governor Sheffield:

At the request of Emil Notti on your behalf, we have reviewed SCS CSHB 357(Rls) am S which addresses the degree to which certain religious schools are to be regulated by the state.

This bill diminishes the authority of executive agencies over all religious pre-elementary schools and over religious elementary and secondary schools which elect to comply with various requirements. The provisions of the bill, and the constitutional issues which they generate, are discussed below. We do not believe that the constitutional issues are sufficiently clear to require veto of this bill.

In order to qualify for the protections afforded by this bill, a school must be operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive direct state or federal funding. It is therefore possible that, except with respect to licensure of pre-elementary schools, executive authority over some religious schools would remain unchanged even if this bill becomes law.

Section 1 of the bill amends AS 14.07.020(8) which currently requires the Department of Education (DOE), in cooperation with the Department of Health and Social Services (DHSS), to "exercise general supervision" over public and private pre-elementary schools. The bill would delete reference to DHSS, would prohibit licensing of any pre-elementary schools, and would

eliminate authority to supervise the "educational component" of pre-elementary schools operated by a church or other qualifying religious organization.

Section 2 of the bill makes it clear that the system of voluntary accreditation of elementary and secondary schools established by AS 14.07.020(10) does not vest authority in DOE to "license" schools operated by a church or other qualifying religious organization.

Section 3 of the bill adds an exemption from compulsory public school attendance for children who attend an educational program operated by a church or other qualifying organization which meets the requirements set out in sections 4 -- 8 of the bill. The compulsory education statute, AS 14.30.010, which would be amended by sec. 3, currently exempts children who attend private schools which employ certificated teachers, who are tutored by certificated tutors, or who attend private schools in which the average student proficiency is not less than that found in nearby public schools, as measured by national achievement tests.

Sections 4 -- 8 of the bill would amend AS 14.45 to provide a means through which elementary and secondary schools operated by churches or other qualifying religious organizations can become partially exempt from state regulation. The exemption would not extend to laws relating to physical health, fire safety, sanitation, immunization, and physical examinations.

The requirements for exemption are set out in new AS 14.45.030 -- 14.45.040. New AS 14.45.030 requires that the religious school maintain monthly attendance records for each student, operate on a regular schedule for a school year of at least 180 days, and annually report to DOE the number of students in each grade and the school calendar. In addition, the parents of each child must file an annual notice of enrollment, signed by the parent and school administrator, with the local public school superintendent. The religious school most notify the superintendent if the child leaves school. New AS 14.45.035 requires that the religious schools administer at least one nationally standardized test, selected by the school from a list compiled by DOE, to children in grades 1, 3, 6, and 9. The test must measure achievement in English grammar, reading, spelling, and mathematics. The results must be maintained by the school and be made available to the child's parent or guardian and "authorized representatives" of the state. New AS 14.45.040 requires that the religious schools maintain "adequate" student records,

including records of immunizations, physical examinations, testing, and courses taken.

Finally, sec. 9 repeals AS 14.45.020 which authorizes DOE to provide final exam questions and diplomas for eighth graders in private and denominational schools. Apparently, this authority has not been exercised since well before statehood.

In general, SCS CSHB 357(Rls) am S would establish two categories of private schools, those which are operated by a church or other qualifying religious organization and those which are not. This gives rise to the legal question of whether or not the disparate treatment afforded each category is in keeping with the equal protection clauses of the state and federal constitutions.

Although courts have developed separate tests under each, the state and federal constitutions both require that there be reasons for treating these categories of private schools differently. The bill itself does not contain a statement of purpose. However, it has been characterized by supporters as an effort to accommodate the free exercise of religion.

The free exercise of religion is protected by the First Amendment to the United States Constitution and by art. 1, sec. 4, of the Alaska Constitution. Courts have developed a threefold test to determine whether state educational requirements impermissibly limit the free exercise of religion: (1) whether the regulated activity is motivated by and rooted in a legitimate and sincerely held religious beliefs; (2) the degree to which the parties' free exercise of religion has been burdened; and (3) whether the state has a compelling interest in the regulation which justifies the burden. Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972). The focus of this test is on the exercise of religion; "[t]he religious character of an organization does not provide a shield from regulation which no way affects religious beliefs or acts." In re Rabbinical Seminary Netzach Israel Ramailis, 450 F.Supp. 1078, 1081 (E.D. N.Y. 1978).

Unfortunately, the limits of permissible regulation have not been clearly established. On one hand, courts have acknowledged that religious schools combine religious and secular education and have invalidated state regulations which unreasonably interfered with the former. E.g., Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105, reh den 404 U.S. 876, 30 L.Ed.2d 123, 92 S.Ct. 24 (1971); State v. Whisner, 351 N.E.2d 750 (Ohio 1976). On the other hand, courts have acknowledged that

"if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." Board of Education v. Allen, 392 U.S. 236, 247, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968). For example, state regulations requiring certified teachers, a minimum curriculum, and state licensure have been approved. E.g., New Jersey State Board of Higher Education v. Board of Directors of Shelton College, 448 A.2d 988 (N.J. 1982); State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), app. dism. 454 U.S. 803, 70 L.Ed.2d 72, 102 S.Ct. 75 (1982); State v. Shaver, 294 N.W.2d 883 (N.D. 1980). See also Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed.2d 1070, 45 S.Ct. 571 (1925).

This is also an area in which courts may defer to the legislature. In State v. Rivinius, 328 N.W.2d 220, 231 (N.D. 1982), the Supreme Court of North Dakota, after approving a teacher certification requirement, indicated that "[w]e are not implying or intimating that the legislature may not work out a system that will be satisfactory to both sides -- meaning the state and the defendants -- and still accomplish the constitutional mandate." See also West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943).

Because the United States Supreme Court has yet to resolve some of these issues, we cannot state with certainty that SCS CSHB 357(Rls) am S provides protections to religious schools beyond those which are constitutionally required. However, since it precludes various means of regulation which, at least for elementary and secondary schools, have been approved by lower courts, we believe this result to be likely. If this is true, the legislation would fall on equal protection grounds unless other reasons based on actual differences between the two categories of private schools could be found to support it. In addition, it would be subject to challenge as an aid to religion under the establishment clauses of the state and federal constitutions.

It is noteworthy that present regulatory requirements of DOE are minimal and that this bill is based on legislation, enacted in North Carolina in 1972, which has not been challenged in court. N.C. Gen. Stat. § 115-257.1, et seq. (Cum. Supp. 1979). We also acknowledge that substantial arguments can be made in its support. See generally "State Regulation of Private Religious Schools in North Carolina -- A Model Approach," 16 Wake Forest Law Review 405 (1980). Accordingly, we do not believe that veto on constitutional grounds is required.

Except as noted, this bill presents no constitutional or other major legal problems. It is possible, however, that problems of statutory interpretation could arise as DOE attempts to exercise its remaining authority in this area.

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:THR:jal

To: Legislators and interested others
From: League of Women Voters, AAUW (American Association of University Women), NAEYC (National Association for the Education of Young Children), the Alaska Women's Lobby

Re: SB 354, HB 514 An Act relating to the regulation of private schools.

Requesting: An ammendment defining the term "pre-elementary school" in Sec. 2. AS 14.07.020. (8)..."pre-elementary schools is this paragraph means schools for children ages three through five years when the schools' primary function is educational and the program operates for four or fewer hours per day."

Problem: Without this ammendment a loophole is created in Alaska statute that permits any program offering care to children up to 10 hours or more a day to exempt itself from health and safety regulations governing all Alaskan day care centers - even though that program is not functionally different from a day care program.

Issues: (1) Education of pre-elementary children is different than the academic emphasis of elementary education, due to shorter attention spans and the need for more physical movement.

(2) All quality childcare programs at the pre-elementary level have educational components which include teaching basic life skills including self-sufficiency, socialization, and basic cognitive skills. Based on content there is no functional difference between a full day "pre-school" and a good day care center.

(3) When a young child is in care for all day every day, the program ceases to be solely a "school" and must include attention to nutritional needs, health of the staff, supervision with at least one staff person to 10 pre-schoolers so that the staff can attempt to meet the individual needs of each child, and enough space to meet the needs to be physically active.

(4) Most legitimate pre-schools operate from two and a half to four hours a day. Even kindergarten limits 6 year olds to two and a half to three hours. Elementary and high school kids attend only 6 hours, yet we permit a three year old to attend "school" 10 hours a day!

For more information call:

L.W.V.	Paula Ziegler	586-9439/586-2660(h)
AAUW	Susan R. Clark	586-6952
NAEYC	Marjorie Fields	789-4408/789-0109(h)
Ak. W.L.	Jana Varnati	364-3487(h)

BILL SHEFFIELD, GOVERNOR

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PHONE: (907) 452-1568

☒ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99801
PHONE: (907) 465-3600

465-3603

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 10, 1984

The Honorable Mae Tischer
Alaska State House
Pouch V
Juneau, AK 99811

Re: HCS CSSB 354 (Rules)

Dear Representative Tischer:

You have asked that this office review the constitutionality of proposed HCS CSSB 354 (Rules).

We believe that proposed HCS CSSB 354 (Rules) presents no significant constitutional problems. For a discussion of relevant constitutional principles, please refer to our July 19, 1983, review of SCS CSHB 357 (Rules) am S.

Please let us know if you have further questions in this regard.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Thomas H. Robertson
Assistant Attorney General

THR:jca

03-C5LH

July 19, 1983

x

The Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Re: SCS CSHB 357(Rls) am S -- state regulation of religious schools
Our file: 388-095-83

Dear Governor Sheffield:

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Sincerely,

Norman C. Gorsuch
Attorney General

NCG:THR:jal

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

February 22, 1984

SENATE BILL 354
MEMBER'S FLOOR FILE
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IV. Attorney General's Opinion on HCS CSSB 354 (Rules)

V. AS 14.07.010 - 14.07.020 (Department of Education)

VI. AS 18.70.010 - 18.70.300 (State Fire Marshall)

/wtl

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

MEMORANDUM February 16, 1984

SUBJECT: Sectional analysis of HCS CSSB 354 (Rules)

TO: Representative Mae Tischer
Chairman, House HESS Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested a sectional analysis of HCS CSSB 354 (Rules), "An Act relating to the regulation of private schools." The main thrust of the bill is to allow religious and other private schools to opt out of the general laws and regulations applicable to private schools if they agree to comply with certain minimal requirements.

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion while at the same time ensuring the quality of all education in the state and allowing diversity in education by encouraging private education.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). It provides that the department will consult with the state fire marshall and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It clarifies that the department must require physical examinations and immunizations in pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is no longer responsible for the general supervision of pre-elementary schools and nurseries except for those pre-elementary schools that receive direct state or federal funding. Supervision over public pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Section 2 also makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is

not authorized to require private schools to be licensed (AS 14.07.020(10)). Finally, section 2 defines "pre-elementary schools" for the purpose of this section (AS 14.07.020(b)).

Section 3 amends the state's compulsory education law (AS 14.30.010) to provide that attendance at a school operating in compliance with AS 14.45 (see section 5, below) satisfies the compulsory education requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. This exemption is only available to religious and other private schools that do not receive state of federal funding and only applies to compulsory school age children. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100).

The parent or guardian of a child of compulsory school age enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the number of students enrolled in each grade and the school calendar (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades four, six, and eight at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the parent or guardian of the student. The school is required to make composite test results available annually to an authorized representative of the

Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the result of which are also public (AS 14.45.120(c)).

The exempt schools are also required to maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school. The administrator of the school must certify under oath or by affirmation to the Department of Education that these records are being maintained (AS 14.45.130). Finally, "religious school," as used in these sections, is defined as a private school operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140), and "private school" is defined as any school that does not receive direct state or federal funding.

It should be kept in mind that these provisions are not mandatory unless the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

KBL:ojb
J3/106

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 11, 1984

SUBJECT: Health and safety regulation of private pre-elementary schools (HCS CSSB 354 (Rules))

TO: Representative Mae Tischer
Chairman, House HESS Committee

FROM: Keith B. Levy
Legislative Counsel

You have requested an opinion on the implication of HCS CSSB 354 (Rules) with respect to health and safety regulation of private pre-elementary schools. The bill, while removing the supervision of private pre-elementary schools from the Department of Education, in no way removes the power of the Department of Public Safety to regulate these schools with respect to fire safety or the Department of Health and Social Services to regulate with respect to health standards. In fact, several sections in the bill as well as other provisions of law make it clear that private pre-elementary schools may be regulated with respect to health and safety.

To begin with, AS 14.07.020(7), as amended by section 2 of the bill, provides that the Department of Education shall:

> prescribe by regulation, after consultation with the state fire marshal and the state sanitarian, standards that will assure healthful and safe conditions in the public and private schools of the state including a requirement of physical examinations and immunizations in pre-elementary schools.

That section applies general health and safety standards to all the public and private schools in the state, including the pre-elementary schools. It also imposes a specific requirement of physical examinations and immunizations on pre-elementary schools. In other words, all pre-elementary

schools are subject to health and safety regulations generally under the bill.

Moreover, Title 18 of the Alaska Statutes sets out provisions for health and safety, all of which, if appropriate, apply to pre-elementary schools unless some specific exemption exists. There is no such exemption in HCS CSSB 354 (Rules). Specifically, AS 18.70.080 provides for the Department of Public Safety to adopt regulations for fire safety applicable to all public buildings. "Buildings" is defined very broadly in AS 18.70.300 and would clearly apply to pre-elementary schools.

In conclusion, HCS CSSB 354 (Rules), while providing that private pre-elementary schools are no longer subject to general regulation by the Department of Education, has no effect on the ability of that department and other departments to regulate these schools with respect to health and safety.

KBL:ojb
J3/079

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 16, 1984

SUBJECT: Regulation of private schools: comparison of HCS CSSB 354 (Rules) with CSSB 354 (Jud) am

TO: Representative Mae Tischer
Chairman, Health, Education, and
Social Services Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested a comparison of CSSB 354 (Jud)am, the Senate version, with HCS CSSB 354 (Rules), the House version of an act relating to the regulation of private schools. The House and Senate versions are essentially the same, with only a few substantive differences. The two bills differ as follows:

(1) In the Senate version, AS 14.07.020(7) is amended to clarify the fact that the Department of Education may regulate health and safety standards in all public and private schools, including certain specific requirements in "private pre-elementary" schools. In the House version, the word "private" is removed. This is merely a technical change since under either version the department would have this power with respect to both public and private pre-elementary schools. In other words, it does not alter the department's statutory powers in this regard.

(2) The Senate version amends AS 14.07.020(8) to provide that the Department of Education has general supervision over public pre-elementary schools and those private pre-elementary schools "that are not in facilities associated with an elementary school that operates grades one through three." The House version differs in that it gives this general supervisory power to the department only with respect to pre-elementary

schools "that receive direct state or federal funding." In other words, the House version limits the department's general supervisory powers to public pre-elementary schools, and any pre-elementary school that receives money from the state or federal government.

(3) The House version removes the definition of "pre-elementary school" from AS 14.07.020(8) and places it in a new subsection (b), having the effect of applying the definition to the entire section. This is not a substantive change, but merely clarifies the fact that the definition applies throughout AS 14.07.020.

(4) The Senate version provides that the exemption provided for in AS 14.45, added by the bill, does not apply to "a facility which serves children under the age of six years and which receives state payments or subsidies" (AS 14.45.100). That sentence was removed from the House version. For several reasons, however, that sentence had no real substantive effect. To begin with, the exemption provided for in AS 14.45.100 applies only to children of compulsory school age, i.e., from 7 to 16 years of age (see AS 14.45.110). Thus, the exemption could not apply to children under the age of six. Moreover, the House version adds a definition of "private school" under AS 14.45, indicating that a private school is one that does not receive direct state or federal funding (AS 14.45.140(1)). Thus, the exemption could not apply to a school that receives government money anyway. Therefore, the removal of the second sentence of AS 14.45.100 in the House version has no substantive effect with respect to the Senate version.

(5) The Senate version requires standardized testing of certain schools for students enrolled in grades two, four, six, and ten (AS 14.45.120(a)). The House version changes the requirement to apply to students in grades four, six, and eight.

(6) The Senate version requires the chief administrative officer of certain private schools to certify that records are being maintained. The House version makes clear that this certification must be made to the Department of Education.

KBL:ojb
J3/102

Effect of amendments. — The 1979 amendment substituted "or offense specified in AS 18.67.101" for "specified in AS 18.67.100" in paragraph (5).

Chapter 70. Fire Protection.

Article
1. Prevention and Investigation (§§ 18.70.010 — 18.70.100)
2. Fire Escapes (Repealed)
3. Mutual Fire Aid Agreements (§§ 18.70.150 — 18.70.160)
4. General Provisions (§ 18.70.300)

Article 1. Prevention and Investigation.

Section
10. General function of Department of Public Safety with respect to fire protection
20. Duties of Department of Public Safety
30. Investigation of fires resulting from crime
40. Cooperation with fire insurance companies
50. Power of department to inspect buildings
60. Removal of property from fire
70. Abatement of fire hazards
75. Authority of municipal fire department officers and their personnel
80. Regulations
81. Approval of fire protection systems
82. Remote housing facilities
84. Standard fire hose and hydrant threads required
85. Sale of nonstandard equipment
90. Enforcement of regulations
95. Smoke detection devices
100. Violation

Collateral references. — 13 Am. Jur. 2d, Buildings, §§ 18-28, 35 Am. Jur. 2d, Fires, §§ 1-4.

39A C.J.S., Fires, §§ 15-18; 39A C.J.S., Health and Environment, §§ 28, 29, 47.

Fire department as pertaining to the governmental or to the proprietary branch of municipality. 9 A.L.R. 143, 33 A.L.R. 686; 84 A.L.R. 514.

Duty and liability of owner or occupant of premises to fireman or policeman coming thereon in discharge of his duty. 13 A.L.R. C37, 86 A.L.R.2d 1205.

Police power as authorizing statute imposing upon owner or occupant liability for expense of fighting fire starting on his land or property. 90 A.L.R.2d 876.

Liability of one negligently causing fire for injuries sustained by person other than firefighter in attempt to control fire or to save life or property. 91 A.L.R.3d 1202.

Sec. 18.70.010. General function of Department of Public Safety with respect to fire protection. The Department of Public Safety shall foster, promote, regulate, and develop ways and means of protecting life and property against fire, explosion, and panic. (§ 1 ch 66 SLA 1955)

NOTES TO DECISIONS

Common-law duty to take action concerning fire hazards after inspection. — Whether or not the state had a statutory duty to take action concerning hazards discovered at a hotel, where the state fire officials undertook to inspect a hotel for fire hazards, and in doing so they discovered a series of conditions constituting an "extreme life hazard," and there was evidence that they discussed some of these hazards with the manager of the hotel, promised him a more formal notification of fire code violations, and took no further action, the state fire officials had a duty to proceed further with regard to the recognized hazards, since the state assumed a common-law duty, owed to the victims of the fire, by its affirmative conduct. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Where the state had not undertaken to inspect a hotel and eliminate the fire hazards, it did not assume any common law duty. State v. Jennings, Sup. Ct. Op. No. 1319 (File Nos. 2322, 2423), 555 P.2d 248 (1976).

Duty to exercise reasonable care in conducting inspections. — Once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and liability will attach where there is a negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

What constitutes reasonable care will vary with the circumstances and hazards involved. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Sec. 18.70.020. Duties of Department of Public Safety. The Department of Public Safety shall aid in the enforcement of all laws and ordinances and the rules and regulations adopted under AS 18.70.010 — 18.70.100 and all other laws relating to fires or to fire prevention and protection, and shall encourage the adoption of fire prevention measures by means of education, and shall prepare or have prepared for dissemination information relating to the subject of fire prevention and extinguishment. (§ 2 ch 66 SLA 1955)

NOTES TO DECISIONS

Common-law duty to take action concerning fire hazards after inspection. — *See* note to AS 18.70.010.

Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Sec. 18.70.030. Investigation of fires resulting from crime. If there is reason to believe that a fire has resulted from crime or that a crime has been committed in connection with a fire, the Department of Public Safety shall report that fact in writing to the district attorney of the judicial district in which the fire occurred. If the fire occurred in an incorporated city with a regularly organized fire department, the investigation and report shall be made in conjunction with the fire official of that area. (§ 3 ch 66 SLA 1955)

Sec. 18.70.040. Cooperation with fire insurance companies. The Department of Public Safety may assist, receive assistance from, and otherwise cooperate with an investigator or agent employed by a fire insurance company licensed to do business in the state, or with an investigator or agent employed by an association of insurance companies licensed to do business in the state. (§ 4 ch 66 SLA 1955)

Sec. 18.70.050. Power of department to inspect buildings. The Department of Public Safety may enter any building subject to regulation under AS 18.70.080 during reasonable hours for the sole purpose of inspecting the property or abating a fire hazard. (§ 5 ch 66 SLA 1955; am § 3 ch 176 SLA 1968)

NOTES TO DECISIONS

Purpose of fire inspection is to protect life and property from fire. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Common-law duty to take action concerning fire hazards after inspection. — See note to AS 18.70.010. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Fire inspector must obtain warrant. — Defendant could not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon defendant's locked warehouse. See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

Sec. 18.70.060. Removal of property from fire. During a fire and in the absence of the owner or claimant, the Department of Public Safety may protect personal property affected by removing it. If the owner or claimant does not take charge of the property within 24 hours the Department of Public Safety may store it at the owner's or claimant's expense. (§ 1 ch 66 SLA 1955)

Sec. 18.70.070. Abatement of fire hazards. The Department of Public Safety may require the owner of a commercial business or public property to abate a fire hazard which exists in violation of law or regulations, and the Department of Public Safety may take appropriate action to assure such abatement. (§ 7 ch 66 SLA 1955)

NOTES TO DECISIONS

Common-law duty to take action concerning fire hazards after inspection. — See note to AS 18.70.010. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Sec. 18.70.075. Authority of municipal fire department officers and their personnel. (a) An officer of a municipal fire department or his authorized representative, while providing fire protection services, has the authority to

(1) control and direct activities at the fire;

(2) order a person to leave a building or place in the vicinity of the fire, for the purpose of protecting the person from injury;

(3) blockade a public highway, street, or private right-of-way temporarily while at a fire;

(4) trespass upon property at or near the scene of a fire at any time of the day or night;

(5) enter a building, including a private dwelling, or upon premises where a fire is in progress, or where there is reasonable cause to believe a fire is in progress, for the purpose of extinguishing the fire;

(6) enter a building, including a private dwelling, or premises near the scene of the fire for the purpose of protecting the building or premises or for the purpose of extinguishing the fire which is in progress in another building or premises;

(7) upon 24-hour notice to the owner or occupant, inspect for preplanning all buildings, structures, or other places within the municipality, except the interior of a private dwelling, where combustible material is or may become dangerous as a fire menace to the building;

(8) direct the removal or destruction of a fence, house, motor vehicle, or other thing which he may judge necessary to remove or destroy to prevent the further spread of the fire.

(b) An owner or occupant of a building or place specified in this section or any other person on the site of a fire or other emergency who refuses to obey the order of an officer of a municipal fire department or his authorized representative in the exercise of his official duties is guilty of a misdemeanor, and upon conviction, is punishable by imprisonment for one year, or by a fine of not more than $1,000, or by both.

(c) In this section, "inspect for preplanning" means to conduct limited inspections for purposes of preparing a fire attack plan in the event of a future emergency, but does not include inspections for purposes of determining compliance with statutory or municipal fire code requirements. (§ 2 ch 215 SLA 1975)

Sec. 18.70.080. Regulations. The Department of Public Safety shall adopt rules and regulations for the purpose of protecting life and property from fire and explosion by establishing minimum standards for

(1) fire detection and suppression equipment;

(2) fire and life safety criteria in commercial, industrial, business, institutional or other public building, and buildings used for residential purposes containing four or more dwelling units;

(3) any activity in which combustible or explosive materials are stored or handled in commercial quantities;

(4) conditions or activities carried on outside a building described in (2) or (3) of this section likely to cause injury to persons or property. (§ 8 ch 66 SLA 1955; am §§ 1, 2 ch 176 SLA 1968; am § 1 ch 23 SLA 1971)

NOTES TO DECISIONS

Common-law duty to take action concerning fire hazards after inspection. — See note to AS 18.70.010. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 235 (1976).

Sec. 18.70.081. Approval of fire protection systems. Before October 30 of each year the Department of Public Safety shall prepare and make available a list of approved fire protection systems to the Department of Community and Regional Affairs, the Department of Commerce and Economic Development, and the public. (§ 1 ch 46 SLA 1980)

Sec. 18.70.082. Remote housing facilities. Any construction camp, logging camp, cannery, or oil or mining camp that has buildings not in a fire department service area in which persons are housed in dormitories or similar facilities shall be equipped with an automatic fire detection system in that portion of the building used for living or sleeping purposes. In this chapter an automatic fire detection system means a type of automatic fire detection system approved by the state fire marshal. (§ 1 ch 65 SLA 1970)

Sec. 18.70.084. Standard fire hose and hydrant threads required. All fire protection equipment to be purchased by state and municipal authorities, or any other authority having charge of public property, shall be equipped with national standard fire hose threads for fire hose couplings and hydrant fittings as adopted by the state fire marshal under AS 18.70.080. (§ 1 ch 48 SLA 1970)

Sec. 18.70.085. Sale of nonstandard equipment. No person may sell or offer for sale in Alaska any fire engine, fire hose, hydrant, or other equipment for fire protection purposes unless the equipment is fitted and equipped according to minimum standards adopted by the state fire marshal under AS 18.70.080. Fire equipment for special purposes or research programs, or special features of fire protection equipment found appropriate for uniformity within a particular protection area, may be exempted from this requirement by the state fire marshal. (§ 1 ch 48 SLA 1970)

Sec. 18.70.090. Enforcement of regulations. The Department of Public Safety and the chief of each city fire department and their authorized representatives in their respective areas may enforce the regulations adopted by the Department of Public Safety for the prevention of fire or for the protection of life and property against fire or panic. All state peace officers may assist the Department of Public Safety in the enforcement of AS 18.70.010 — 18.70.100 and the regulations adopted under it. The authority conferred in AS 18.70.010 — 18.70.100 extends to the enforcement of the provisions of AS 11.46.400 — 11.46.430. (§ 9 ch 66 SLA 1955; am § 8 ch 117 SLA 1968; am § 20 ch 166 SLA 1978)

Effect of amendments. — The 1978 amendment deleted "rules and" preceding "regulations" in the first and second sentences and substituted "AS 11.46.400 — 11.46.430" for "AS 11.20.010 — 11.20.050, and 11.20.070" at the end of the third sentence.

NOTES TO DECISIONS

City fire chief can enforce standards without delegation by state fire marshal. — The language of this section would indicate that the fire chief in each city can enforce state fire standards independently of any delegation by the state fire marshal's office. State v. Jennings, Sup. Ct. Op. No. 1319 (File Nos. 2322, 2420, 555 P.2d 248 (1976).

State not liable for city's negligence. — Where the state fire marshal's office, in accordance with its policy, had deferred to the city's fire prevention agency for the purposes of fire prevention and inspection within the city limits, and, thus, the state fire marshal referred complaints about the hotel to the city fire marshal for action; and the city conducted inspection and initiated enforcement, there is no principal-agent relationship between the state and the city which would justify holding the state vicariously liable for the city's negligence. State v. Jennings, Sup. Ct. Op. No. 1319 (File Nos. 2322, 2420, 555 P.2d 248 (1976).

Common-law duty to take action concerning fire hazards after inspection. — See note to AS 18.70.010. Adams v. State, Sup. Ct. Op. No. 1318 (File No. 2326), 555 P.2d 245 (1976).

Collateral references. — Power to require closing of place of amusement or other place of public assembly because of fire hazard or unsanitary conditions. 140 A.L.R. 1048.

Destruction of building in emergency. 14 A.L.R.2d 78.

Sec. 18.70.095. Smoke detection devices. Smoke detection devices shall be installed in all living units built, manufactured or sold in the state. The devices shall be of a type and deployed in a manner approved by the state fire marshal. (§ 1 ch 148 SLA 1975)

NOTES TO DECISIONS

Applied in Northern Lights Motel, Inc. v. Sweeney, Sup. Ct. Op. No. 1386 (File No. 2476), 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (1977).

Sec. 18.70.100. Violation. (a) A person who violates any provision of AS 18.70.010 — 18.70.100 or the published rules and regulations or orders adopted under it from which no appeal has been taken within 30 days after the issuance of a final order is, severally, for each violation, guilty of a misdemeanor, and is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both. A person aggrieved by a final order of the Department of Public Safety may appeal to the superior court within 30 days after the issuance of the order. The imposition of one penalty for a violation does not excuse the violation and a person guilty of a violation shall correct the violation within a reasonable time. When not otherwise specified, each 10 days that a prohibited condition is maintained is a separate offense.

(b) The application of the penalty prescribed in (a) of this section does not prevent the Department of Public Safety from enforcing the removal of the prohibited conditions. (§ 10 ch 66 SLA 1955; added by § 1 ch 113 SLA 1957)

Collateral references. — Giving false fire alarm by telephone as minor criminal offense. 97 A.L.R.2d 510.

Article 2. Fire Escapes.

Section
110—140 [Repealed]

Secs. 18.70.110 — 18.70.140.

Repealed by § 2 ch 23 SLA 1971.

Editor's notes. — The repealed article derived from § 40-4-1, ACLA 1949 to § 40-4-3, ACLA 1949; § 40-4-6, ACLA 1949.

Article 3. Mutual Fire Aid Agreements.

Section
150 Adoption of mutual fire aid agreements
160 Agreement not to affect insurance rates or liability

Collateral references. — 35 Am. Jur. 2d, Fires, §§ 1-4.

36A C.J.S., Fires, §§ 15, 16

Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense. 8 A.L.R. 1628.

Fire department as pertaining to the governmental or to the proprietary branch of municipality. 9 A.L.R. 143; 33 A.L.R. 688; 84 A.L.R. 614.

Statute relating to municipal fire departments as interference with local self government. 100 A.L.R. 1076; 141 A.L.R. 903.

Police power as authorizing statute imposing upon owner or occupant liability for expense of fighting fire starting on his land or property. 90 A.L.R.2d 875.

Sec. 18.70.150. Adoption of mutual fire aid agreements. A city, other incorporated entity, and other fire protection groups may organize a mutual-aid program by adopting an ordinance or resolution authorizing and permitting their fire department, fire company, emergency relief squad, fire police squad or fire patrol to go to the aid of another city, incorporated entity, or fire protection group, or territory outside of it. While extending aid under AS 18.70.150 and 18.70.160 the fire department, company, squad, or patrol has the same privileges and immunities it possesses when it performs the same functions in its own area. The ordinance or resolution may authorize the heads of the fire department to extend aid, subject to conditions and restrictions prescribed in the ordinance or resolution. (§ 1 ch 92 SLA 1957)

NOTES TO DECISIONS

This section represents an erroneous belief that cities are not liable in tort for negligence connected with fire-fighting activities. City of Fairbanks v. Schaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962).

As a city which maintains a fire department may be held liable for injuries resulting from negligence connected with the department's firefighting activities. City of Fairbanks v. Schaible, Sup. Ct. Op. No. 97 (File Nos. 112, 113), 375 P.2d 201 (1962). See contra: City of Fairbanks v. Gillettson, 16 Alaska 590 (1957), aff'd, 262 F.2d 734 (9th Cir. 1959), where § 56-2-2 ACLA 1949 (now AS 09.65.070) was ignored by both the district court and the Court of Appeals.

Collateral references. — Fire departments as pertaining to the governmental or to the proprietary branch of municipality. 9 A.L.R. 143; 33 A.L.R. 688; 84 A.L.R. 614.

Sec. 18.70.160. Agreement not to affect insurance rates or liability. An agreement made under AS 18.70.150 and 18.70.160 shall be carried out in a manner which does not raise insurance rates. An agreement may not reduce the liability of an insurance company in case of loss during the absence of men and equipment. (§ 1 ch 92 SLA 1957)

Article 4. General Provisions.

Section
300 Definition of building

Sec. 18.70.300. Definition of building. In this chapter "building" means a structure, installation, facility, or edifice erected or in the process of being erected and which is used or intended for use as a commercial, industrial, business, institutional, other public building, or residential building containing four or more dwelling units. (§ 4 ch 176 SLA 1968; am § 27 ch 32 SLA 1971)

Revisor's notes. — In ch. 176, SLA 1968, this section was numbered 18.70.165.

Chapter 72. State Regulation of Fireworks.

Section
10 Regulation of sale of dangerous fireworks
20 Regulation of sale of salable fireworks
30 Fireworks wholesaler's license
40 Violation
50 Definitions
60 Application of chapter

Collateral references. — 68 Am. Jur. 2d Schools, §§ 5-7, 37-55.
78 C.J.S. Schools and School Districts, §§ 83-91.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

Sec. 14.07.010. Department of Education. The Department of Education includes the commissioner of education, the state Board of Education, and the staff necessary to carry out the functions of the department. (§ 1 ch 98 SLA 1966)

NOTES TO DECISIONS

Quoted in Begich v. Jefferson, Sup. Ct. Op. No. 481 (File No. 894), 441 P.2d 27 (1968).

Cited in Tunley v. Municipality of Anchorage School Dist., Sup. Ct. Op. No. 2160 (File Nos. 4796, 4797, 4826), 617 P.2d 490 (1980).

Sec. 14.07.020. Duties of the department. The department shall

(1) exercise general supervision over the public schools of the state except the University of Alaska;

(2) study the conditions and needs of the public schools of the state and adopt or recommend plans for the improvement of the public schools;

(3) provide advisory and consultative services to all public school governing bodies and personnel;

(4) prescribe by regulation a minimum course of study for the public schools;

(5) establish, in coordination with the Department of Health and Social Services, a program for the continuing education of children who are held in detention facilities in the state during the period of detention;

(6) accredit those public schools which meet accreditation standards prescribed by regulation by the department; these regulations shall be adopted by the department and presented to the legislature during the first 10 days of any regular session, and become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house;

(7) prescribe by regulation, after consultation with the Department of Health and Social Services, standards that will assure healthful and safe conditions in the public and private schools of the state; the standards for private schools may not be more stringent than those for public schools;

(8) in cooperation with the Department of Health and Social Services, exercise general supervision over public and private pre-elementary schools and over the educational component of nurseries as defined in AS 47.35.080(4); pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

(9) provide accredited elementary and secondary correspondence study programs available to any Alaskan through a centralized office of correspondence study;

(10) accredit private elementary and secondary schools which request accreditation and which meet accreditation standards prescribed by regulation by the department;

(11) review plans for construction of new public elementary and secondary schools and for additions to and major rehabilitation of existing public elementary and secondary schools and, in accordance with regulations adopted by the department, determine and approve the extent of eligibility for state aid of a school construction project begun after July 1, 1978; for the purposes of this paragraph, "plans" include educational specifications, schematic designs, and final contract documents;

(12) provide educational opportunities in the areas of vocational education and training, basic education, and fire-service training to individuals over 16 years of age who are no longer attending school;

(13) administer the grants awarded under AS 14.11.020. (§ 1 ch 98 SLA 1966; am § 2 ch 69 SLA 1971; am § 6 ch 104 SLA 1971; am § 1 ch 190 SLA 1975; am § 6 ch 50 SLA 1977; am §§ 1-3 ch 126 SLA 1978; am § 10 ch 147 SLA 1978; am § 1 ch 86 SLA 1979; am § 24 ch 59 SLA 1982; §§ 1, 2 ch 92 SLA 1982)

Revisor's notes. — A reference to AS 14.11.020 was substituted for a reference to AS 14.07.190 in paragraph (13) by the revisor of statutes under AS 01.05.031 to conform to the renumbering of that section.

Effect of amendments. — The first 1978 amendment deleted "private, and denominational" preceding "schools" near the beginning of paragraph (6), inserted "and private" preceding "schools" in paragraph (7), added the langunge beginning "the standards for private schools" to the end of paragraph (7), and added paragraph (10).

The second 1978 amendment added paragraph (11).

The 1979 amendment added paragraph (12).

The first 1982 amendment substituted "of" for "and" preceding "new public elementary" in paragraph (11).

The second 1982 amendment substituted "'plans' include" for "a 'plan' includes" in paragraph (11), inserted "and approve" and "the" preceding "purposes of this paragraph" in that same paragraph, and added paragraph (13).

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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465-3603

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 6, 1984

The Honorable Mae Tischer
Alaska State House
Pouch V
Juneau, AK 99811

Re: HCS CSSB 354 (HESS)

Dear Representative Tischer:

You have asked whether HCS CSSB 354 (HESS) presents legal problems.

The line between legal issues and policy issues is often unclear in controversial areas of the law. We have reviewed HCS CSSB 354 (HESS) with an eye toward the former. Accordingly, we express no view on the overall wisdom of this legislation.

HCS CSSB 354 (HESS) is structurally similar to CSHB 514 (HESS) which we addressed in our letter to you of January 23, 1984. Each bill avoids the equal protection problems which we identified during our review of SCS CSHB 357 (RIs) am S.

Although we believe that HCS CSSB 354 (HESS) presents no significant constitutional problems, there are at least two questions of statutory interpretation which could arise as this legislation is implemented.

The first question is whether the definition of pre-elementary school contained in proposed AS 14.07.020(8) adequately distinguishes between pre-elementary education and child care. We are informed that these categories are factually very similar. Child care is subject to regulation by the Department of Health and Social Services under AS 47.35.

The second question concerns the meaning of the second sentence of proposed AS 14.45.100. This sentence states that certain private pre-elementary schools are not eligible for the general exemption from state regulation contained in the first sentence of AS 14.45.100. However, this exception appears to be

superfluous since, as a result of changes made in AS 14.07.020, regulation of private pre-elementary schools would be limited to health and safety matters which the first sentence of AS 14.45.100 does not affect.

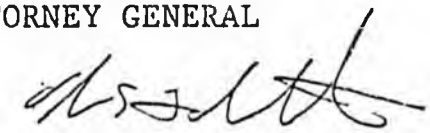
It appears that the second sentence of proposed AS 14.45.100 is intended, in part, to assure that the exemption is not available to private schools which receive public funds. If this is the case, an issue arises as to why it is limited to facilities which serve children under six years of age. We suggest that you consider deleting the phrase "which serves children under the age of six years and" or, alternatively, deleting this sentence in its entirety and adding to proposed AS 14.45.140 a definition of "private school" which addresses this issue.

We note that the addition of a definition of "private school" to AS 14.45.140 could also be used to limit coverage of AS 14.45 to elementary and secondary schools. This seems to be the intent of language which was added to proposed AS 14.45.110(a), the effect of which is limited to that subsection. As we have indicated, coverage of pre-elementary schools seems unnecessary since agency authority to regulate them is restricted by changes made in proposed AS 14.07.020.

We have previously discussed each of these questions with your staff. If you have additional questions, please do not hesitate to contact this office.

Very truly yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
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THR:jal

Alaska State Legislature

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House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

TO: Representative Mae Tischer
FROM: Bill Lovell, Staff
DATE: February 20, 1984

RE: Comparison of HCS CSSB 354 (HESS) and HCS CSSB 354 (Rules)

I have prepared the following comparison of the HESS Committee version and the Rules Committee version of a House Committee Substitute for Committee Substitute for Senate Bill 354, "[a]n Act relating to the regulation of private schools."

Section 1 of the House Rules Committee Substitute contains no variations from the House HESS version.

Section 2 of the House Rules Committee Substitute contains six variations from the House HESS version. On the page and line(s) indicated, the House Rules Committee Substitute makes the following changes:

Page 1, line 22, creates a new subsection (a), including language currently in AS 14.07.020, except for the repositioning of the definition of "pre-elementary schools" and other changes indicated below. This change is only technical, allowing the definition of "pre-elementary schools" to be included in a new subsection (b) described below.

Page 2, line 19, deletes "private" before the phrase "pre-elementary schools" on lines 19 and 20. This change is basically technical. Since the law already mandates that standards for private schools may not be more stringent than those for public schools, it follows that similar physical examinations and immunizations must be required of both public and private pre-elementary schools. Deleting the word "private," as indicated above, clarifies this intent.

Page 2, line 23, deletes "public" after the phrase "supervision over." This change becomes basically technical when taken in conjunction with the next change in this paragraph as explained on page 2 of this analysis.

Page 2, line 24, inserts "that receive direct state or federal funding" after the phrase "pre-elementary schools." This change extends Department of Education supervisory authority to include, not only public pre-elementary schools, but all pre-elementary schools, public or private, that receive any direct state or federal funding.

Page 2, lines 26 - 28, deletes the definition of "pre-elementary schools." This definition is contained substantively in the new subsection (b) below.

Page 3, lines 21 - 23, creates a new subsection (b) that includes the definition of "pre-elementary schools" previously contained substantively in AS 14.07.020 (8), except that the definition in (b) now applies to all of AS 14.07.020, where it had previously applied only to paragraph (8).

Section 3 of the House Rules Committee Substitute contains no variations from the House HESS version.

Section 4 of the House Rules Committee Substitute contains no variations from the House HESS version.

Section 5 of the House Rules Committee Substitute contains two variations from the House HESS version. On the page and line(s) indicated, the House Rules Committee Substitute makes the following changes:

Page 5, line 25, deletes "A facility that serves children under the age of six years and receives state payments is not eligible for the exemption provided by this section." In his review of the House HESS Committee Substitute for CSSB 354, Assistant Attorney General Rick Robertson advised that the sentence indicated above was ambiguous and should be substantively modified, or deleted with subsequent changes to other related sections of the bill. Briefly, Mr. Robertson noted that the bill did not at that time authorize the Department of Education to supervise any private pre-elementary schools, beyond basic health and safety; therefore, there were no regulations from which private pre-elementary schools could be exempt. The Rules Committee Substitute deletes the indicated statement; adds a new definition of private schools which prohibits exemption by pre-elementary schools that receive direct state or federal funding; and explicitly extends Department of Education authority to include pre-elementary schools that receive direct state or federal funding.

Page 7, lines 18 - 19, inserts a definition of "private school"

for these sections. This definition effectively prohibits a school that receives any direct state or federal funding from being exempt from Department of Education regulation. The addition of this definition requires the drafter to put the definition of "private school" into a new paragraph (1) and the definition of "religious school," also contained in the House HESS version, into a new paragraph (2).

A copy of the Rules Committee Substitute with highlighted changes is being provided to each interested member of the House.

WTL:cas

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

TO: Representative Mae Tischer
FROM: Bill Lovell, Staff
DATE: February 20, 1984

RE: Analysis of HCS CSSB 354 (Rules)

I have worked with Keith Levy of the Division of Legal Services to prepare the following analysis of the House Rules Committee Substitute for Committee Substitute for Senate Bill 354, "[a]n Act relating to the regulation of private schools."

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion or with the right of parents to choose to have their children attend private schools while at the same time ensuring the quality of all education in the state and encouraging diversity in education.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). The bill creates a new subsection (a) in the law, including language currently in AS 14.07.020, except for the repositioning of the definition of "pre-elementary schools" and other changes indicated below. New language provides that the department will consult with the state fire marshal and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It states that the department must require physical examinations and immunizations in pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is authorized to supervision only those pre-elementary schools which receive direct state or federal funding. Supervision of pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Finally, section 2 makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is not authorized to require private schools to be licensed (AS 14.07.020(10)). A new subsection (b) defines pre-elementary schools, as used in this section, as schools for children ages three through five years when the schools are primarily educational in purpose.

Section 3 amends the state's compulsory education law (AS 14.30.010) to provide that attendance at a school operating in compliance with AS

14.45 (see section 5 below) satisfies compulsory attendance requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100).

The parent or guardian of a child of compulsory school age enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the school calendar and the number of students enrolled in each grade (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades four, six, and eight at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the tested student's parent or guardian. The school is required to make composite test results available annually to an authorized representative of the Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the results of which are also public information (AS 14.45.120(c)).

The exempt schools are also required to maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school. The administrator of the school must certify to the department, under oath or affirmation, that these records are being maintained (AS 14.45.130). "Private school," as used in these sections, is defined as a school that does not receive direct state or federal funding. (AS 14.45.140 (1)). Finally, "religious school," as used in these sections, is defined as a private school operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140(2)).

It should be kept in mind that these provisions are not mandatory unless

the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

KBL:WTL:cas

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

TO: All Members of the House
FROM: Representative Mae Tischer
DATE: February 15, 1984

RE: HCS CSSB 354 (Rules)

Attached please find a copy of the House Rules Committee Substitute for Senate Bill 354, "[a]n Act relating to the regulation of private schools."

My staff has done a considerable amount of preparation on this important legislation and I would be more than happy to have them provide you with any back-up material you might need.

For any additional information, please contact the House HESS Committee staff at 465 - 3777.

MMT:wtl

Attachment

DRAFT

13-1739
Levy
1/12/84

IN THE HOUSE BY TISCHER

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of private schools." Purpose clause here

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 14.07.020 is amended to read:

Sec. 14.07.020. DUTIES OF THE DEPARTMENT. The department shall

(1) exercise general supervision over the public schools of the state except the University of Alaska;

(2) study the conditions and needs of the public schools of the state and adopt or recommend plans for the improvement of the public schools;

(3) provide advisory and consultative services to all public school governing bodies and personnel;

(4) prescribe by regulation a minimum course of study for the public schools;

(5) establish, in coordination with the Department of Health and Social Services, a program for the continuing education of children who are held in detention facilities in the state during the period of detention;

(6) accredit those public schools which meet accreditation standards prescribed by regulation by the department; these regulations shall be adopted by the department and presented to the legislature during the first 10 days of any regular session, and become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in

by a majority of the members of each house;

(7) prescribe by regulation, after consultation with the state fire marshal and the state sanitarian [DEPARTMENT OF HEALTH AND SOCIAL SERVICES], standards that will assure healthful and safe conditions in the public and private schools of the state; the standards for private schools may not be more stringent than those for public schools;

(8) [IN COOPERATION WITH THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] exercise general supervision over public [AND PRIVATE] pre-elementary schools [AND OVER THE EDUCATIONAL COMPONENT OF NURSERIES AS DEFINED IN AS 47.35.080(4)]; pre-elementary schools in this section [PARAGRAPH] means schools for children ages three through five years when the schools' primary function is educational;

(9) provide accredited elementary and secondary correspondence study programs available to any Alaskan through a centralized office of correspondence study;

(10) accredit private ~~elementary and secondary~~ schools which request accreditation and which meet accreditation standards prescribed by regulation by the department; nothing in this paragraph authorizes the department to require private ~~sectarian and nonsectarian~~ religious schools to be licensed;

(11) review plans for construction of new public elementary and secondary schools and for additions to and major rehabilitation of existing public elementary and secondary schools and, in accordance with regulations adopted by the department, determine and approve the extent of eligibility for state aid of a school construction project begun after July 1, 1978; for the purposes of this paragraph, "plans" include educational specifications, schematic designs, and final contract documents;

(12) provide educational opportunities in the areas of vocational education and training, basic education, and fire-service training to individuals over 16 years of age who are no longer attending school;

(13) administer the grants awarded under AS 14.11.020;

goes to item (7) (14) require physical examinations and immunizations in private ~~sectarian and nonsectarian~~ pre-elementary schools.

* Sec. 2. AS 14.30.010(b) is amended to read:

(b) This section does not apply if a child

(1) is provided an academic education comparable to that offered by the public schools in the area, either by

(A) attendance at a private school in which the teachers are certificated according to AS 14.20.020;

(B) tutoring by personnel certificated according to AS 14.20.020; [OR]

(C) attendance at a private school in which the average student proficiency is not less than the ~~average~~ proficiency found in the public schools in the area as measured by national achievement tests; the board [DEPARTMENT] with assistance from representatives of the private schools shall adopt [PROMULGATE] regulations defining the subject areas to be tested and the minimum average scores to be achieved; or

Clarify matter (D) attendance at an educational program operated in religious or other compliance with AS 14.45 by a private ~~sectarian or nonsectarian~~ school;

(2) attends a school operated by the federal government;

(3) has a physical or mental condition which a competent medical authority determines will make attendance impractical;

(4) is in the custody of a court or law enforcement

authorities;

(5) is temporarily ill or injured;

(6) has been suspended or denied admittance according to AS 14.30.045;

(7) resides more than two miles from either a public school or a route on which transportation is provided by the school authorities, except that this subsection does not apply if the child resides within two miles of a federal or private school which the child is eligible and able to attend;

(8) is excused by action of the school board of the district at a regular meeting or by the district superintendent subject to approval by the school board of the district at the next regular meeting;

(9) has completed the 12th grade;

(10) is enrolled in a full-time program of correspondence study approved by the department; in those school districts providing an approved correspondence study program, a student may be enrolled either in the district correspondence program or in the centralized correspondence study program;

(11) is equally well-served by an educational experience approved by the school board as serving the child's educational interests despite an absence from school, the request for excuse is made in writing by the child's parents or guardian, and approved by the principal or administrator of the school that the child attends.

* Sec. 3. AS 14.45.030 is amended to read:

Sec. 14.45.030. ATTENDANCE AND ANNUAL REPORTS REQUIRED. (a) Teachers and others in charge of private sectarian ~~or nonsectarian~~ [OR DENOMINATIONAL] schools not operated in compliance with this ~~chapter~~ article are not exempt from laws and regulations relating to education, and

shall make regular monthly attendance reports and annual reports to the commissioner in the same manner as teachers and superintendents in the public schools.

* Sec. 4. AS 14.45 is amended by adding new sections to read:

ARTICLE 2. EXEMPT PRIVATE ~~SECTARIAN~~ Religious SCHOOLS.

Sec. 14.45.100. EXEMPTION. A private ~~sectarian~~ religious school that complies with AS 14.45.100 - 14.45.130 is exempt from other provisions of law and regulations relating to education except law and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations.

Sec. 14.45.110. REQUIREMENTS OF EXEMPT SCHOOLS. (a) The parent or guardian of a child enrolled in a private ~~sectarian~~ Religious school that complies with AS 14.45.100 - 14.45.130 shall file an annual notice of enrollment in the school for the child with the local public school superintendent for the area in which the child resides on a form provided by the department. The form shall be signed by the parent or guardian and the chief administrative officer of the school and returned to the local public school superintendent by the parent or guardian. The school shall notify the local public school superintendent within a reasonable time if the child is no longer enrolled in or attending the school.

(b) A private ~~sectarian~~ Religious school that elects to comply with AS 14.45.100 - 14.45.130 shall maintain monthly attendance records for each student enrolled in the school, shall operate on a regular schedule, excluding reasonable holidays and vacations, during at least 180 days of the year, and shall make an annual report to the commissioner of the number of students in each grade and the school calendar.

Sec. 14.45.120. STANDARDIZED TESTING REQUIREMENTS. (a) A private ~~sectarian~~ religious school that elects to comply with AS 14.45.100 -

14.45.130 shall administer a nationally standardized test selected by the chief administrative officer of the school to all students enrolled in grade; ~~one, three~~ 4, six, and ~~nine~~ 8 at least once each school year.

(b) The nationally standardized test must measure achievement in English grammar, reading, spelling, and mathematics.

(c) A private ~~sectarian~~ religious school that elects to comply with AS 14.45.100 - 14.45.130 shall maintain records of the results of the nationally standardized tests and the records shall be made available to the parent or guardian of the student. Each school shall make composite test results for the school available annually to an authorized representative of the department. The composite test results of a private ~~sectarian~~ or ~~nonsectarian~~ school operated in compliance with this chapter are not public information unless each public school is also required to administer a nationally standardized test Refer to (b) and the composite test results for each public school are public information.

Sec. 14.45.130. RECORDS. A private ~~sectarian~~ school that elects to comply with AS 14.45.100 - 14.45.130 shall maintain student permanent records reflecting immunizations, physical examinations, standardized testing, academic achievement and courses taken at the school. The chief school will certify the records as being kept

ARTICLE 3. EXEMPT PRIVATE NONSECTARIAN SCHOOLS.

Sec. 14.45.150. EXEMPTION. A private nonsectarian school that complies with AS 14.45.150 - 14.45.180 is exempt from other provisions of law and regulations relating to education except law and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations.

Sec. 14.45.160. REQUIREMENTS OF EXEMPT SCHOOLS. (a) The parent or guardian of a child enrolled in a private nonsectarian school that complies with AS 14.45.150 - 14.45.180 shall file an annual notice of

enrollment in the school for the child with the local public school superintendent for the area in which the child resides on a form provided by the department. The form shall be signed by the parent or guardian and the chief administrative officer of the school and returned to the local public school superintendent by the parent or guardian. The school shall notify the local public school superintendent within a reasonable time if the child is no longer enrolled in or attending the school.

(b) A private nonsectarian school that elects to comply with AS 14.45.150 - 14.45.180 shall maintain monthly attendance records for each student enrolled in the school, shall operate on a regular schedule, excluding reasonable holidays and vacations, during at least 180 days of the year, and shall make an annual report to the commissioner of the number of students in each grade and the school calendar.

Sec. 14.45.170. STANDARDIZED TESTING REQUIREMENTS. (a) A private nonsectarian school that elects to comply with AS 14.45.150 - 14.45.180 shall administer a nationally standardized test selected by the chief administrative officer of the school to all students enrolled in grades one, three, six, and nine at least once each school year.

(b) The nationally standardized test must measure achievement in English grammar, reading, spelling, and mathematics.

(c) A private nonsectarian school that elects to comply with AS 14.45.150 - 14.45.180 shall maintain records of the results of the nationally standardized tests and the records shall be made available to the parent or guardian of the student. Each school shall make composite test results for the school available annually to an authorized representative of the department. The composite test results of a private sectarian or nonsectarian school operated in compliance with

this chapter are not public information unless each public school is also required to administer a nationally standardized test and the composite test results for each public school are public information.

Sec. 14.45.180. RECORDS. A private nonsectarian school that elects to comply with AS 14.45.150 - 14.45.180 shall maintain student records reflecting immunizations, physical examinations, standardized testing, and courses taken at the school.

* Sec. 5. AS 44.27.020 is amended to read:

Sec. 44.27.020. DUTIES OF DEPARTMENT. The Department of Education shall

(1) administer the state's program of education at the elementary, secondary, and adult levels, including, but not limited to, programs of vocational education and training, vocational rehabilitation, library services, correspondence courses, adult basic education, and fire-service training, but not including degree programs of postsecondary education or an educational program operated in compliance with AS 14.45 by a private sectarian or nonsectarian school;

(2) administer the historical library;

(3) plan, finance and operate related school and educational activities and facilities.

* Sec. 6. AS 14.45.020 is repealed.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

☒ *POUCH K - STATE CAPITOL*
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

465-3603

January 11, 1984

The Honorable Jan Faiks
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: Sectarian and Nonsectarian Schools

Dear Senator Faiks:

Enclosed, pursuant to your request of this afternoon, is a revision of the draft legislation you provided this office on November 17, 1983. This revision resolves the constitutional issues which we have discussed. I must emphasize, despite the fact that some changes have been made, that our efforts should not be construed as expressing support for this legislation as a matter of policy.

If you have questions in this regard, please do not hesitate to let me know.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Thomas H. Robertson
Assistant Attorney General

THR:jal
Enclosure

03-C5LH

BY _____

IN THE _____

_____ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of private sectarian and nonsectarian schools."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. The purpose of this Act is to eliminate unnecessary state involvement in the affairs of private schools and to protect religious freedom as expressed through affiliation with sectarian educational institutions.

* Sec. 2. AS 14.07.020(7) is amended to read:

DRAFT

(7) prescribe by regulation, after consultation with the State fire marshall + STATE SANITARIAN ~~Department of Health and Social Services~~, standards that will assure healthful and safe conditions in the public and private pre-elementary, elementary, and secondary schools of the state; the standards for private schools may not be more stringent than those for public schools;

* Sec. 3. AS 14.07.020(8) is amended to read:

(8) [IN COOPERATION WITH THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] exercise general supervision over public [AND PRIVATE] pre-elementary schools [AND OVER THE EDUCATIONAL COMPONENT OF NURSERIES AS DEFINED IN AS 47.35.080(4)]; pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

* Sec. 4. AS 14.07.020(10) is amended to read:

(10) accredit private pre-elementary, elementary, and secondary schools which request accreditation and which meet

accreditation standards prescribed by regulation by the department;

* Sec. 5. AS 14.30.010(b)(1) is amended to read:

(1) is provided an academic education comparable to that offered by the public schools in the area, either by

(A) attendance at a private school in which the teachers are certified according to AS 14.20.020;

(B) tutoring by personnel certified according to AS 14.20.020; or

(C) attendance at private sectarian or nonsectarian school operated in compliance with AS 14.45 [ATTENDANCE AT A PRIVATE SCHOOL IN WHICH THE AVERAGE STUDENT PROFICIENCY IS NOT LESS THAN THE AVERAGE PROFICIENCY FOUND IN THE PUBLIC SCHOOLS IN THE AREA AS MEASURED BY NATIONAL ACHIEVEMENT TESTS; THE DEPARTMENT WITH ASSISTANCE FROM REPRESENTATIVES OF THE PRIVATE SCHOOLS SHALL PROMULGATE REGULATIONS DEFINING THE SUBJECT AREAS TO BE TESTED AND THE MINIMUM AVERAGE SCORES TO BE ACHIEVED];

** Sec. 6. AS 14.45.020 ~~and AS 14.45.030~~ are repealed.

* Sec. 7. AS 14.45 is amended by adding new sections to read:

CHAPTER 45. PRIVATE [AND DENOMINATIONAL] SCHOOLS

ARTICLE 1. GENERAL PROVISIONS

Sec. 14.45.030. ATTENDANCE AND ANNUAL REPORTS REQUIRED. Teachers and others in charge of private [OR DENOMINATIONAL] schools shall make regular monthly attendance reports and annual reports to the commissioner in the same manner as teachers and superintendents in the public schools.

* Sec. 8. AS 14.45 is amended by adding new sections to read:

ARTICLE 2. EXEMPT SCHOOLS

Sec. 14.45.100. EXEMPTION FROM EDUCATION LAWS. A private sectarian or nonsectarian school operated in compliance with

AS 14.45.100 -- 14.45.140 is exempt from other provisions of state law and regulations relating to education except laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations.

Sec. 14.45.110. ATTENDANCE REPORTS OF EXEMPT SCHOOLS. (a) The parent or guardian of a child enrolled in a private sectarian or nonsectarian school that elects to comply with AS 14.45.100 -- 14.45.140 shall file with the superintendent of the public school district in which the child resides a notice of enrollment within 30 days after enrollment of the child in the school on a form provided by the department. The form must be signed by the parent and the chief administrative officer of the school.

(b) A private sectarian or nonsectarian school that elects to comply with AS 14.45.100 -- 14.45.140 shall notify the superintendent if the child is no longer enrolled in or attending the school.

CALENDAR(?)

Sec. 14.45.120. PROGRAM REQUIREMENTS OF EXEMPT SCHOOLS. A private sectarian or nonsectarian school that elects to comply with AS 14.45.100 -- 14.45.140 shall operate on a regular schedule, excluding reasonable holidays and vacations, during at least 180 days of the year, and shall report to the department the school calendar and the number of students in each grade within 30 days after the start of each school year.

Sec. 14.45.130. STUDENT RECORDS OF EXEMPT SCHOOLS. (a) A private sectarian or nonsectarian school that elects to comply with AS 14.45.100 -- 14.45.140 shall maintain permanent student records, including records of daily attendance, immunizations, physical examinations, testing, courses taken at the school, and grades received.

(b) Upon reasonable notice the school shall make student records maintained under this section available for inspection by the

department.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

MEMORANDUM

February 6, 1984

SUBJECT: Attorney General's analysis of HCS CSSB 354 (HESS)

TO: Representative Mae Tischer
Chairman, Health, Education, and
Social Services Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested an analysis of a letter from the Attorney General concerning the latest draft of HCS CSSB 354(HESS). The Attorney General's letter indicates that the bill presents no significant constitutional problems, an opinion with which I agree. The criticisms of the bill in the Attorney General's letter only relate to potential problems of statutory interpretation and style. They are, for the most part, matters of clarity which could be adopted, but are probably not essential.

First, the Attorney General notes that the bill does not adequately distinguish between pre-elementary schools and child care. As amended by the bill, AS 14.07.020(7) provides that the Department of Education, after consultation with the state fire marshall and the state sanitarian, regulates the health and safety aspects of private schools, including pre-elementary schools. Under AS 47.35, however, the Department of Health and Social Services regulates nurseries (child care centers). The Attorney General apparently feels that AS 14.07.020(7) should contain a clear definition of pre-elementary schools so that a nursery or pre-elementary school could not choose between the Department of Education and the Department of Health and Social Services simply by calling itself a nursery or a pre-elementary school.

While I agree that there is some potential confusion here, it is my opinion that a change is not essential. AS 47.35.080(4) defines nursery rather clearly and excludes

establishments "whose primary function is educational," i.e., pre-elementary schools. Accordingly, it is clear that D.H.S.S regulates nurseries, while D.O.E regulates the health and safety aspects of all public and private schools, including pre-elementary schools. In other words, the confusion that the Attorney General is concerned with is insignificant when the bill is read in conjunction with AS 47.35.080(4).

The second question raised by the Attorney General has to do with the second sentence of AS 14.45.100, in section 5 of the bill. That sentence, which was added as a Senate floor amendment, provides that "a facility that serves children under the age of six and receives state payments is not eligible for the exemption provided by this section."

The Attorney General points out that the sentence is superfluous since the exemption provided for in that section does not affect programs for children under compulsory school age anyway. This observation is correct, and moreover, private schools are ineligible to receive direct state aid under Art. VII, sec. 1 of the state constitution. Therefore, I agree that the sentence is unnecessary and could be removed entirely. However, since the sentence neither adds nor subtracts substantively from the bill, removing or amending it is not essential.

Finally, the Attorney General notes that the Senate amended AS 14.45.110(a) in section 5 of the bill to make clear that the section only applies to children of compulsory school age. The Attorney General points out that all of AS 14.45 was intended to apply only to compulsory school age children, and therefore this distinction should be made throughout AS 14.45, or a definition added to clarify the point.

Again, I agree with the Attorney General's analysis. It is true that some language indicating that the provisions of AS 14.45 apply only to compulsory school age children would add clarity to the bill. However, the change is not essential since the provisions of AS 14.45 indicate implicitly that they apply only to school age children. This is indicated by section 3 of the bill which amends the compulsory school attendance law to provide that compliance with AS 14.45 satisfies the compulsory attendance requirement. It also follows from the fact that a private school may elect to comply with AS 14.45 or not, as it chooses.

In conclusion, I agree with the Attorney General's criticisms of HCS CSSB 354(HESS) insofar as the changes suggested would add clarity to the bill. However, these changes are not essential to the bill from a legal standpoint.

KBL:ojb
J3/056

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 31, 1984

SUBJECT: Sectional analysis of HCS CS SB 354 (HESS)

TO: Representative Mae Tischer
Chairman, House HESS Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested a sectional analysis of HCS CS SB 354 (HESS), "An Act relating to the regulation of private schools." The main thrust of the bill is to allow religious and other private schools to opt out of the general laws and regulations applicable to private schools if they agree to comply with certain minimal requirements.

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion while at the same time ensuring the quality of all education in the state and allowing diversity in education by encouraging private education.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). It provides that the department will consult with the state fire marshall and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It clarifies that the department must require physical examinations and immunizations in private pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is no longer responsible for the general supervision of private pre-elementary schools and nurseries. Supervision over public pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Finally, section 2 makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is not authorized to require private schools to be licensed (AS 14.07.020(10)).

Section 3 amends the state's compulsory education law (AS 14.30.010) to provide that attendance at a school operating in compliance with AS 14.45 (see section 5, below) satisfies the compulsory education requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100). The exemption is also not available to schools that serve children under the age of six and receive state funds.

The parent or guardian of a child of compulsory school age enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the number of students enrolled in each grade and the school calendar (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades four, six, and eight at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the parent or guardian of the student. The school is required to make composite test results available annually to an authorized representative of the Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the result of which are also public (AS 14.45.120(c)).

The exempt schools are also required to maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school. The administrator of the school must certify under oath or by affirmation to the Department of Education that these records are being maintained (AS 14.45.130). Finally, "religious school," as used in these sections, is defined as a private school operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140).

It should be kept in mind that these provisions are not mandatory unless the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

KBL:ojb
J3/022

COMMITTEE REPORT

HOUSE

(7) FURTHER:

1/24/84 Date: 1-30-84

The Committee on HEALTH, EDUCATION AND SOCIAL SERVICES has had CSSB 354(Jud)am

"An Act relating to the regulation of private schools."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with HCS for CSSB 354 (HESS) [X] same title [ ] new title

and recommends THAT THE CS DO PASS

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS:

X Rick Ulk

M. W. Miller

Terry Maddox

Mad Tucker

MEMBERS HAVING OTHER RECOMMENDATIONS:

Pete Laney PASS SENATE VERSION

Hilda Kogan pass Senate version

Mike Davis PASS SENATE VERSION

Mad Tucker
CHAIRMAN

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 514
Title: Regulation of Private Schools
Sponsor: Rep. Tischer
Requestor: House HESS
Date of Request: 1-20-84

FISCAL DETAIL
Agency Affected: Public Safetv
Program Category Affected: Life and Protection
BRU, Program or Subprogram(s) Affected: Fire Prevention

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

No fiscal impact

ANALYSIS: Attach a separate page for analysis

Prepared By: Gordon Brunton Phone: 465-4331
Division: Fire Prevention Date: 1-20-84

Approved by Commissioner: Robert J. Sundberg Date: 1-20-84
Agency: Public Safetv

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

TO: Representative Mae Tischer
FROM: Bill Lovell, Staff
DATE: January 30, 1984

RE: Comparison of SCS SB 354 (Judiciary) am, and HCS SB 354 (HESS)

For your convenience, I have compared the House HESS Committee Substitute of Senate Bill 354 to the version passed by the Senate.

Page 2, lines 23 - 25 After the word "schools," delete underlined material: "and private pre-elementary schools that are not in facilities associated with an elementary school that operates grades one through three".

Page 5, line 24 Delete "or subsidies."

Page 5, line 27 After the word "child," insert "of compulsory school age".

Page 5, line 29 - Page 6, line 1 Delete "of compulsory school age".

Page 6, line 19 After the word "grades," substitute "four, six and eight" for existing language "two, four, six, and ten".

Page 7, line 15 After the word "affirmation," insert "to the department".

/wtl

minimum standards

definition of pre-school -

unol

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: H.B. 514
Title: An Act relating to the regulation of private schools
Sponsor: Tischer, et al
Requestor:
Date of Request: 1/23/84

FISCAL DETAIL
Agency Affected: Environmental Conservation
Program Category Affected: NRMEC
BRU, Program or Subprogram(s) Affected: Environmental Quality Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES		0	0	0		
200 TRAVEL		0	0	0		
300 CONTRACTUAL		0	0	0		
400 SUPPLIES		0	0	0		
500 EQUIPMENT		0	0	0		
600 LAND & STRUCTURES		0	0	0		
700 GRANTS, CLAIMS		0	0	0		
800 MISCELLANEOUS		0	0	0		
TOTAL OPERATING		0	0	0		
CAPITAL		0	0	0		
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0		
FEDERAL FUNDS		0	0	0		
OTHER		0	0	0		
TOTAL		0	0	0		

POSITIONS:

FULL-TIME		0	0	0		
PART-TIME		0	0	0		
TEMPORARY		0	0	0		

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Joe Cladouhos, Director Phone: 465-2640
Division: Environmental Quality Management Date: 1/23/84

Approved by Commissioner: Richard Neve' Date: 1/23/84
Agency: Environmental Conservation

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB-514
Title: ...regulation of private schools
Sponsor: Tischer
Requestor: Hess
Date of Request: 1-19-84

FISCAL DETAIL
Agency Affected: Education
Program Category Affected: Elementary & Secondary Education
BRU, Program or Subprogram(s) Affected: School Improvement

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard Luther, Director Phone:
Division: Education Program Support Date:

Approved by Commissioner: Harvold Reynolds, Jr. Date: 1-20-84
Agency: Education

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

• ALASKA COUNCIL OF SCHOOL ADMINISTRATORS •
326 Fourth St., Suite #510 Juneau, Alaska 99801 586-9702

an organization of Alaskan School Administrators

January 24, 1984

The Honorable Mae Tischer
House of Representatives
Chairman, Health, Education
and Social Services
Pouch V
Juneau, AK 99811

Dear Representative Tischer:

The Alaska Council of School Administrators would like to go on record as supporting H.B. 514 as amended. We are particularly pleased that the bill calls for a process of notifying local school districts about enrolled or non-enrolled students as found in Sec. 14.45.110. This bill enables the chief administrative officer of a district to fulfill his requirements under the compulsory attendence law AS Sec. 14.30.030.

Once again, we support the bill as written and urge its adoption.

Sincerely,

Don MacKinnon
Executive Secretary

DM:clc

American Association of University Women
Alaska State Division

Susan R. Clark, State Legislative Chair
1109 C Street, Juneau, Ak. 99801
(907) 586-6952

23 January 1984

The Alaska Division of AAUW would like to go on record in support of an amendment to HB 519/SB 354, relating to the regulation of private schools. On page two of the bill (in Sec. 2. AS 14.07.020.) we would recommend that (8) read as follows: "...pre-elementary schools in this paragraph means schools for children ages three through five years when the school's primary function is educational and the program operates for four or fewer hours a day." Of specific concern to us is the health and safety of pre-elementary children ages 3 through 5 who spend from five to 10 or more hours daily in care outside their home.

Without this ammendment a loophole is created or rather maintained in Alaska statute that permits any program offering care to children up to 10 hours or more a day to exempt itself from health and safety regulations governing all Alaskan day care centers - even though that program is not functionally different from a day care program. The Dept. of Education has been called to task over the last several years by both the State Division of Internal Audit and the Federal Office of Child Development for the lack of a clear definition. Says the latter: "Your statute is indeed weak, allowing for confusion and almost any interpretation..." The Dept. audit found that "neither of the statutes [D.O.E.'s wording nor D.H.S.S's AS 47.35.010-80] set criteria nor define what is to be considered a primarily educational facility versus a child care facility;" and "because primarily educational has not been defined, neither the regulato: Departments, the facilities themselves, nor the public has a positive definition to use in deciding whether or not a program is a preschool or daycare program. As a result, any facility may choose to be classified as a preschool, and avoid the requirement to comply with daycare standards."

One of the issues involved here is that education of pre-elementary children is different than the academic emphasis of elementary education, due to shorter attention spans, the need for more physical movement (and the need for physical rest), and the underlying necessity of children needing to learn pre-academic skills. Goals for a pre-schooler are different than those for an older child, and Early Childhood educators set out the following as desirable outcomes of a preschool education:

a. Development of a positive self-concept, a sense of self-worth that comes from experiencing success, and a growing awareness of one's strengths as well as one's weakness.
b. Achievement of independence in decision making and a sense of mastery over one's environment (buttons, bows and zippers...); plus an achievement of mutual interdependence - a sense of responsibility for self and others within a community or group.
c. Movement from preoccupation with one's own biological and

psychological needs toward involvement in outside interests and activities; finding pleasure from human interaction; seeking problems and finding satisfaction in solving them.

d. Internalizing the concepts of problem solving abilities.
e. Coping with change and wider relationships.

Parents overwhelmingly want the option of an enrichment program for their children - the inclusion of life-expanding experiences not normally available in the home - and early enrichment has been shown to be important to the full development of all types and classes of children. Because of these factors all quality childcare programs at the pre-elementary level have (and all programs are encouraged to have) educational components teaching the basic life skills of self-sufficiency, socialization, and basic cognitive skills. Parents and community are no longer willing to accept custodial childcare or "warehousing" of kids as acceptable. Thus based on educational content there is no functional difference between a full day "preschool" and a good day care center. In fact in the D.O.E. audit, "of the 19 daycare programs surveyed, 18 stated they offered a preschool program." Ironically in Alaska while parents are lured by the term "preschool" into thinking they are doing better by their children, the standards for preschools are considerably lower than for daycare centers. [See attachment for comparison.]

When a young child is in care for all day every day, the program ceases to be solely a "school" and must include attention to nutritional needs, rest, staff health, adequate supervision with enough staff to attempt to meet the individual needs of each child, and enough space to meet the need to be physically active. Quality childcare is commonly described in national studies as having a tight child/staff ratio (a small number of children to each staff member). Safety in emergencies is a factor, but in normal times children under five need more individual attention than they will ever need at any other time. To form strong and positive self-concept, children need to be listened to, supported and encouraged. A large number of children can be tolerated in "school"-like situations for short periods during the day when activities are highly structured, but the emphasis must necessarily be on control. On a full time basis that can contribute to degrees of "maternal deprivation" resulting from the lack of a strong, rewarding relationship in the early years with a single close adult. "Preschools" have no child/staff ratio requirements. Similarly "pre-schools" have no minimum space requirements although the D.O.E. audit pointed out that adequate space is "absolutely necessary to ensure a quality, developmentally-orientated child care program":

> "the higher the quality of space in a center, the more likely were teachers to be sensitive and friendly in their manner toward children, to encourage children in their self-chosen activities and to teach consideration for the rights and feelings of self and others. Where spatial quality was low, children were less likely to be involved and interested, were more likely to exhibit agressive behavior, and teachers more likely to be neutral and insensitive in their manner, to use large amounts of guidance and restriction, and to teach arbitrary rules of social living."

There can be a workable definition of "pre-elementary school". Most legitimate pre-schools operate from two and a half to three

hours a day, as do most kindergartens for 6 year olds. Even elementary and high school kids do not attend school longer than about 6 hours a day, yet we permit three year olds to attend "school" 10 hours a day. We expect pre-schools to offer a fairly highly structured program for children and often the child/staff ratio is large (20 or more youngsters to 1 adult), but on a short time basis this can be acceptable. Beyond four hours the needs of small children demand more nurturing and less structured care, more space and less control, provision for a nutritional meal and snacks, a time for rest and naps, and the assurance that staff are not carriers of T.B., and assurance that an emergency plan is operable After four hours children need more individual attention.

All 50 states regulate full-day child care, though in many states it took a tragedy to enact licencing laws. Without this amendment, Alaska is the only state not regulating full day programs which are funtionally identical to day care centers.
The results are a "risk to children", says the D.O.E. audit, for "programs quickly call themselves pre-elementary schools when they learn that is a means of escaping regulations." Please don't let tragedy have to happen first, before we correct what no other state will tolerate.

Preschool Standards are Lower Than Daycare Standards

In Alaska, the Department of Education's standards for preschools are lower than the Department of Health and Social Services standards for daycare centers. For example, the only preschool standard equal to daycare standards is the immunization standard as shown in the following table.

COMPARISON OF DAYCARE AND PRESCHOOL STANDARDS

STANDARD	DAYCARE	PRESCHOOLS
License Renewal	Annual	5 yrs.
Agency Review	Annual	5 yrs.
Staff Pupil Ratio	1-10	no standard
** Indoor Space	35 sq. ft.per child	no standard
Outdoor space	75 sq. ft.per child	no standard
Fire Inspection	Annual	5 years
Sanitation Inspection	Annual	5 years
Health Program	required	no standard
Prone Rest	required	no standard
Immunizations	required	required
Nutrition Program	required	no standard
* Corporal Punishment	regulated	no standard

The Department of Health and Social Services also requires that daycare programs provide opportunities and experiences to promote the individual child's physical, emotional, social and intellectual growth, as outlined below:

- -- opportunities for balance of active/quiet play, group and individual, and indoor and outdoor play;
- -- opportunities for individual self expression in conversation. imaginative play and creative expressions;
- -- use of games, toys, books, sand, puzzles, for intellectual and social development;
- -- walking excursions/field trips; and
- -- equipment and furniture be of sufficient quality and quantity and appropriate to a child's use.

* The regulation reads: "Satisfactory compliance with this subsection requires that ... (7) caregivers not use any form of corporal punishment unless otherwise approved in writing by the parent of the child, and that they not use any other technique which is humiliating, shaming, frightening, or otherwise damaging to a child."

** "Several studies have found that most social involvement appears to occur at medium density (35-50 sq. ft. per child), while agressiveness occurs at higher densities (below 35 sq. ft.) and random behavior occurs in large undifferentiated settings (over 50 sq. ft.)."

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

TO: Representative Mae Tischer
FROM: Bill Lovell, Staff
DATE: February 9, 1984

RE: Analysis of HCS CSSB 354 (Rules)

For your convenience, I have prepared the following analysis of the House Rules Committee Substitute for Committee Substitute for Senate Bill 354, "[a]n Act relating to the regulation of private schools."

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion or with the right of parents to choose to have their children attend private schools while at the same time ensuring the quality of all education in the state and encouraging diversity in education.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). The bill creates a new subsection (a) in the law, including all language currently in AS 14.70.020. New language provides that the department will consult with the state fire marshal and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It clarifies that the department must require physical examinations and immunizations in pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is no longer responsible for the general supervision of pre-elementary schools that receive state or federal funding. Supervision of pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Finally, section 2 makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is not authorized to require private schools to be licensed (AS 14.07.020(10)). A new subsection (b) defines pre-elementary schools as being for children ages three through five years and primarily educational in purpose.

Section 3 amends the state's compulsory education law (AS 14.30.010) to provide that attendance at a school operating in compliance with AS 14.45 (see section 5 below) satisfies compulsory attendance requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and

regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100).

The parent or guardian of a child of compulsory school age enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the number of students enrolled in each grade and school calendar (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades four, six, and eight at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the parent or guardian of the student. The school is required to make composite test results available annually to an authorized representative of the Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the results of which are also public (AS 14.45.120(c)).

The exempt schools are also required to maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school. The administrator of the school must certify to the department, under oath or affirmation, that these records are being maintained (AS 14.45.130). "Private school," as used in these sections, is defined as a school that does not receive direct state or federal funding. (AS 14.45.140 (1)). Finally, "religious school," as used in these sections, is defined as a private school operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140(2)).

It should be kept in mind that these provisions are not mandatory unless the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

MMT:WTL:cas

DATABANK

State Education Statistics

PERFORMANCE OUTCOMES[1]

See notes on pages 10 and 11.

State and year		ACT (scores for 28 states)					SAT (scores for 22 states)					Graduation rate		Pupil/teacher ratio		Average teacher salary
		ACT score (1)	Rank[2] out of 28 (2)	% of h.s. seniors taking test (3)	Score change 1972-82 (4)	Ranking of score change[4] (out of 28) (5)	SAT score (6)	Rank[2] out of 22 (7)	% of h.s. seniors taking test (8)	Score change 1972-82 (9)	Ranking of score change (out of 22) (10)	% (11)	Rank[2] out of 51 (12)	pupils/ teacher (13)	Rank[2] out of 51 (14)	Salary ($) (15)
Alabama	1982	17.2	26.0	55.2	-1.1	16.0	–	–	–	–	–	67.1	[illegible]	20.7	43.0	15,413
	1972	18.3	25.5	49.6	–	–	–	–	–	–	–	65.4		23.9	42.0	7,737
Alaska	1982	18.7	13	31.4	-0.9	10.0	–	–	–	–	–	71.0	[illegible]0	16.0	8.5	29,000
	1972	19.6	15.5	33.6	–	–	–	–	–	–	–	[illegible]	25.0	21.0	16.0	14,124
Arizona	1982	18.7	13.5	41.2	-0.6	4.0	–	–	–	–	–	72.4	33.0	19.8	37.0	17,359
	1972	19.3	17.5	55.5	–	–	–	–	–	–	–	73.8	37.0	22.2	25.5	10,136
Arkansas	1982	17.7	20.0	56.3	-0.9	10.0	–	–	–	–	–	74.7	30.0	18.8	29.0	13,270
	1972	18.6	22.0	40.4	–	–	–	–	–	–	–	68.9	45.0	23.4	40.5	7,021
California	1982	–	–	–	–	–	899	4.0	38.4	-56.0	20.0	68.9	39.0	23.1	50.0	19,648
	1972	–	–	–	–	–	957	2.0	31.6	–	–	79.9	22.0	24.1	43.0	11,300
Colorado	1982	19.6	5.0	66.7	-0.3	1.5	–	–	–	–	–	78.3	22.0	18.7	30.0	17,734
	1972	19.9	11.5	80.2	–	–	–	–	–	–	–	84.8	9.0	22.5	31.5	9,088
Connecticut	1982	–	–	–	–	–	896	6.5	69.0	-49.0	16.0	71.2	37.0	15.0	1.5	17,440
	1972	–	–	–	–	–	945	4.0	70.7	–	–	83.4	12.0	19.4	5.0	10,079
Delaware	1982	–	–	–	–	–	897	5.0	49.3	-46.0	11.5	81.8	9.0	17.0	22.5	18,025
	1972	–	–	–	–	–	943	5.0	87.2	–	–	78.0	29.0	22.3	38.0	10,211
District of Columbia	1982	–	–	–	–	–	821	21.0	53.4	18.0	1.0	55.6	50.0	18.5	27.0	22,883
	1972	–	–	–	–	–	803	22.0	68.2	–	–	54.8	51.0	21.2	20.0	11,022
Florida	1982	–	–	–	–	–	889	9.5	37.5	-52.0	18.0	65.4	46.0	19.9	36.5	15,563
	1972	–	–	–	–	–	941	6.0	26.8	–	–	72.1	39.0	22.7	34.0	9,020
Georgia	1982	–	–	–	–	–	823	20.0	43.0	-11.0	2.0	–	–	18.8	31.5	15,444
	1972	–	–	–	–	–	834	20.0	55.0	–	–	64.8	49.0	25.2	50.0	7,710
Hawaii	1982	–	–	–	–	–	867	18.0	47.3	-64.0	22.0	84.2	4.0	22.7	46.0	20,993
	1972	–	–	–	–	–	921	14.5	52.9	–	–	89.1	4.0	22.3	38.0	10,523
Idaho	1982	18.9	10.5	55.3	-1.0	13.0	–	–	–	–	–	78.9	19.0	20.9	45.0	15,146
	1972	19.9	11.5	45.2	–	–	–	–	–	–	–	84.7	10.0	22.6	33.0	7,392
Illinois	1982	18.8	16.0	67.4	-1.2	18.5	–	–	–	–	–	74.8	28.0	18.6	27.0	19,518
	1972	19.8	13.0	62.1	–	–	–	–	–	–	–	78.0	26.0	22.5	31.5	10,882
Indiana	1982	–	–	–	–	–	860	17.0	47.0	-46.0	11.5	76.9	21.0	20.0	40.0	16,876
	1972	–	–	–	–	–	906	18.0	50.4	–	–	78.1	34.0	24.6	45.5	9,605
Iowa	1982	20.3	2.0	54.6	-1.7	27.0	–	–	–	–	–	86.6	3.0	18.5	11.5	16,150
	1972	22.0	1.0	49.0	–	–	–	–	–	–	–	89.5	3.0	20.2	11.5	8,638
Kansas	1982	18.9	10.5	60.8	-1.1	16.0	–	–	–	–	–	80.9	11.0	15.7	4.5	15,250
	1972	20.0	9.5	56.2	–	–	–	–	–	–	–	82.8	15.0	19.8	8.0	8,254
Kentucky	1982	17.5	23.5	63.7	-0.9	10.0	–	–	–	–	–	68.9	44.0	20.8	44.0	15,580
	1972	18.4	23.5	45.1	–	–	–	–	–	–	–	70.4	42.0	23.2	37.0	7,444
Louisiana	1982	16.7	27.0	60.8	-1.3	20.5	–	–	–	–	–	64.0	48.0	19.6	35.0	14,900
	1972	18.0	27.0	56.7	–	–	–	–	–	–	–	66.5	47.0	22.4	30.0	8,849
Maine	1982	–	–	–	–	–	890	8.0	46.5	-41.0	8.5	72.1	34.0	18.0	24.0	13,994
	1972	–	–	–	–	–	931	11.0	44.2	–	–	80.9	18.0	22.2	26.5	8,750
Maryland	1982	–	–	–	–	–	839	9.5	50.3	-47.0	14.0	75.6	24.0	18.5	27.0	19,286
	1972	–	–	–	–	–	936	8.0	51.4	–	–	80.2	21.0	22.1	24.0	10,463
Massachusetts	1982	–	–	–	–	–	896	11.5	65.6	-45.0	10.0	75.9	23.0	16.0	8.5	18,258
	1972	–	–	–	–	–	933	10.0	66.2	–	–	77.9	30.0	21.2	30.0	9,200
Michigan	1982	18.7	13.5	51.4	0.4	3.0	–	–	–	–	–	72.7	32.0	22.9	49.0	21,057
	1972	19.1	19.0	74.4	–	–	–	–	–	–	–	81.0	17.0	24.8	48.0	11,300
Minnesota	1982	20.2	3.0	28.9	-1.2	18.5	–	–	–	–	–	89.2	1.0	17.1	16.0	17,182
	1972	21.4	2.0	44.3	–	–	–	–	–	–	–	91.5	1.0	20.6	17.0	10,255
Mississippi	1982	15.5	28.0	74.5	0.6	7.0	–	–	–	–	–	63.0	49.0	19.3	34.0	13,000
	1972	16.3	28.0	78.5	–	–	–	–	–	–	–	57.6	50.0	23.1	36.0	6,520
Missouri	1982	18.7	13.5	45.2	-1.4	23.0	–	–	–	–	–	75.4	23.0	17.0	15.0	15,422
	1972	20.1	8.0	21.1	–	–	–	–	–	–	–	77.5	31.0	22.3	25.0	8,805
Montana	1982	19.5	8.0	49.3	-1.6	26.0	–	–	–	–	–	82.2	8.0	18.5	11.5	15,967
	1972	21.1	3.0	48.5	–	–	–	–	–	–	–	79.0	27.0	21.2	20.0	–
Nebraska	1982	19.9	4.0	72.6	-0.7	8.0	–	–	–	–	–	83.6	6.0	15.7	4.5	14,675
	1972	20.6	6.0	27.1	–	–	–	–	–	–	–	86.9	7.0	19.9	9.5	7,661
Nevada	1982	16.3	18.0	44.5	-1.0	13.0	–	–	–	–	–	75.3	26.0	21.1	46.0	17,700
	1972	19.3	17.5	51.3	–	–	–	–	–	–	–	75.0	35.0	24.6	45.5	10,200
New Hampshire	1982	–	–	–	–	–	925	1.0	66.2	-47.5	14.0	78.3	13.0	16.8	13.5	13,273
	1972	–	–	–	–	–	972	1.0	52.1	–	–	80.7	18.0	20.6	14.5	8,685
New Jersey	1982	–	–	–	–	–	869	15.0	64.7	-47.0	14.0	78.1	15.0	15.9	7.0	18,300
	1972	–	–	–	–	–	916	17.0	71.1	–	–	70.7	23.0	19.6	6.5	9,500
New Mexico	1982	17.8	21.5	66.6	-0.8	7.0	–	–	–	–	–	71.8	36.0	18.8	31.5	16,948
	1972	18.4	23.5	51.2	–	–	–	–	–	–	–	76.9	32.0	23.3	39.5	8,486
New York	1982	–	–	–	–	–	890	6.5	61.6	-59.0	21.0	66.3	45.0	17.6	21.0	20,400
	1972	–	–	–	–	–	955	3.0	60.2	–	–	74.7	30.0	19.3	4.0	11,400
North Carolina	1982	–	–	–	–	–	827	19.0	46.6	-27.0	3.0	68.4	41.0	19.9	38.5	15,856
	1972	–	–	–	–	–	849	19.0	47.4	–	–	66.6	46.0	23.3	38.5	8,183
North Dakota	1982	17.8	18.0	64.6	-1.6	28.0	–	–	–	–	–	87.3	2.0	16.6	13.5	14,661
	1972	19.6	15.5	67.3	–	–	–	–	–	–	–	89.0	6.0	19.9	9.5	7,386
Ohio	1982	19.0	9.0	40.2	-1.0	13.0	–	–	–	–	–	77.5	18.0	19.7	36.0	16,200
	1972	20.0	9.5	36.2	–	–	–	–	–	–	–	80.3	20.0	24.4	44.0	9,050
Oklahoma	1982	17.6	21.5	51.4	-1.1	16.0	–	–	–	–	–	77.6	17.0	17.2	17.5	14,640
	1972	18.7	21.0	58.5	–	–	–	–	–	–	–	79.3	24.0	23.0	35.0	7,900
Oregon	1982	–	–	–	–	–	906	2.0	41.7	-50.0	4.0	71.7	35.0	20.3	41.0	16,500
	1972	–	–	–	–	–	938	2.0	38.8	–	–	78.2	26.0	20.7	46.0	9,465
Pennsylvania	1982	–	–	–	–	–	885	13.0	51.4	-41.0	8.5	78.8	12.0	17.3	19.5	17,690
	1972	–	–	–	–	–	926	13.0	55.2	–	–	85.0	8.0	21.6	22.0	9,900
Rhode Island	1982	–	–	–	–	–	877	14.0	60.7	-50.0	17.0	72.9	31.0	18.1	10.0	19,803
	1972	–	–	–	–	–	927	12.0	59.8	–	–	81.1	16.0	20.6	14.5	10,000
South Carolina	1982	–	–	–	–	–	700	22.0	49.2	-33.0	7.0	64.3	47.0	19.0	33.0	14,106
	1972	–	–	–	–	–	823	21.0	50.0	–	–	60.2	44.0	20.2	11.5	7,300
South Dakota	1982	19.2	9.1	8.0	81.9	-1.5	25.0	–	–	–	–	–	83.9	6.0	15.8	6.0
	1972	20.6	8.0	55.0	–	–	–	–	–	–	–	90.8	2.0	18.7	3.0	7,757
Tennessee	1982	17.5	23.5	60.3	-0.8	7.0	–	–	–	–	–	68.9	40.0	20.5	42.0	14,073
	1972	18.3	25.5	52.6	–	–	–	–	–	–	–	72.4	38.0	24.7	47.0	7,970
Texas	1982	–	–	–	–	–	868	18.0	32.4	-63.0	19.0	66.2	42.0	18.4	25.0	16,715
	1972	–	–	–	–	–	921	14.5	32.2	–	–	70.2	43.0	22.0	23.0	8,376
Utah	1982	18.4	17.0	66.4	.3	20.5	–	–	–	–	–	81.4	10.0	27.4	51.0	16,612
	1972	19.7	14.0	62.5	–	–	–	–	–	–	–	83.3	13.0	25.3	51.0	8,538
Vermont	1982	–	–	–	–	–	904	3.0	54.3	-31.0	6.5	77.7	16.0	15.3	3.0	13,235
	1972	–	–	–	–	–	935	9.0	60.5	–	–	70.9	41.0	17.1	1.0	8,850
Virginia	1982	–	–	–	–	–	868	11.5	51.0	-31.0	5.5	75.0	27.0	17.6	22.5	14,649
	1972	–	–	–	–	–	919	16.0	54.3	–	–	76.4	33.0	20.5	13.0	9,100
Washington	1982	–	–	–	–	–	–	–	–	–	–	76.9	20.0	21.7	47.0	20,702
	1972	–	–	–	–	–	–	–	–	–	–	83.9	11.0	25.1	49.0	10,178
West Virginia	1982	17.4	25.0	48.4	-1.4	23.0	–	–	–	–	–	74.8	29.0	17.3	19.5	14,946
	1972	18.8	20.0	43.4	–	–	–	–	–	–	–	71.9	40.0	23.4	40.5	7,976
Wisconsin	1982	20.4	1.0	32.0	-0.3	1.5	–	–	–	–	–	83.4	7.0	17.2	17.5	20,062
	1972	20.7	4.0	40.7	–	–	–	–	–	–	–	89.1	8.0	19.6	8.5	10,370
Wyoming	1982	19.2	7.0	51.8	-1.4	23.0	–	–	–	–	–	78.3	14.0	15.0	1.5	20,436
	1972	20.6	6.0	53.8	–	–	–	–	–	–	–	83.1	14.0	18.5	2.0	9,215
U.S. average	1982	18.4	–	–	-0.7	–	893	–	–	-44.0	–	72.8	–	18.9	–	17,560
	1972	19.1	–	–	–	–	937	–	–	–	–	77.2	–	22.3	–	9,615

State Performance Outcomes, Resource Inputs, and Population Characteristics, 1972 and 1982[1]

RESOURCE INPUTS								POPULATION CHARACTERISTICS									
Average teacher salary	Federal funds as % of school revenues			Current expenditures per pupil		Expend. as % of income per capita		Per capita income		% poverty ages 5–17		Median years education of adults		Minority % of enrollment		Handicapped % of enrollment	
Rank[2] out of 51 (16)	% (17)	Rank[2] out of 51 (18)	State comp ed program[3] (19)	Expenditure $ (20)	Rank[2] out of 51 (21)	% (22)	Rank[2] out of 51 (23)	Income ($) (24)	Rank[2] out of 51 (25)	% (26)	Rank[2] out of 51 (27)	years (28)	Rank[2] out of 51 (29)	% (30)	Rank[2] out of 51[1] (31)	% (32)	Rank[2] 51 (33)
35.0	18.6	2.5	NO	1,[illegible]	48.5	21.2	32.0	8,649	48.0	23.1	3.5	12.2	45.0	37.0	13.0	9.5	20.0
42.0	18.3	3.0	–	5,13	50.0	15.9	50.0	3,423	49.0	29.5	4.0	10.8	43.0	34.5	7.0	–	–
1.0	9.5	22.5	NO	5,369	1.0	33.0	1.0	16,257	1.0	11.4	36.0	12.8	2.0	22.5	26.0	8.2	34.0
1.0	17.4	4.0	–	1,441	2.0	27.3	3.0	5,285	4.0	14.8	21.0	12.4	4.5	16.3	24.0	–	–
21.0	12.9	11.0	YES	2,305	26.0	22.7	21.0	10,173	33.0	15.8	17.0	12.6	15.5	29.8	18.0	9.3	23.0
14.0	8.4	23.5	–	911	22.0	21.3	17.0	4,285	30.0	17.5	18.0	12.3	10.5	27.2	13.0	–	–
49.0	16.8	2.5	NO	1,713	50.0	20.2	40.0	8,479	50.0	22.7	8.0	12.2	45.0	30.2	17.0	8.7	15.0
49.0	17.3	5.0	–	801	49.0	18.4	42.0	3,268	50.0	31.6	2.0	10.5	48.5	29.4	10.0	–	–
10.0	10.1	19.0	YES	2,427	22.0	19.3	46.0	12,567	5.0	14.2	22.0	12.7	6.5	45.9	6.0	8.0	39.0
3.5	6.1	36.5	–	932	20.0	18.4	41.0	5,062	10.0	12.1	26.0	12.4	4.5	27.6	12.0	–	–
17.0	5.9	45.5	NO	2,708	15.0	22.0	28.0	12,302	8.0	10.8	41.0	12.8	2.0	23.1	34.0	7.2	45.0
25.0	8.5	21.0	–	905	23.0	19.8	29.0	4,574	14.0	12.3	24.0	12.4	4.5	16.4	21.0	–	–
20.0	6.2	41.5	YES	2,683	17.0	19.5	45.0	13,748	3.0	10.4	44.0	12.6	15.5	23.0	25.0	11.2	3.0
15.0	3.1	49.5	–	1,110	7.0	20.3	21.0	5,464	2.0	7.2	51.0	12.2	18.0	13.0	29.0	–	–
18.0	11.3	13.0	NO	3,125	5.0	28.6	8.0	11,731	14.0	14.6	20.0	12.5	28.0	29.0	23.0	10.9	5.0
11.0	7.1	30.5	–	1,097	8.0	21.3	18.0	5,143	9.0	12.0	28.0	12.1	29.0	21.3	20.0	–	–
2.0	–	–	NO	3,441	3.0	23.6	18.0	14,550	2.0	26.3	2.0	12.7	6.5	96.4	1.0	1.6	51.0
5.0	14.1	8.0	–	1,063	11.0	18.7	39.0	5,870	1.0	23.2	12.0	12.2	18.0	86.5	1.0	–	–
32.0	10.3	17.0	YES	2,278	27.0	20.7	37.0	10,978	21.0	17.8	16.0	12.5	28.0	32.0	16.0	8.8	28.0
27.0	9.7	19.0	–	861	28.0	19.4	31.0	4,434	28.5	18.9	16.0	12.1	29.0	28.0	11.0	–	–
33.0	13.9	8.0	YES	1,721	49.0	18.0	49.0	9,583	37.0	20.4	9.0	12.2	45.0	37.2	12.0	9.6	14.0
43.0	10.8	15.0	–	788	37.0	20.0	23.0	3,931	36.0	24.4	9.0	10.8	43.0	33.7	8.0	–	–
4.0	15.8	5.0	YES	2,604	20.0	22.1	25.0	11,652	15.0	11.7	36.0	12.7	6.5	75.2	2.0	6.9	46.0
7.0	8.4	23.5	–	1,020	13.5	20.0	25.0	5,107	9.0	9.7	41.0	12.3	10.5	–	–	–	–
37.0	10.3	17.0	NO	1,878	44.0	20.8	35.0	9,059	43.0	13.4	26.0	12.6	15.5	8.6	45.0	7.6	40.0
46.0	12.2	12.0	–	732	39.0	18.7	40.0	3,906	37.0	12.0	28.0	12.3	10.5	4.5	44.0	–	–
11.0	7.1	35.5	YES	2,720	14.0	22.5	23.0	12,100	10.0	14.1	23.0	12.5	28.0	39.8	10.0	10.1	8.0
6.0	4.9	42.5	–	986	16.0	19.2	34.0	5,135	8.0	10.7	35.0	12.1	29.0	24.9	15.0	–	–
24.0	8.4	40.0	YES	2,008	39.0	20.0	41.0	10,021	35.0	11.0	39.0	12.4	37.5	17.3	31.0	8.3	33.0
19.0	5.4	39.5	–	837	34.0	19.3	32.0	4,329	24.0	9.0	45.0	12.1	29.0	11.3	30.0	–	–
27.0	8.1	43.5	NO	2,343	24.0	21.7	29.0	10,791	25.0	10.8	41.0	12.5	28.0	8.0	46.0	9.4	22.0
18.0	2.5	51.0	–	970	18.0	22.0	14.0	4,415	23.0	9.8	38.5	12.2	18.0	2.8	46.0	–	–
36.0	6.2	41.5	NO	2,251	29.0	19.1	47.0	11,765	13.0	10.7	43.0	12.6	15.5	17.2	32.0	8.9	27.0
36.0	6.6	32.5	–	854	30.0	18.8	38.0	4,549	15.0	11.5	30.5	12.3	10.5	10.3	31.0	–	–
31.0	16.0	4.0	NO	1,835	46.5	20.5	39.0	8,934	44.0	21.2	7.0	12.1	50.0	12.2	38.0	8.7	37.0
45.0	16.5	6.5	–	850	44.5	18.1	45.0	3,686	45.0	25.1	7.0	9.9	51.0	9.8	32.0	–	–
39.0	12.7	12.0	NO	2,002	40.5	19.8	44.0	10,231	32.0	23.1	3.5	12.2	45.0	43.4	7.0	8.7	30.0
29.0	12.5	10.0	–	867	26.0	24.8	5.0	3,489	48.0	30.1	3.0	10.8	43.0	41.0	5.0	–	–
46.0	9.0	24.0	NO	1,985	42.0	22.0	27.0	9,042	42.0	15.1	18.5	12.5	28.0	1.2	50.0	9.9	1.0
31.0	7.3	29.0	NO	793	36.0	21.4	15.0	3,707	42.0	14.2	22.0	12.1	29.0	0.7	49.0	–	–
12.0	8.2	31.0	YES	2,998	7.0	24.5	13.0	12,238	9.0	11.9	35.0	12.5	28.0	33.6	14.0	11.1	4.0
8.0	7.1	30.5	–	962	19.0	19.4	30.0	4,953	11.0	11.6	30.5	12.1	29.0	24.8	16.5	–	–
18.0	6.8	46.5	YES	2,964	10.0	24.5	12.0	12,088	11.0	12.3	33.0	12.8	15.5	18.4	23.0	11.4	2.0
23.0	4.7	44.0	–	1,020	13.5	20.6	18.0	4,948	12.0	8.4	49.0	12.2	18.0	6.5	33.0	–	–
3.0	7.0	37.5	YES	2,652	19.0	24.2	15.0	10,956	22.0	12.4	32.0	12.5	28.0	29.1	19.0	6.9	49.0
3.5	3.8	48.0	–	1,175	5.0	24.5	7.0	4,706	13.0	9.1	44.0	12.1	29.0	16.2	25.0	–	–
22.0	7.0	37.5	YES	2,698	18.0	24.1	18.0	11,175	18.0	9.5	46.0	12.6	18.5	7.8	43.5	9.1	23.0
10.0	4.6	45.5	–	1,134	6.0	25.6	4.0	4,434	20.5	9.6	42.0	12.2	18.0	2.8	45.0	–	–
51.0	24.3	1.0	NO	1,685	51.0	21.7	30.0	7,778	51.0	30.3	1.0	12.2	45.0	51.9	4.0	9.5	18.0
50.0	20.0	1.0	–	634	48.0	20.6	18.0	3,071	51.0	41.5	1.0	10.7	45.0	51.1	2.0	–	–
34.0	9.6	21.0	YES	2,197	31.0	21.6	31.0	10,170	34.0	14.0	24.5	12.4	37.5	20.7	29.0	10.8	8.0
30.0	6.8	32.5	–	845	33.0	19.9	27.0	4,241	32.0	14.8	20.0	11.8	36.0	16.9	22.0	–	–
28.0	9.8	20.0	NO	2,727	13.0	28.5	4.0	9,580	38.0	12.7	30.0	12.6	15.5	12.3	36.5	7.8	39.0
–	8.5	21.0	–	–	–	–	–	4,092	33.0	12.9	23.0	12.3	10.5	6.9	36.0	–	–
11.0	8.7	27.5	YES	2,445	21.0	22.9	20.0	10,683	29.0	11.8	37.0	12.6	18.5	12.3	36.5	10.0	11.0
44.0	8.4	34.0	–	856	29.0	19.2	35.0	4,469	19.0	12.0	28.0	12.2	18.0	8.1	34.0	–	–
19.0	7.2	34.0	NO	2,069	35.0	17.3	51.0	11,981	12.0	9.4	49.0	1.6	15.5	19.1	30.0	7.1	47.0
12.0	5.0	38.0	–	917	21.0	17.8	47.0	5,148	6.0	8.8	46.0	12.4	4.5	14.2	29.0	–	–
48.0	5.3	48.0	NO	2,256	28.0	21.0	33.0	10,729	27.0	8.9	50.0	12.6	18.5	1.6	49.0	8.6	50.0
32.0	8.0	41.0	–	847	32.0	19.9	28.0	4,258	31.0	7.7	50.0	12.2	18.0	0.9	48.0	–	–
14.0	8.1	43.5	YES	3,265	4.0	25.1	9.0	13,019	4.0	13.3	27.0	12.5	28.0	37.7	11.0	12.3	1.0
20.0	4.3	47.0	–	1,219	4.0	22.7	12.0	5,3[illegible]	3.0	8.7	47.5	12.1	29.0	21.6	18.5	–	–
23.0	18.0	7.0	NO	2,178	33.0	23.7	17.0	9,190	40.0	21.7	6.0	12.8	15.5	57.2	3.0	8.1	38.0
34.0	18.5	2.0	–	849	31.0	23.0	9.0	3,593	44.0	26.3	6.0	12.2	18.0	47.3	3.0	–	–
7.0	7.1	35.5	YES	3,769	2.0	30.6	2.0	12,314	7.0	17.9	14.0	12.5	28.0	42.9	8.0	7.5	42.0
2.0	5.4	39.5	–	1,466	1.0	27.9	2.0	5,260	5.0	12.2	25.0	12.1	29.0	26.7	14.0	–	–
28.0	–	–	YES	2,033	36.0	22.5	24.0	9,044	41.0	17.8	15.0	12.2	45.0	32.4	15.0	9.5	19.0
37.0	11.7	13.0	–	883	43.0	18.3	43.0	3,789	39.0	24.0	11.0	10.6	47.0	39.6	9.0	–	–
40.0	11.0	15.0	NO	2,002	40.5	18.4	48.0	10,878	24.0	14.0	24.5	12.5	28.0	4.5	48.0	7.5	41.0
47.0	10.0	17.5	–	740	38.0	17.0	48.0	4,351	26.0	16.7	19.0	12.0	36.5	2.4	47.0	–	–
26.0	8.5	29.0	YES	2,321	26.0	21.7	28.0	10,677	30.0	12.2	34.0	12.4	37.5	22.3	27.8	9.8	15.0
26.0	8.2	30.0	–	871	25.0	19.3	33.0	4,505	17.0	9.8	38.5	12.1	29.0	14.0	27.0	–	–
43.0	13.6	9.0	NO	2,237	30.0	19.7	43.0	11,370	18.0	15.1	18.5	12.5	28.0	24.3	23.0	9.7	16.0
40.0	11.6	14.0	–	686	44.0	18.2	44.0	3,772	40.0	19.5	14.0	12.1	29.0	16.4	23.0	–	–
13.0	2.4	30.0	YES	3,130	5.0	30.3	3.0	10,335	31.0	10.9	41.0	12.7	8.5	9.3	41.0	8.1	36.0
21.0	4.6	45.5	–	979	17.0	22.5	13.0	4,146	17.0	10.3	37.0	12.3	10.5	4.6	43.0	–	–
19.0	8.9	25.5	YES	2,641	11.0	25.9	7.0	10,655	23.0	13.2	28.0	12.4	37.5	22.3	27.5	8.6	31.0
17.0	4.9	42.5	–	1,073	9.0	24.0	8.0	4,47[illegible]	18.0	10.6	36.0	12.0	36.5	13.3	28.0	–	–
9.0	8.1	27.5	YES	2,996	9.0	27.9	8.0	10,723	28.0	12.6	31.0	12.3	41.0	11.7	39.0	10.0	9.0
18.0	7.8	28.0	–	1,023	12.0	23.1	18.0	4,429	22.0	11.0	34.0	11.8	41.0	5.1	41.0	–	–
41.0	–	–	NO	1,916	43.0	22.5	22.0	8,502	49.0	7.[illegible]	8.0	12.1	50.0	42.0	9.0	10.0	10.0
44.0	18.5	6.5	–	700	42.0	20.1	22.0	3,490	47.0	19.1	5.0	10.5	40.5	41.2	4.0	–	–
47.0	13.0	10.0	NO	2,018	37.0	20.9	34.0	9,666	36.0	9.4	11.0	12.6	28.0	11.4	40.0	7.2	46.0
41.0	10.0	17.5	–	796	36.0	20.4	28.0	3,893	38.0	8.3	18.0	12.1	29.0	8.4	40.0	–	–
45.0	15.6	6.0	NC	1,831	46.0	20.6	38.0	8,906	45.0	20.2	10.0	12.2	45.0	28.8	21.0	10.5	7.0
39.0	13.3	9.0	–	659	45.0	18.8	46.0	3,664	43.0	24.8	8.0	10.6	47.0	21.6	18.5	–	–
30.0	11.1	14.0	YES	2,012	36.0	17.6	50.0	11,419	17.0	18.1	12.0	12.4	37.5	46.0	5.0	8.1	37.0
36.0	8.5	31.0	–	660	46.5	16.3	49.0	3,991	34.0	21.5	13.0	11.8	40.0	36.0	6.0	–	–
25.0	8.1	32.0	YES	1,842	45.0	20.8	36.0	8,875	40.0	9.8	46.0	12.8	2.0	7.6	43.5	9.4	21.0
33.0	7.9	35.0	–	707	41.0	19.0	37.0	3,730	41.0	10.0	38.0	12.5	1.0	8.2	39.0	–	–
50.0	7.4	31.0	NO	2,365	23.0	24.9	10.0	11,507	39.0	13.0	29.0	12.4	18.5	1.1	51.0	8.8	29.0
28.0	8.1	36.5	–	1,232	3.0	31.2	1.0	3,947	35.0	11.4	32.0	12.2	18.0	0.5	50.0	–	–
42.0	10.3	17.0	NO	2,193	32.0	19.8	42.0	11,095	20.0	14.4	21.0	12.4	37.5	28.2	22.0	8.5	32.0
24.0	10.6	16.0	–	875	24.0	20.0	24.0	4,373	25.0	18.2	17.0	11.7	39.0	24.8	16.5	–	–
8.0	8.8	28.5	YES	2,670	18.0	23.2	19.0	11,560	18.0	10.3	45.0	12.7	8.5	15.0	34.0	7.3	44.0
13.0	7.7	27.0	–	866	27.0	19.1	38.0	4,325	16.0	9.3	43.0	12.4	4.5	7.0	36.0	–	–
38.0	9.5	22.5	NO	2,173	34.0	24.8	11.0	8,769	47.0	18.2	13.0	12.1	50.0	4.9	47.0	9.2	24.0
38.0	12.4	11.0	–	713	40.0	19.9	26.0	3,577	46.0	24.3	10.0	10.6	47.0	4.9	42.0	–	–
8.0	6.6	30.0	YES	2,759	12.0	25.8	8.0	10,774	26.0	9.6	47.0	12.5	28.0	14.2	36.0	7.3	43.0
9.0	3.1	49.5	–	1,089	10.0	24.8	8.0	4,314	29.0	8.7	47.5	12.1	29.0	8.7	37.0	–	–
6.0	5.5	47.0	NO	2,997	8.0	24.2	14.0	12,372	6.0	7.5	51.0	12.7	9.5	8.7	42.0	9.0	26.0
22.0	7.6	28.0	–	1,001	15.0	22.8	11.0	4,395	24.0	11.2	33.0	12.4	4.5	9.3	33.0	–	–
–	9.3	–	–	2,473	–	22.3	–	11,107	–	18.3	–	12.5	–	26.7	–	9.0	–
–	7.1	–	–	904	–	20.7	–	4,515	–	14.8	–	12.1	–	22.1	–	–	–

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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JUNEAU, ALASKA 99811
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M E M O R A N D U M

February 6, 1984

SUBJECT: Attorney General's analysis of HCS CSSB 354 (HESS)

TO: Representative Mae Tischer
Chairman, Health, Education, and Social Services Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested an analysis of a letter from the Attorney General concerning the latest draft of HCS CSSB 354(HESS). The Attorney General's letter indicates that the bill presents no significant constitutional problems, an opinion with which I agree. The criticisms of the bill in the Attorney General's letter only relate to potential problems of statutory interpretation and style. They are, for the most part, matters of clarity which could be adopted, but are probably not essential.

First, the Attorney General notes that the bill does not adequately distinguish between pre-elementary schools and child care. As amended by the bill, AS 14.07.020(7) provides that the Department of Education, after consultation with the state fire marshall and the state sanitarian, regulates the health and safety aspects of private schools, including pre-elementary schools. Under AS 47.35, however, the Department of Health and Social Services regulates nurseries (child care centers). The Attorney General apparently feels that AS 14.07.020(7) should contain a clear definition of pre-elementary schools so that a nursery or pre-elementary school could not choose between the Department of Education and the Department of Health and Social Services simply by calling itself a nursery or a pre-elementary school.

While I agree that there is some potential confusion here, it is my opinion that a change is not essential. AS 47.35.080(4) defines nursery rather clearly and excludes

establishments "whose primary function is educational," i.e., pre-elementary schools. Accordingly, it is clear that D.H.S.S regulates nurseries, while D.O.E regulates the health and safety aspects of all public and private schools, including pre-elementary schools. In other words, the confusion that the Attorney General is concerned with is insignificant when the bill is read in conjunction with AS 47.35.080(4).

The second question raised by the Attorney General has to do with the second sentence of AS 14.45.100, in section 5 of the bill. That sentence, which was added as a Senate floor amendment, provides that "a facility that serves children under the age of six and receives state payments is not eligible for the exemption provided by this section."

The Attorney General points out that the sentence is superfluous since the exemption provided for in that section does not affect programs for children under compulsory school age anyway. This observation is correct, and moreover, private schools are ineligible to receive direct state aid under Art. VII, sec. 1 of the state constitution. Therefore, I agree that the sentence is unnecessary and could be removed entirely. However, since the sentence neither adds nor subtracts substantively from the bill, removing or amending it is not essential.

Finally, the Attorney General notes that the Senate amended AS 14.45.110(a) in section 5 of the bill to make clear that the section only applies to children of compulsory school age. The Attorney General points out that all of AS 14.45 was intended to apply only to compulsory school age children, and therefore this distinction should be made throughout AS 14.45, or a definition added to clarify the point.

Again, I agree with the Attorney General's analysis. It is true that some language indicating that the provisions of AS 14.45 apply only to compulsory school age children would add clarity to the bill. However, the change is not essential since the provisions of AS 14.45 indicate implicitly that they apply only to school age children. This is indicated by section 3 of the bill which amends the compulsory school attendance law to provide that compliance with AS 14.45 satisfies the compulsory attendance requirement. It also follows from the fact that a private school may elect to comply with AS 14.45 or not, as it chooses.

In conclusion, I agree with the Attorney General's criticisms of HCS CSSB 354(HESS) insofar as the changes suggested would add clarity to the bill. However, these changes are not essential to the bill from a legal standpoint.

KBL:ojb
J3/056

SB 354

BILL SB0354
PAGE 01765
DATE 01/13/84
CHAMBER SENATE
TEXT SENATE BILL NO. 354 by Senators Faiks, Kerttula, Bennett, Ferguson, Ray, Moss, Pettyjohn, Halford, P. Fischer, Gilman and Kelly, entitled:

"An Act relating to the regulation of private schools."

was read the first time and referred to the Judiciary Committee.

BILL SB0354
PAGE 01782
DATE 01/17/84
CHAMBER SENATE
TEXT President Kerttula stated that SENATE BILL NO. 354 (regulation of private schools) would have an additional referral to the Health, Education and Social Services Committee. SENATE BILL NO. 354 was referred to the Judiciary Committee and the Health, Education and Social Services Committee.

BILL SB0354
PAGE 01798
DATE 01/19/84
CHAMBER SENATE
TEXT The Judiciary Committee considered SENATE BILL NO. 354 (regulation of private schools) and recommended it be replaced with

CS FOR SENATE BILL NO. 354 (JUD)

Senator Ray, Chairman and Senator Ziegler signed "no recommendation". Senators Pettyjohn and Eliason signed "do pass". SENATE BILL NO. 354 was referred to the Health, Education and Social Services Committee.

BILL SB0354
PAGE 02348
DATE 01/24/84
CHAMBER HOUSE
TEXT COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 354 (Judiciary) amended, by the Judiciary Committee, entitled:

"An Act relating to the regulation of private schools."

was read the first time and referred to the Health, Education & Social Services Committee.

The Health, Education and Social Services Committee considered SENATE BILL NO. 354 (regulation of private schools). Senator Josephson, Chairman, signed "do pass if amended". Senator Paul Fischer signed "do pass". Senator Halford signed "do pass when amended". Senator Vic Fischer signed "do not pass unless amended".
The committee attached a zero fiscal note.
SENATE BILL NO. 354 was referred to the Rules Committee.

The Rules Committee considered SENATE BILL NO. 354 (regulation of private schools) and a majority of the committee recommended it be placed on the January 24 supplemental calendar. The report was signed by Senator Faiks, Chairman and concurred in by Senators Ferguson, Ray and Kelly.

SENATE BILL NO. 354 (regulation of private schools) was read the second time.

Senator Ray moved and asked unanimous consent that the Judiciary Committee Substitute offered on page 1798 be adopted. Without objection, §CS FOR SENATE BILL NO. 354 (JUD)¶ was adopted.

CS FOR SENATE BILL NO. 354 (JUD) was read the second time.

Senator Vic Fischer offered the following Amendment No. 1:

Page 2, line 23: following "pre-elementry schools" insert: "§and private pre-elementary schools that are¶ §not in facilities associated with an elementary school¶ §operating grades one through three¶"

Senator Vic Fischer moved that Amendment No. 1 be adopted.

Senator Ray offered the following amendment to Amendment No. 1:

Delete "operating" and insert "that operates"

Senator Ray moved for the adoption of the amendment to Amendment No. 1. Senator Gilman objected, then withdrew his objection. Senator Rodey asked unanimous consent. There being no further objection, the amendment to Amendment No. 1 was adopted.

Senator Vic Fischer moved and asked unanimous consent that Amendment No. 1 as amended be adopted. Senator Ferguson objected.

The question being: "Shall Amendment No. 1 as amended be adopted?" The roll was taken with the following result:

CS SB 354 (JUD) Am #1 as amended

Yeas:	14	Fahrenkamp, Faiks, Fischer Vic, Gilman, Halford, Josephson, Kelly, Kerttula, Mulcahy, Pettyjohn, Ray, Rodey, Sackett, Ziegler
Nays:	2	Ferguson, Fischer Paul
Excused:	4	Bennett, Eliason, Moss, Sturgulewski

and so, Amendment No. 1 as amended was adopted.

Senator Josephson offered the following Amendment No. 2:

Page 5, line 20: Add the following sentence to Sec. 14.45.100. "A facility which serves children under the age of six years and which receives state payments or subsidies is not eligible for the exemption provided by this section."

Senator Josephson moved and asked unanimous consent that Amendment No. 2 be adopted. Senator Pettyjohn objected, then withdrew his objection. There being no further objection, Amendment No. 2 was adopted.

Senator Josephson offered the following Amendment No. 3:

Page 5, line 24: after "child" insert "of compulsory school age"

Senator Josephson moved and asked unanimous consent that Amendment No. 3 be adopted. Without objection, Amendment No. 3 was adopted.

Senator Josephson offered the following Amendment No. 4:

Page 6, line 14: delete "one, three, six, and nine" and insert "two, four, six and ten"

Senator Josephson moved and asked unanimous consent that Amendment No. 4 be adopted. Senator Ferguson objected, then withdrew his objection. There being no further objection, Amendment No. 4 was adopted.

Senators Halford and Josephson offered the following Amendment No. 5:

Page 7, lines 9-10: delete "under oath to the department"

Senator Halford moved and asked unanimous consent that Amendment No. 5 be adopted. Senator Ray objected.

Senator Halford moved and asked unanimous consent that Amendment No. 5 be withdrawn. Without objection, Amendment No. 5 was withdrawn.

Senators Josephson and Halford offered the following Amendment No. 6:

Page 7, lines 9-10: after "under oath" insert "by affirmation" and delete "to the department"

Senator Josephson moved and asked unanimous consent that Amendment No. 6 be adopted. Without objection, Amendment No. 6 was adopted.

Senator Ray moved and asked unanimous consent that §CS FOR¶ §SENATE BILL NO. 354 (JUD) am¶ be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 354 (JUD) am was read the third time.

Senator Ferguson moved and asked unanimous consent that his name be deleted as a co-sponsor on the original bill. Without objection, it was so ordered.

The question being: "Shall CS FOR SENATE BILL NO. 354 (JUD) am (regulation of private schools) pass the Senate?" The roll was taken with the following result:

CS SB 354 (JUD) am 3RD

Yeas:	15	Fahrenkamp, Faiks, Fischer Paul, Fischer Vic, Gilman, Halford, Josephson, Kelly, Kerttula, Mulcahy, Pettyjohn, Ray, Rodey, Sackett, Ziegler
Nays:	1	Ferguson
Excused:	4	Bennett, Eliason, Moss, Sturgulewski

and so, CS FOR SENATE BILL NO. 354 (JUD) am passed the Senate.

CS FOR SENATE BILL NO. 354 (JUD) am was engrossed, signed by the President and Secretary and transmitted to the House for consideration.

BILL SB0354
PAGE 02411
DATE 02/01/84
CHAMBER HOUSE
TEXT The Health, Education & Social Services Committee has had COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 354 (Judiciary) amended (relating to the regulation of private schools) under consideration, recommends it be replaced with HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 354 (HESS) (same title) and reports it back as follows: Tischer (Chairman), Uehling, M. W. Miller and Martin recommend do pass; Goll, Koponen and Davis recommend "pass Senate version".
CSSB 354(Jud)am was referred to the Rules Committee for placement on the calendar.

BILL SB0354
PAGE 02617
DATE 02/16/84
CHAMBER HOUSE
TEXT The Rules Committee has had COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 354 (Judiciary) amended (relating to the regulation of private schools) under consideration and recommends it be replaced with HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 354 (Rules) (same title), and reports it back as follows: Fuller (Chairman), Barnes, Phillips, Liska, Tischer and M. M. Miller recommend do pass.
CSSB 354(Jud)am was returned to the Rules Committee for placement on the calendar.

Regulation of Religious Schools

SENATE BILL NO. 354, (see page 18). The five-day hearing notice rule was waived on January 16 so the bill could be heard in Judiciary. January 17 a Health, Education & Social Services referral was added. Reported back from Judiciary on January 19 with the committee recommending it be replaced with a CS and as follows: Ray (Chairman) and Ziegler signed "no recommendation"; Pettyjohn and Eliason signed "do pass." To Health, Education & Social Services.

Note: A corrected version of SB 354 was printed on Monday, January 16. The bill that we summarized in last week's report (p. 18) was printed by mistake. The following is a sectional analysis of the bill, prepared by Keith B. Levy, Legislative Counsel:

You have requested a sectional analysis of SB 354, "An Act relating to the regulation of private schools." The main thrust of the bill is to allow religious and other private schools to opt out of the general laws and regulations applicable to private schools if they agree to comply with certain minimal requirements.

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion while at the same time ensuring the quality of all education in the state.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). It provides that the department will consult with the state fire marshall and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It clarifies that the department must require physical examinations and immunizations in private pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is no longer responsible for the general supervision of private pre-elementary schools and nurseries. Supervision over public pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Finally, section 2 makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is not authorized to require private schools to be licensed (AS 14.07.020(10)).

Section 3 amends the state's compulsory education law (AS 14.30.010) to provide that attendance at a school operating in compliance with AS 14.45 (see section 5, below) satisfies the compulsory education requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100).

The parent or guardian of a child enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the number of students enrolled in each grade and the school calendar (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades one, three, six, and nine at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the parent or guardian of the student. The school is required to make composite test results available annually to an authorized representative of the Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the result of which are also public (AS 14.45.120(c)).

Regulation of Pvt. Schools

CS FOR SENATE BILL NO. 354 (JUD)(AM), (see pages 18;74;133). Received in the House January 24 and referred to Health, Education and Social Services.

Regulation of Private Schools

CS FOR SENATE BILL NO. 354 (JUDICIARY)(AMENDED), (see pages 18;74). Before the Senate on January 24. The Judiciary CS was adopted by unanimous consent. The following amendments were adopted:

--Am. No. 1 as amended. Original amendment by Vic Fischer, amended by Ray, and adopted, 14-2. Nays: Ferguson & Paul Fischer. Changes language in Sec. 2 to direct the Dept. of Education to "... exercise general supervision over public pre-elementary schools and private pre-elementary schools that are not in facilities associated with an elementary school that operates grades one through three." Underlined material added by amendment. Currently DOE, in cooperation with the Dept. of H&SS, exercises general supervision over both public and private pre-elementary schools, as well as over the educational component of nurseries.

--Am. No. 2 by Josephson, by unanimous consent. Adds to section granting exemption from school laws to private schools that comply with certain health and safety laws: "A facility which serves children under the age of six years and which receives state payments or subsidies is not eligible for the exemption provided by this section."

--Am. No. 3 by Josephson, by unanimous consent. Amends "Requirements of Exempt Schools" to read: "The parent or guardian of a child enrolled in a religious or other private school that complies with AS 14.45.100 - 14.45.140 shall file an annual notice of enrollment in the school for the child of compulsory school age with the local public school superintendent ...." (Underlined material added.)

--Am. No. 4 by Josephson, by unanimous consent. Requires exempt religous and private schools to comply with standardized testing requirements--administering a nationally standardized test to all students enrolled in grades two, four, six, and ten (was "grades one, three, six, and nine" in Judiciary CS).

--Am. No. 6 by Josephson and Halford, by unanimous consent. Amends section on records to read: "The chief administrative officer of a school that elects to comply with AS 14.45.100 - 14.45.140 shall certify under oath by affirmation [TO THE DEPARTMENT] that the records required under (a) of this section are being maintained." (Underlined material added, bracketed material deleted from Judiciary version by Am. 6.)

operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140).

It should be kept in mind that these provisions are not mandatory unless the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

The Senate Judiciary Committee made two additions to the "Purpose" in Sec. 1: "In conformity with the fundamental right to freedom of religion guaranteed by the constitutions of the United States and the State of Alaska and in recognition of the right of parents to choose to have their children educated in private schools, it is the purpose of this Act ... (3) to allow diversity in education by encouraging private education." (Underlined material added by Judiciary.)

Regulation of Private Schools

CS FOR SENATE BILL NO. 354 (JUD)(AM), (see pages 18;74;133; 143). Reported back to the Senate on February 1 by Health, Education & Social Services with a majority recommending it be replaced with a House HESS CS and that it do pass. Concurring: Tischer (Chmn.), Uehling, M. W. Miller and Martin. Goll, Koponen and Davis recommended "pass Senate version." To Rules.

The House HESS CS makes the following changes to the Senate version:

--Deletes Senate floor amendment relating to general supervision by DOE over private pre-elementary schools that are not in facilities associated with an elementary school that operates grades one through three (Am. No. 1 as amended, page 133).

--Deletes "or subsidies" from Am. No. 2 adopted by the Senate (see page 134).

--Changes "of compulsory school age" (added by Am. No. 3, page 134) to more logical place in sentence: "The parent or guardian of a child of compulsory school age enrolled in a religious or other private school that complies with AS 14.45.100 - 14.45.140 shall file an annual notice of enrollment in the school for the child with the local public school superintendent ...."

--Changes grades for administering standardized tests to grades four, six and eight (was two, four, six and ten--see Am. No. 4, page 134).

--Amends section on records to read: "The chief administrative officer of a school that elects to comply with AS 14.45.100 - 14.45.140 shall certify to the department under oath or by affirmation, that the records required under (a) of this section are being maintained." (Underlined material added by House HESS CS--same section amended by the Senate, see Am. No. 6, page 134.)

PROPOSED AMENDMENT TO

CS FOR SENATE BILL 354 (Judiciary)

*Section 1. PURPOSE. In conformity with the fundamental right to freedom of religion guaranteed by the constitutions of the United States and the State of Alaska; and in recognition of the right of parents to choose to have their children educated in private schools, it is the purpose of this Act

(1) to ensure that in matters of education by religious organizations, the state shall not control or interfere with the rights of conscience and religious liberty; and

(2) to further the state's legitimate interest in ensuring the quality of all education, and

(3) to allow diversity in education by encouraging private education.

Levy
1/18/84

BY TISCHER, FURNACE, LINDAUER, BARNES, SZYMANSKI, ABOOD, BETTISWORTH, BUSSELL, CATO, COWDERY, DUNCAN, FLOOD, FRITZ, FULLER, HERRMANN, LARSON, LISKA, MARTIN, M.M.MILLER, M.W.MILLER, PESTINGER, PHILLIPS, RINGSTAD, SHULTZ, WARD AND HAYES

IN THE HOUSE

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 514

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of private schools."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. In conformity with the fundamental right to freedom of religion guaranteed by the constitutions of the United States and the State of Alaska and in recognition of the right of parents to choose to have their children educated in private schools, it is the purpose of this Act

(1) to ensure that in matters of education by religious organizations the state shall not control or interfere with the rights of conscience and religious liberty;

(2) to further the state's legitimate interest in ensuring the quality of all education, including private education; and

(3) (to allow diversity in education by) encouraging (minimizing STATE regulation of) private education. State involvement in the affairs of

* Sec. 2. AS 14.07.020 is amended to read:

Sec. 14.07.020. DUTIES OF THE DEPARTMENT. The department shall

(1) exercise general supervision over the public schools of the state except the University of Alaska;

(2) study the conditions and needs of the public schools of the state and adopt or recommend plans for the improvement of the public schools;

(3) provide advisory and consultative services to all public school governing bodies and personnel;

(4) prescribe by regulation a minimum course of study for the public schools;

(5) establish, in coordination with the Department of Health and Social Services, a program for the continuing education of children who are held in detention facilities in the state during the period of detention;

(6) accredit those public schools which meet accreditation standards prescribed by regulation by the department; these regulations shall be adopted by the department and presented to the legislature during the first 10 days of any regular session, and become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house;

(7) prescribe by regulation, after consultation with the state fire marshal and the state sanitarian [DEPARTMENT OF HEALTH AND SOCIAL SERVICES], standards that will assure healthful and safe conditions in the public and private schools of the state including a requirement of physical examinations and immunizations in private pre-elementary schools; the standards for private schools may not be more stringent than those for public schools;

(8) [IN COOPERATION WITH THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] exercise general supervision over public [AND PRIVATE] pre-elementary schools [AND OVER THE EDUCATIONAL COMPONENT OF NURSERIES AS DEFINED IN AS 47.35.080(4)]; pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

(9) provide accredited elementary and secondary correspondence study programs available to any Alaskan through a centralized office of correspondence study;

(10) accredit private [ELEMENTARY AND SECONDARY] schools which request accreditation and which meet accreditation standards prescribed by regulation by the department; nothing in this paragraph authorizes the department to require religious or other private schools to be licensed;

(11) review plans for construction of new public elementary and secondary schools and for additions to and major rehabilitation of existing public elementary and secondary schools and, in accordance with regulations adopted by the department, determine and approve the extent of eligibility for state aid of a school construction project begun after July 1, 1978; for the purposes of this paragraph, "plans" include educational specifications, schematic designs, and final contract documents;

(12) provide educational opportunities in the areas of vocational education and training, basic education, and fire-service training to individuals over 16 years of age who are no longer attending school;

(13) administer the grants awarded under AS 14.11.020.

* Sec. 3. AS 14.30.010(b) is amended to read:

(b) This section does not apply if a child

(1) is provided an academic education comparable to that offered by the public schools in the area, either by

(A) attendance at a private school in which the teachers are certificated according to AS 14.20.020;

(B) tutoring by personnel certificated according to AS 14.20.020; or

(C) attendance at an educational program operated in compliance with AS 14.45.100 - 14.45.140 by a religious or other private school [ATTENDANCE AT A PRIVATE SCHOOL IN WHICH THE

AVERAGE STUDENT PROFICIENCY IS NOT LESS THAN THE AVERAGE PROFICIENCY FOUND IN THE PUBLIC SCHOOLS IN THE AREA AS MEASURED BY NATIONAL ACHIEVEMENT TESTS; THE DEPARTMENT WITH ASSISTANCE FROM REPRESENTATIVES OF THE PRIVATE SCHOOLS SHALL PROMULGATE REGULATIONS DEFINING THE SUBJECT AREAS TO BE TESTED AND THE MINIMUM AVERAGE SCORES TO BE ACHIEVED];

(2) attends a school operated by the federal government;

(3) has a physical or mental condition which a competent medical authority determines will make attendance impractical;

(4) is in the custody of a court or law enforcement authorities;

(5) is temporarily ill or injured;

(6) has been suspended or denied admittance according to AS 14.30.045;

(7) resides more than two miles from either a public school or a route on which transportation is provided by the school authorities, except that this subsection does not apply if the child resides within two miles of a federal or private school which the child is eligible and able to attend;

(8) is excused by action of the school board of the district at a regular meeting or by the district superintendent subject to approval by the school board of the district at the next regular meeting;

(9) has completed the 12th grade;

(10) is enrolled in a full-time program of correspondence study approved by the department; in those school districts providing an approved correspondence study program, a student may be enrolled either in the district correspondence program or in the centralized correspondence study program;

(11) is equally well-served by an educational experience approved by the school board as serving the child's educational interests despite an absence from school, the request for excuse is made in writing by the child's parents or guardian, and approved by the principal or administrator of the school that the child attends.

* Sec. 4. AS 14.45.030 is amended to read:

Sec. 14.45.030. NON-EXEMPT SCHOOLS [ATTENDANCE AND ANNUAL REPORTS REQUIRED]. Teachers and others in charge of religious or other private [OR DENOMINATIONAL] schools not operated in compliance with AS 14.45.100 - 14.45.140 are not exempt from laws and regulations relating to education. Non-exempt schools shall make regular monthly attendance reports and annual reports to the commissioner in the same manner as teachers and superintendents in the public schools.

* Sec. 5. AS 14.45 is amended by adding new sections to read:

ARTICLE 2. EXEMPT RELIGIOUS AND OTHER PRIVATE SCHOOLS.

Sec. 14.45.100. EXEMPTION. A religious or other private school that complies with AS 14.45.100 - 14.45.140 is exempt from other provisions of law and regulations relating to education except law and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations.

Sec. 14.45.110. REQUIREMENTS OF EXEMPT SCHOOLS. (a) The parent or guardian of a child enrolled in a religious or other private school that complies with AS 14.45.100 - 14.45.140 shall file an annual notice of enrollment in the school for the child with the local public school superintendent for the area in which the child resides on a form provided by the department. The form shall be signed by the parent or guardian and the chief administrative officer of the school and returned to the local public school superintendent by the parent or guardian. The school shall notify the local public school

superintendent within a reasonable time if the child is no longer enrolled in or attending the school.

(b) A religious or other private school that elects to comply with AS 14.45.100 - 14.45.140 shall maintain monthly attendance records for each student enrolled in the school, shall operate on a regular schedule, excluding reasonable holidays and vacations, during at least 180 days of the year, and shall make an annual report to the commissioner of the number of students in each grade and the school calendar.

Sec. 14.45.120. STANDARDIZED TESTING REQUIREMENTS. (a) A religious or other private school that elects to comply with AS 14.45.100 - 14.45.140 shall administer a nationally standardized test selected by the chief administrative officer of the school to all students enrolled in grades four, six, and eight at least once each school year.

(b) The nationally standardized test must measure achievement in English grammar, reading, spelling, and mathematics.

(c) A religious or other private school that elects to comply with AS 14.45.100 - 14.45.140 shall maintain records of the results of the nationally standardized tests and the records shall be made available to the parent or guardian of the student. Each school shall make composite test results for the school available annually to an authorized representative of the department. The composite test results of a religious or other private school operated in compliance with AS 14.45.100 - 14.45.140 are not public information unless each public school

(1) is also required to administer a nationally standardized test that measures achievement in English grammar, reading, spelling, and mathematics; and

(2) the composite test results for each public school are public information.

Sec. 14.45.130. RECORDS. (a) A religious or other private school that elects to comply with AS 14.45.100 - 14.45.140 shall maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school.

(b) The chief administrative officer of a school that elects to comply with AS 14.45.100 - 14.45.140 shall certify under oath to the department that the records required under (a) of this section are being maintained.

Sec. 14.45.140. DEFINITION. In this chapter

(1) "religious school" means a private school operated by a church or other religious organization that does not receive direct state or federal funding.

* Sec. 6. AS 14.45.020 is repealed.

Joanne Wallington, M.D.

Pediatric Cardiology

"Children's Heart Disease"

Suite 209
4001 Dale Street
Anchorage, Alaska 99504
(907) 278-1915

January 30, 1984

Representative Walt Furnace
Pouch V
Juneau, AK 99811

Dear Mr. Furnace:

I would like to express my support for Senate bill 129 and Senate bill 130 which will provide for the teaching of cardiopulmonary resuscitation in the schools and provide funds for the necessary instructional materials. I believe this life saving information should be known by as many people as possible. Providing this instruction in the schools will give a large and ever growing number of individuals capable of providing resuscitation and I think the cost is quite small compared to the benefits.

Sincerely,

Joanne Wallington, M.D.

JW:ken

cc: Senator Ziegler
Senator Eliason
Senator Ferguson

Rep. Furnace: Jan Ziegler thought this additional write up might be helpful to you
Linda Kozisek

SB 130

January 18, 1984

I want to thank the sponsors of HB 514 and Senate Bill 354 for their attitude, concern, and intentions. The purpose of this legislation as expressed is excellent. The assurance of religious liberty and a child's education without conflict is supported by most of us. However, there is an incongruence in the bill as written. Section I subsection (1) states that "the state shall not control or interfere with the rights of conscience and religious liberty;". Yet, in this bill churches seeking exemptions have to meet conditions and file reports to the state.

I am the Minister of Education for Glacier Valley Baptist Church, in Juneau. As a church we can not request or accept an exemption from the Department of Education. Exemptions can only be granted to a lesser by a greater power. We can not take an easy way out from possible confrontations if that way involves denial of the Sovereignty of our Lord.

The state can still meet its obligations of ensuring that a child receives an education that prepares him as a viable member of society, by placing the primary responsibility of education where it belongs, on the parent. The parent should be responsible for the reports to the state if he elects to educate his child in a program other than the public schools, or state controlled alternatives.

In view of the purpose of this legislation, please see my enclosure for the suggested changes.

Thank you.

Sincerely,

William E. Brown

William E. Brown
Minister of Education

Page 1 line 16 DELETE "all" from all education. In line 19 one example is given that voids the "all" aspect.

Section 14.45.030. page 5 lines 3-9 DELETE If you don't meet the requirements of the exemption (voluntary or otherwise) you are under Department of Education's control.

Section 14.45.100. page 5 lines 11-16 DELETE Asking for an exemption implies recognition of control or higher authority. This is incongruent to the stated purpose of the legislation in Section I subparagraph (1) and (2)

Page 5 lines 25, 26, 27 recognizes the local public school superintendent as in authority over the church school.

Page 5 lines 28, 29 Page 6 lines 1-5 Entangles the church school unnecessarily and once again places the school as answerable to the state.

Page 6 lines 6-11 Testing requirements DELETE (a) A religious or other private school" Excessive entanglement.

Page 6 lines 14-19 Subsection (c) DELETE

CHANGES

Article 2 Section 14.45.100. Children Enrolled In Private and Religious Schools.

Parents choosing to enroll their children in schools where the laws and regulations relating to education except law and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations are not applicable must file notice of enrollment with their local public school district.

Section 14.45.110 Parental Responsibilities concerning non licensed education.

Page 5 lines 18-24 Remain

line 25 DELETE school shall notify, add "the parent shall notify."

Page 6 lines 6-11 change "a religious or other private school" to "a parent"

Page 6 line 8 change "shall administer" to "shall submit the results"

Page 6 line 14-19 Subsection (C) change line 19 from "the composite test results" to "the student test results from a non licensed school utilized by parents in compliance with AS 14.45.100-AS 14.45.140"

Page 6 lines 28-29

A parent or guardian that elects to comply with AS 14.45.100-14.45.140 shall file an annual report reflecting standardized test scores, past year's grades, and approaching year's course of study, no later than October 1. Students enrolled for the first time in a non licensed church or private school will not be required to report previous year's performance.

Page 7 lines 1-3 DELETE. Insert A student that transfers from an alternative education covered by AS 14.45.100-14.45.140 to a public school shall have records that reflect immunizations, physical examinations, standardized testing, academic achievement, and courses attended.

Page 7 lines 4-7 DELETE - excessive entanglement

NOTICE OF ENROLLMENT IN A NON-LICENSED SCHOOL

198__ SCHOOL YEAR

STUDENT'S NAME _____ AGE ____ GRADE ____

SCHOOL PROVIDING SERVICES _____ CITY _____

COURSE OF STUDY FOR THIS ACADEMIC YEAR

_____ _____ _____ _____

_____ _____ _____ _____

_____ _____ _____ _____

REST OF FORM IS TO BE COMPLETED FOR STUDENTS CONTINUING IN A NON-LICENSED SCHOOL.

COURSES TAKED PRIOR ACADEMIC YEAR. LIST GRADES EARNED.

_____ ____ _____ _____ _____

_____ _____ _____ _____

_____ _____ _____ _____

IF A CHILD WAS IN GRADES ONE, THREE, SIX, OR NINE, COMPLETE THE FOLLOWING STANDARDIZED TEST INFORMATION.

ME OF TEST	DATE ADMINISTERED	PCTL SCORES ENGLISH GRAMMAR	READING	SPELLING	MATHEMATICS

PARENTS OR GUARDIAN'S SIGNATURE _____

ADMINISTRATOR'S SIGNATURE OF SERVICING SCHOOL _____

American Association of University Women
Alaska State Division

Susan R. Clark
Division Legislative Chair
1109 C Street, Juneau, Alaska
(907) 586-6952

30 January 1984

SB 354 relating to regulation of private schools:

Members of House HESS Committee, I am here today representing both the State Division of the American Association of University Women at the direction of our State President Evelyn Bonner of Sitka, and the State League of Women Voters at the direction of Paula Ziegler who is today in Ketchican and cannot attend herself.

Both organizations believe in quality child care for children of pre-elementary age, and that care given any child outside his or her home should provide enriching and varied experiences with parental involvement strongly encouraged. While the bill before you speaks to the education of children from age three through grade 12, we are confining our remarks to the pre-kindergarten child, whose need for individual attention from adults is higher than at any other time in that child's life, and who is particularly vulnerable when receiving care from persons other than her or his family.

We realize that this bill is going to pass, but because it deals with the Dept. of Education statutes that have been found to be inadequate by the State Dept. of Internal Audit as well as the Federal Office of Child Development, we feel obligated to bring these problems to your attention. Of highest concern is that there is no definition of the word "preschool" in the statute. Currently there are aproximately 250 unlicensed/uncertificated "preschools" operating in the state and about 100 of these are functionally identical to licensed day care centers. When this bill is enacted, Alaska will be the only state in the Union that does not regulate programs that operate full day (up to 10 hours or more) care of pre-school children. In states other than Alaska, preschools are considered to be of short hour duration which generally concentrate on structured planned activities. Parents overwhelmingly want enrichment/education programs for their children, and believe that by sending their children to preschool programs they are doing the best for their children. However most are unaware that the Division of Internal Audit and the Senate Advisory Council's Day Care Status Report found that "standards for preschool certification were significantly lower than standards for day care center licensure," and under this bill would be practically non-existant.

Citizens and parents have come to rely on certain consumer protection standards that they believe are in place concerning basic health and safety at the very least. Most parents assume that the Fire Marshall's inspection includes a requirement that there be a minimum number of staff to care for the children under emergencies. It does not, although the Senate Advisory Report points out that the 1982 Natl. Fire Code utilized by Alaska determines that a minimum staff to child ratio of 1 to 10 is necessary for an acceptable

SB354 (The Private School Bill) passed the state senate on Tuesday, January 24th. The bill will go a long way in protecting the liberty of parents to send their child to a religious or private school.

Six amendments were added to the bill during the senate floor debate just prior to passage. They are listed below along with comments about their effect upon the bill.

AMENDMENT #1

Sec. 2. AS 14.07.020 (Para. 8)
Page 2 lines 23-25

"and private pre-elementary schools that are not in facilities associated with an elementary school that operates grades one through three"

There has been controversy over the difference between a child care center and a "pre-school." An attempt was made to say that a program was a "pre-school" if the children aged 3-5 attended less than 4 hours a day. That approach should be resisted. Parents should decide how long they want their children in a particular program.

A second approach was the one found in this amendment. It could create some serious problems. A church in a community with no public-school kindergarten may wish to have a church kindergarten, but be denied the right unless it was also willing to have a Christian school--at least for grades 1-3.

This could lead to an "equal protection" problem for the church and in the eyes of the Attorney General's office. The church could sue the state to indicate that it was being denied the right to have a Christian kindergarten. The administration may find in this Amendment #1 all it needs to veto the entire bill. The concept of Amendment #1 was not in the agreement that was made between legislators and the administration when they agreed to the legislation this year.

There is a third approach that could solve the problem and yet remain within the spirit of the legislative-administration decision. All child-care centers receive state funds for monetary help to parents that qualify as low-income. It amounts to thousands of dollars. None of the groups that wish to be exempt under this bill receive nor wish these funds. Separate the two groups on the basis of FUNDING. This also fits the definition section on page 7 of the bill.

Additional reasons for rejecting Amendment #1

1). ...not in facilities...Some church schools have more than one facility either on the same property or at different locations. If interpreted in a narrow fashion, some groups that deserve the exemption may find it denied. 2). What about a school for grades above third grade. Will they qualify?

SUGGESTED SOLUTION

A new amendment needs to be substituted by the House. Suggested wording:

"and private pre-elementary schools that receive direct state funding."

A second less-desirable amendment could read--

"and private pre-elementary schools that are associated with an elementary or secondary school program."

AMENDMENT #2

Sec. 5 14.45.100
Page 5 lines 22-25

"A facility which serves children under the age of six years and which receives state payments or subsidies is not elgible for the exemption provided by this section."

The overall thrust of this amendment is appropriate except for two words--"or subsidies." There is a growing number of people that classify a tax-exemption as a "subsidy." These two words must be removed lest a few years from now the whole purpose of the bill be lost as far as the church schools being exempt.

AMENDMENT #3
Sec. 5 14.45.110
Page 5 line 29

"of compulsory school age"

This is a good amendment that will eliminate a lot of paperwork for both the schools and government. This section is in the bill to satisfy the Compulsory School Law. However the law applies to children above the pre-school age. Therefore parents of these children should not have to notify the local school district that their pre-school child is attending a private or church school.

AMENDMENT #4
Sec. 4 14.45.120
Page 6 line 19

"two, four, six and ten"

It is difficult to test children in grade 2 on the subject of "English grammar." The state tests the public schools on an "Assessment Test" in grades 4 and 8. I would suggest that the following be substituted for Amendment #4.

Substitute - "four, six, and eight" OR "four, six, eight, and ten."

AMENDMENT #5 and 6
Sec.5 14.45.130 (Para. b)
Page 7 Lines 14-15

"or by affirmation ~~to the department~~"

One amendment adds three words
the other deletes three words

These two amendments are probably workable and don't need changing unless the administration threatens to veto the bill because "to the department" is deleted. That is something that should be investigated.

This position paper has been prepared
by Pastor Burton Carney of the
Harvester Christian Church and Academy

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344-0528

THE DEPARTMENT OF EDUCATION NEEDS TO IMPROVE MANAGEMENT OF PRESCHOOL PROGRAMS

FEBRUARY 1982

STATE OF ALASKA
OFFICE OF THE GOVERNOR
DIVISION OF INTERNAL AUDIT

05-41

SUMMARY

The Department of Education is responsible for preschool programs in the State of Alaska. There are at least 185 early childhood programs in the state that provide preschool services.

This report shows that the Department of Education needs to better manage preschools, and needs to define which early childhood programs should be classified as preschools. The report also shows that the Department needs to set standards for preschools.

BETTER MANAGEMENT OF PRESCHOOL PROGRAMS IS NEEDED

The Department has certified only 28 early childhood programs as preschools, and has monitored even fewer. Historically, the Department has placed little emphasis on preschools. In addition, deciding which early childhood programs actually are preschools is difficult because the Department has not provided a definition of preschools. The lack of a definition causes confusion for those attempting to manage other child care programs.

STANDARDS FOR PRESCHOOLS SHOULD BE IMPROVED

The Department has not developed adequate preschool standards. And, although Alaska Statutes require that the Department of Education cooperate with the Department of Health and Social Services in regulating preschools, there has been little cooperation. Inadequate standards lead to inconsistent care for similar populations in preschool and daycare centers, and lessens the value of the preschool certification process.

RECOMMENDATIONS

To assure that the Department of Education meets their management responsibilities for preschools, we recommend the Commissioner require that:

- -- preschool programs in Alaska are regulated; and
- -- preschool programs are monitored to assure compliance with requirements.

To help eliminate the confusion in determining which early childhood programs are preschools, we recommend the Commissioner provide a definition of which early childhood programs are preschools.

To assure that the similar populations in preschool and daycare programs receive consistent care, we recommend the Commissioner of the Department of Education cooperate with the Commissioner of the Department of Health and Social Services in developing health, safety and developmental standards for preschools. We also recommend the Commissioner of the

Department of Education develop standards for the educational component of preschools.

DEPARTMENT COMMENTS

In response to our draft report, the Commissioner of the Department of Education and the Commissioner of the Department of Health and Social Services agreed with our recommendations and are taking action to improve management of early childhood programs. (See Appendices I and II)

CONTENTS

INTRODUCTION

There are at least 37,000 children 6 years old or younger in Alaska. Many of these children spend part of their time in organized early childhood programs, such as preschools. Research has produced abundant evidence that a good child development program has significant short and long term effects. Early childhood programs have been found to have a positive effect on a child's self respect, proficiency at learning, achievement and intelligence test scores, reduction of grade failure, and social development. According to a major economic study the benefits of a quality child development program provide a 248 percent return on the original investment.

In the State of Alaska, the Department of Education is responsible for setting preschool standards for a level of care that will insure safety, reduce predictable harm, and provide developmental opportunities. The Department of Health and Social Services is similarly responsible for daycare programs.

DEPARTMENT OF EDUCATION RESPONSIBILITIES

Alaska Statute 14.07.020 provides that the Department of Education, in cooperation with the Department of Health and Social Services, exercise general supervision over public and private preschools and over the educational component of daycare centers, and prescribe regulations that will assure healthful and safe conditions in the schools. The Departments' responsibility is defined in Section 4 of the Alaska Administrative Code 60.010 which requires the Department issue a certificate of approval after:

- conducting an investigation of preschool applicants;
- reviewing the proposed plan of education, mode of operation and supervision of children; and
- investigating whether the programmatic objectives of the preschool are being met.

This regulation also requires that preschools have:

- a valid Department of Education certificate displayed with effective dates;
- insurance;
- a Cumulative Health Record Form and records of immunization of children;
- records of physical exam and records of immunization for staff and volunteer workers;
- a disaster plan;
- documentation, on file with the Department of Education, showing inspections for public safety were made before certification and;
- provided programmatic requirements to the Department of Education.

DEPARTMENT OF HEALTH AND SOCIAL SERVICE RESPONSIBILITIES

The role of the Department of Health and Social Services is to license, investigate and supervise daycare centers; and to issue and enforce regulations. Facilities that are primarily educational are exempt from Department of Health and Social Service regulation.

OTHER STATE INVOLVEMENT IN PRESCHOOL AND DAYCARE PROGRAMS

The Department of Community and Regional Affairs contracts with local communities to provide daycare assistance to enable parents to work or enter training. In addition, the State, through the Department, provides funds to Federal Head Start programs in Alaska.

The Department of Commerce and Economic Development provides a revolving loan fund to enable daycare facilities to obtain loans when necessary to meet licensing standards.

In addition, the Department of Environmental Conservation and the Department of Public Safety review early childhood programs for compliance with fire and sanitation standards.

SCOPE OF THE REVIEW

We performed the following steps in reviewing Department of Education's role in exercising general supervision of Alaska's preschools:

- -- reviewed applicable statutes and administrative procedures;
- -- interviewed educators, Departmental administrators, and early childhood learning center staff;
- -- visited preschools;
- -- reviewed and analyzed documents of the Department of Education and preschools; and
- -- gathered information by questionnaires to similar programs in other states, and to preschool and daycare centers in Alaska.

BETTER MANAGEMENT OF PRESCHOOL PROGRAMS IS NEEDED

Historically, the Department of Education has taken little action to manage preschools and has not allocated resources for managing preschools. As a result, the Department has certified and monitored few preschools, which could expose the State to liabilities. In addition, the Department's failure to develop a definition which distinguishes between child care programs and preschools results in confusion for those attempting to manage other child care programs.

THE DEPARTMENT OF EDUCATION MAKES LITTLE EFFORT TO MANAGE PRESCHOOLS

Little staff time or funds are allocated to performing the Department's statutory obligation in early childhood education. The Department staff member responsible for early childhood education programs is also responsible for guidance and counseling, and private and denominational schools. Only about one eighth of her staff time is allocated to the early childhood program. In addition, the Department of Education budgets show that no funds have been allocated to early childhood programs in the last 5 years.

FEW PROGRAMS ARE CERTIFIED

The Department of Education certifies few preschool programs. Responses to questionnaires from 41 of Alaska's 52 school districts showed that there are at least 167 preschool programs in the State. Yet, during the past 5 years the Department of Education has certified only 28 programs. In addition, many of the 28 certificates were given without the necessary documentation on file in the Department. For example, of the 28 programs certified, the Department did not have a fire and sanitation inspection report on file for 12 of the programs, did not have documentation of insurance for 18 programs and did not have programmatic requirements for 18 of the programs.

In addition, many daycare centers are offering preschool programs without Department of Education supervision over the educational component. For example, of the 19 daycare programs surveyed, 18 stated they offered a preschool program but were not certified by the Department of Education.

FEW PROGRAMS ARE MONITORED

The Department is not making onsite visits to monitor the safety, medical records, insurance records or to see if the school is actually implementing a curriculum. The Department has made only about 15 onsite visits in the last 5 years. The early childhood coordinator stated that seven of the onsite visits occurred as a result of a crisis situation and the other reviews were performed on lunch hours while traveling for other reasons.

LIABILITY EXISTS FOR NONPERFORMANCE OF STATUTORY RESPONSIBILITY

The concept of "State Certification" implies to the public that:

-- the preschool is, in fact, an education institution; and

-- the State, through the appropriate agency, has determined the preschool to be in compliance with appropriate laws and regulations.

In a November 1980 memo to the Department of Law, the Commissioner of Health and Social Services expressed concern about the number of unregulated preschools. The Commissioner stated in the memo that the problem of unregulated preschools causes unequal application of the law and has the following results.

1. Lowering respect for Alaska statutes in general.

2. Enforcement problems for this Department. Programs quickly call themselves pre-elementary schools when they learn that is a means of escaping regulations.

3. Risk to children in unregulated pre-elementary schools.

4. A large early childhood population subject to immunization regulations but not receiving the immunizations.

In response, the Department of Law noted that:

> "This office understands that the Department of Education does not now investigate facilities applying for certification and does not supervise the physical examination of immunization requirements. Nor is the department involved in monitoring of other health and safety codes.
>
> Even assuming that there are no certifiable pre-elementary schools in Alaska, the department's records should reflect that applications have been submitted and that investigations have taken place sufficient to determine that the Department of Education finds that no facility is a pre-elementary school or a day care facility with an education component."

The Department of Laws' advisor to the Department of Education told us that the Department of Education has been designated to perform a responsibility and currently is not performing it. Failure to perform where there is a duty to perform, can place the State in a position of exposure to liability.

PRESCHOOLS ARE NOT DEFINED

Alaska Statute 14.07.020 (8) provides that the Department of Education "...exercise general supervision over public and private pre-elementary

schools...when the school's primary function is educational." Alaska Statute 47.35.010-80 provides that the Department of Health and Social Services license..."an establishment providing care and services for any part of the 24-hour day for a child... but does not include any establishment whose primary purpose is educational." Neither of the statutes set criteria nor define what is to be considered a primarily educational facility versus a child care facility.

In 1975, the Department of Health, Education and Welfare (Federal Office of Child Development) commented in a letter to the Department of Health and Social Services that "Your statute is indeed weak, allowing for confusion and almost any interpretation..." The letter said that the most difficult job for the two Departments was the formulation of a clear and full definition of a facility whose function is "primarily educational", and the Departments should work towards better statutes and a clarification of the primarily educational function. The letter said a definition is needed so each applicant will know whether or not the law applied to their program and so each Department has a positive definition to use in deciding whether or not a facility is in their area of responsibility.

Even though the statute is weak, the Department could take action to establish standards and a definition of preschools, but they have not done so. In 1971, the Attorney General stated that a determination must be made whether a given school is actually primarily educational, and the "Department of Education...may define what type of program or programs is primarily educational."

RESPONSIBILITY FOR REGULATION IS NOT CLEAR

Because primarily educational has not been defined, neither the regulatory Departments, the facilities themselves, nor the public has a positive definition to use in deciding whether or not a program is a preschool or daycare program. As a result, any facility may choose to be classified as a preschool, and avoid the requirement to comply with daycare standards. For example, 8 of the 28 certified preschools provide daycare services but do not have to comply with daycare standards because they chose to be certified as preschools.

This problem also creates confusion for regulatory agencies. At locations where both preschool and daycare services are provided, the Department of Health and Social Services has found it difficult to determine compliance because two different standards are used. For example, children in the Department of Education regulated preschool program often intermingle with children in the Department of Health and Social Services regulated daycare program, thereby changing the acceptable staff pupil ratio.

In addition, the Municipality of Anchorage also has difficulty issuing accurate, legal and meaningful permits because some child care centers are providing services regulated by their ordinance and services regulated by the Department of Education.

The Department of Health and Social Services and the Municipality of Anchorage told us that the regulatory confusion also results in some early childhood programs being unregulated. For example, we found 36 early childhood programs unregulated by either the Department of Health and Social Services or the Department of Education.

STANDARDS FOR PRESCHOOLS SHOULD BE IMPROVED

The Department of Education's preschool standards do not assure that certified preschools provide quality educational programs in a safe and healthy setting. Alaska Statutes require that the Department of Education cooperate with the Department of Health and Social Services in regulating preschools, but cooperation has not occurred. In addition, the statutes do not give the Department authority to enforce standards. Inadequate standards lead to inconsistent care for similar populations in preschools and daycare centers. Also, the value of the preschool certification process is questionable because of the inadequate standards.

PRESCHOOL STANDARDS IN ALASKA ARE INADEQUATE

Preschool standards should assure that certified preschools provide quality educational programs in a safe and healthy setting. But, the Department of Education has not established educational standards for preschools. In addition, the Departments health and safety standards for preschools are lower than the standards the Department of Health and Social Services has established for daycare centers.

Standards are Needed to Assure Quality Preschool Programs

According to Federal and national association authorities in the field of child care and development, there are two levels of standards. First, there is licensing, which is the base level and assures that a program or facility meets health, safety and child development standards.

The second level generally supplements basic licensing and is designed to assure quality where a specialized service, such as education, is being offered. Thus, a facility providing child care should be licensed, while a facility operating as a preschool should have a child care license plus be certified as a preschool.

Educational Standards Have Not Been Developed

The Department of Education has not developed specific educational standards for preschools. The Department only requires that preschools provide written information concerning the schools philosophy and goals. Examples of standards that many states have set for preschools are those relating to teacher certification and space requirements.

Teacher Certification

According to education authorities the quality of the staff determines, to a high degree, the excellence of an educational program. For example, The Teacher Education Committee of the Association for

Childhood Education International has recommended that teachers of children three through eight years of age:

-- should have study in the areas of physical and biological sciences, mathematics and philosophy, language and literature, the social and behavioral sciences, and the fine arts.

-- should have a minimum of twenty-four semester hours of professional preparation in the field of early childhood education,

-- should have supervisory experience with young children, and

-- should be required to take refresher courses and to keep active affiliation with professional organizations.

In a recent survey of 26 states, 17 said they require separate certification, four said they require a separate early childhood endorsement, and five said they currently have no requirement on early childhood teacher certification.

Alaska is one of the five states surveyed that does not require any early childhood training as a prerequisite for teaching children under age six. The Department of Education allows any person 19 years old or over, or any student who is age 16 and enrolled in a training program, to be a staff member.

Space

National experts advise that an adequate amount of space available for children's activities is absolutely necessary to ensure a quality, developmentally-orientated child care program. For example, research has shown that space effects the quality of living and learning within a center:

> "the higher the quality of space in a center, the more likely were teachers to be sensitive and friendly in their manner toward children, to encourage children in their self chosen activities, and to teach consideration for the rights and feelings of self and others. Where spatial quality was low, children were less likely to be involved and interested, and teachers more likely to be neutral and insensitive in their manner, to use large amounts of guidance and restriction, and to teach arbitrary rules of social living."

In addition, tendencies towards social versus aggressive behavior has been found to be effected by space and according to a research study report:

"Several studies have found that most social involvement appears to occur at medium density (35-50 sq. ft.), while aggressiveness occurs at higher densities (below 35 sq. ft.) and random behavior occurs in large, undifferentiated settings (over 50 sq. ft. per child)."

Eight of the ten states who responded to our survey on this question required a minimum of 35 square feet per child. The Department of Education has not established space requirements for preschools in Alaska.

Preschool Standards are Lower Than Daycare Standards

In Alaska, the Department of Education's standards for preschools are lower than the Department of Health and Social Services standards for daycare centers. For example, the only preschool standard equal to daycare standards is the immunization standard as shown in the following table.

COMPARISON OF DAYCARE AND PRESCHOOL STANDARDS

STANDARD	DAYCARE	PRESCHOOLS
License Renewal	Annual	5 yrs.
Agency Review	Annual	5 yrs.
Staff Pupil Ratio	1-10	no standard
Indoor Space	35 sq. ft.per child	no standard
Outdoor space	75 sq. ft.per child	no standard
Fire Inspection	Annual	5 years
Sanitation Inspection	Annual	5 years
Health Program	required	no standard
Prone Rest	required	no standard
Immunizations	required	required
Nutrition Program	required	no standard
Corporal Punisnment	regulated	no standard

The Department of Health and Social Services also requires that daycare programs provide opportunities and experiences to promote the individual child's physical, emotional, social and intellectual growth, as outlined below:

- -- opportunities for balance of active/quiet play, group and individual, and indoor and outdoor play;
- -- opportunities for individual self expression in conversation. imaginative play and creative expressions;
- -- use of games, toys, books, sand, puzzles, for intellectual and social development;
- -- walking excursions/field trips; and
- -- equipment and furniture be of sufficient quality and quantity and appropriate to a child's use.

COOPERATION IN DEVELOPING PRESCHOOL STANDARDS HAS NOT OCCURRED

Alaska Statutes require that the Department of Education cooperate with the Department of Health and Social Services in the general supervision

THE VALUE OF ALASKA'S PRESCHOOL CERTIFICATION PROCESS IS QUESTIONABLE

Those who are aware of the Department of Education's standards for preschools generally consider the preschool certification process to be meaningless. For example:

-- Many of the early childhood educators we interviewed said that because of the Department's inadequate standards, the preschool certificates issued by the Department do not assure a quality preschool program. Certification is, in fact, misleading to parent consumers.

-- We interviewed instructors of two early childhood training programs and both teach their students that the Department's standards are not an acceptable standard to assure a quality preschool program.

-- We visited one two-hour a day educationally oriented program that chose to be licensed as a day care center rather than a preschool because they thought parents would have no assurance of a quality preschool program if it only complied with the the Department's preschool standards.

-- The legislature recently mandated that eligibility for a child care grant program is dependent on compliance with day care licensing standards. Those preschools certified by the Department of Education are not eligible for the grants unless they also have a daycare license.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The Department of Education needs to better manage preschool programs. During the past 5 years, the Department certified only 28 preschools and visited for monitoring purposes only 15 preschools. But, our analysis shows that there are at least 167 preschools. And, 18 of 19 daycare programs surveyed said they provided preschool services. In addition, because the Department of Education has not provided a definition of preschools there is confusion for those attempting to manage other early childhood programs.

The Department of Education has not cooperated with the Department of Health and Social Services in developing standards for preschool programs. Currently, there is inconsistent care for similar populations in preschools and daycare programs because preschool standards are lower than daycare standards. Preschools programs should meet daycare standards and should meet additional standards for education.

RECOMMENDATIONS

To assure that the Department of Education meets their management responsibilities for preschools, we recommend the Commissioner require that:

-- preschool programs in Alaska are regulated; and

-- preschool programs are monitored to assure compliance with requirements.

To help eliminate the confusion in determining which early childhood programs are preschools, we recommend the Commissioner provide a definition of which early childhood programs are preschools.

To assure that the similar populations in preschools and daycare programs receive consistent care, we recommend the Commissioner of the Department of Education cooperate with the Commissioner of the Department of Health and Social Services in developing health, safety and developmental standards for preschools. We also recommend the Commissioner of the Department of Education develop standards for the educational component of preschool.

DEPARTMENT COMMENTS

Both the Department of Education and Department of Health and Social Services responded to a draft of this report. Their comments are summarized below and are included as appendices I and II of this report.

Department of Education

The Commissioner of the Department of Education agreed with our recommendations and listed actions the Department has taken or will take to resolve the problems associated with managing preschool programs. The actions include:

-- Developing a tentative agreement with the Department of Health and Social Services and the Department of Community and Regional Affairs for coordination of early childhood programs.

-- Introducing a request for statutory change to require all child care programs be licensed by the Department of Health and Social Services for base level standards.

-- Development of standards for a voluntary education certification process in addition to the mandatory base level licensing.

-- Establishing on site reviews for evaluation of the educational component of certified preschools. (See Appendix I)

Department of Health and Social Services

The Commissioner of the Department of Health and Social Services agreed with our recommendations and is also in agreement with the plans for improvement as presented by the Department of Education. (See Appendix II)

MEMORANDUM State of Alaska

TO: John O'Meara, Director
Division of Internal Audit
Office of the Governor

DATE: February 2, 1982

FILE NO:

TELEPHONE NO: 465-2800

FROM: Marshall L. Lind, Commissioner
Department of Education

SUBJECT: Response to Draft Report

Attached is our response to your draft report titled "The Department of Education Needs to Improve Management of Preschool Programs". As you will note in our response, we are planning a series of actions which will address the conditions described in your report.

You and your staff are to be complimented for the professional manner in which the review was conducted and the report presented. The findings and recommendations are proving useful to us in planning how to better meet our responsibilities for preschool programs.

RESPONSE TO
THE DEPARTMENT OF EDUCATION NEEDS TO IMPROVE MANAGEMENT OF PRESCHOOL PROGRAMS

FEBRUARY 1982

STATE OF ALASKA
DEPARTMENT OF EDUCATION

INTRODUCTION:

The Department of Education is in basic agreement with the findings of the report by the Division of Internal Audit titled "The Department of Education Needs to Improve Management of Preschool Programs". In responding, therefore, we will make no effort to counter any of the findings of the report. We also believe that nothing would be gained by attempting to present reasons for our past activities in the management of preschool programs. Rather, we will present those actions which have been taken and those planned to address the conditions described in the report.

ACTIONS TAKEN:

During the past two months we have met several times with a representative from Health and Social Services and once with a representative from Community and Regional Affairs. These meetings have resulted in a tentative agreement between the three departments for the coordination of early childhood programs. We have also met with representatives from the Alaskan chapters of the National Association for the Education of Young Children to discuss plans for the role these chapters might play in the management of preschool programs. A presentation has also been made before the State Board of Education. At this meeting the board voted unanimously to endorse the early childhood education career ladder certification concept. The Board was also advised of tentative plans for carrying out Department of Education responsibilities for preschools.

ACTIONS PLANNED:

The tentative plan for managing preschool programs consists of the following steps. The conditions from the report, which will be addressed by each step, are presented following the description of each step.

PROPOSED STEP I:

All day care programs, including those claiming to be preschool programs, will be licensed by the Department of Health and Social Services. This base level of licensing will be mandatory and no programs should be exempt from the licensing requirement.

CONDITIONS ADDRESSED:

Requiring that all programs which provide services for preschool age children be licensed by Health and Social Services will clear up the confusion which currently exists for regulating agencies, and for the care providers. It will not be necessary to make a predetermination of whether or not a program is "primarily education." Programs will not be able to avoid basic licensing requirements by claiming to be educational programs. The plan will insure that all programs meet basic health, safety and child development standards, and will eliminate instances of inconsistent care for similar populations of children and differential treatment of care providers.

The plan will also negate the need for the Department of Education to obtain the enforcement authority giving it the power to close schools which do not meet basic health and safety standards, since Health and Social Services already has this authority and will be responsible for base level licensing which will insure adequate health and safety standards.

Implementing Step I of the plan will necessitate a change in statute. The Departments of Health and Social Services and Education are currently working cooperatively to determine those required changes. We anticipate that we will be introducing requests for statutory changes during this legislative session.

The change in licensing requirements will also greatly increase the staff load for Department of Health and Social Services licensing personnel. This will not correspond with a decrease for Department of Education personnel, since Department of Education personnel are not currently involved in licensing. Successful implementation will, therefore, require an increase in the Department of Health and Social Services licensing budget.

PROPOSED STEP II:

Day care centers wishing to have their educational programs certified will, on a voluntary basis, notify the Department of Education. An on-site review of these facilities will be conducted using a criteria for preschool programs. Those programs successfully meeting the criteria will be certified by the Department of Education.

CONDITIONS ADDRESSED:

This step will satisfy the Department of Education's statutory responsibility for certifying preschool programs. It will also provide a definition for preschool programs without making it a condition for base level licensing.

Since the certification process is voluntary only those programs choosing to go beyond base level licensing will do so.

It is anticipated that certification will be at two levels, a basic acceptance level and an exemplary level. We plan to develop an on-site review process which will involve persons from the regional chapters of the National Association for the Education of Young Children as members of the review teams. This will result in a peer monitoring process administered by the Department of Education.

The standards for preschool programs which will be used as the criteria for certification will be developed by a Task Force during the Spring of this year. The Task Force will be made up of persons from the state who are knowledgable in the area of preschool education and who represent the various groups who will be impacted by the plan for managing preschool programs.

CONCLUSION:

These, then are the activities which have taken place and the plans for future activities which will enable the Department of Education to better manage preschool programs.

We feel that the plans represent a cooperative inter-departmental effort which will result in the coordination and better management of preschool programs as well as early childhood programs in general.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

POUCH H 01
JUNEAU, ALASKA 99811
PHONE: 465-3030

February 8, 1982

RECEIVED
FEB 8 1982
Office of the Governor
Division of Internal Audit

John O'Meara, Director
Division of Internal Audit
Office of the Governor
Pouch AU
Juneau, Alaska 99811

Dear Mr. O'Meara:

This is in response to your draft report titled "The Department of Education Needs to Improve Management of Preschoo Programs." The Department of Health & Social Services is in general agreement with the findings of the audit. The document captures the essence of a serious problem and we are hopeful that the plan developed between the Departments--of Education and Health & Social Services will provide corrective action. We have received the Department of Education's response to the audit which outlines that plan.

The Department of Health & Social Services is pleased to have been a participant in recent meetings between representatives of the Departments of Education, Community & Regional Affairs, and Health & Social Services. The dialogue which has begun is extremely useful and the tentative inter-departmental agreement establishes a new precedent of coordinating between three departments around concerns for young children and their families.

The Department of Health & Social Services is in full agreement with proposed Step 1 of the Department of Education's response, that all child care facilities now called Day Care Centers, Family Day Care Homes, and Preschools be licensed under one standard by the Department of Health & Social Services. A recognized principle of government is responsibility to provide equal protection and opportunity to all citizens. For young children who spend part of the day away from their families, the State fulfills this responsibility in part, through licensing to assure a basic level of care and protection, adequate program, and opportunity for development. Licensing under one standard will eliminate the disparity between the care children receive in day care facilities and preschools.

The Department of Health & Social Services is in full agreement that a change of statute is necessary to implement Step 1. In the ten years since the statutes were changed, the disparity has increased rather than decreased. A clear legislative mandate is required to correct a problem of this long standing.

The Department of Health & Social Services will require an increase in staff to perform the licensing studies. Without additional staff the Department of Health & Social Services could not accept the responsibility for an estimated 167 additional programs.

The Department is aware that some programs not now regulated may be fearful that Department of Health & Social Services regulation would result in closure of needed programs. The Department, should it receive the authority, fully intends to implement carefully and in as a supportive manner as possible. Every person or organization whose activities are regulated through licensing has the right to notice of the requirements and an opportunity to comment on them. When there are findings of non-compliances, information for correcting areas of non-compliance will be provided and reasonable time limits for meeting the new standards will be established. It is the Departments' belief that in regulating a new area, two years may be required for full implementation.

The Department of Health & Social Services believes that proposed Step 2 in the Department of Education's response, the certification of educational programs on a voluntary basis, will be well received by providers of early childhood programs. Our experience with day care centers is that directors want to have the educational component of their programs recognized. We are also in agreement that peer monitoring through regional chapters of the National Association for the Education of Young Children is an appropriate role for a professional organization to take and are therefore, in agreement with the Department of Education's plan to use this model.

It is the intent of the Department of Health & Social Services to fully cooperate with the Department of Education in implementing the proposed plan in a timely manner. It is also our intent to continue work on the inter-departmental agreement between the Departments of Education, Community & Regional Affairs, and Health and Social Services for the coordination of Early Childhood programs.

The Division of Internal Audit is to be commended for the careful study given to this important area.

Sincerely,

Helen D. Beirne

Helen D. Beirne
Commissioner

(20)

7-5-83

STATE OF MICHIGAN

IN THE COURT OF APPEALS

SHERIDAN ROAD BAPTIST CHURCH; FIRST BAPTIST CHURCH BRIDGEPORT; REVEREND GERALD SOMERO; REVEREND RENE B. OUELLETTE; RONALD MUNSON and JANICE MUNSON, his wife; WILLIAM L. SWAIN and SHARON SWAIN, his wife; and MRS. SUSANNE KWAITOWSKI,

Plaintiffs-Appellees,

versus

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; and PHILLIP E. RUNKEL, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellants.

Court of Appeals No. 69050

Ingham County Circuit Court
No. 80-26205-AZ

AMICUS CURIAE BRIEF

OF CATHOLIC LEAGUE FOR RELIGIOUS & CIVIL RIGHTS

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ATTORNEYS FOR CATHOLIC LEAGUE
FOR RELIGIOUS AND CIVIL RIGHTS

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STATEMENT OF QUESTIONS INVOLVED

Catholic League for Religious and Civil Rights concurs with the Counter-Statement of Questions Involved which Appellees presented.

STATEMENT OF FACTS

Catholic League for Religious and Civil Rights concurs with the Counter-Statement of Facts Appellees presented.

ARGUMENT

I.

THE CIVIL AND RELIGIOUS RIGHTS OF PARENTS IN THE EDUCATION OF THEIR CHILDREN ARE VALUES STRONGLY RECOGNIZED BOTH IN THE PRONOUNCEMENTS OF THE CATHOLIC CHURCH AND THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE UNITED STATES CONSTITUTION.

This case requires this court to determine the extent to which a state may limit the fundamental right of parents to educate their children in accordance with their religious beliefs.

The Catholic Church recognizes a primary and most significant role which parents must play in the education of their children. For example, the Second Vatican Council stated:

> [S]ince parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children. Their role as educators is so decisive that scarcely anything can compensate for their failure in it. For it devolves on parents to create a family atmosphere so animated with love and reverence for God and others that a well-rounded personal and social development will be fostered among the children. Hence, the family is the first school of those social virtues which every society needs.
>
> SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON CHRISTIAN EDUCATION, GRAVISSIMUM EDUCATIONIS (1965), no. 3.

In a recent pronouncement Pope John Paul II elaborated on the nature of this primary parental role and explained that it could never be completely alienated to others:

> The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.
>
> POPE JOHN PAUL II, APOSTOLIC EXHORTATION, THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD, FAMILIARIS CONSORTIO (1981) (hereinafter "FAMILIARIS CONSORTIO"), at no. 36 (emphasis in original).

The significance of the right and duty of Christian parents to educate their children in a manner comporting with their faith led the Pope to state that the "rights of parents to choose an education in conformity with their religious faith must be absolutely guaranteed." FAMILIARIS CONSORTIO at no. 40.

Interestingly the concerns the Catholic church has expressed have been mirrored to a large extent by the pronouncements of the United States Supreme Court in cases involving constitutional challenges to state statutes impinging upon parents' religiously motivated choices in the education of their children. The first case lending support to this conclusion is Pierce v. Society of Sisters, 268 U.S. 510 (1925). There the Supreme Court upheld a challenge to a law forbidding attendance at private schools on the basis of a "liberty" interest which the Court felt inhered in the Due Process Clause, U.S. CONST., amend. XIV. The Court noted that there was a "liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-535. The Court further observed, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

Although Pierce was decided under a "substantive due process" rationale, which fell out of favor for a time before making a powerful return in the "personal privacy" cases of the last two decades, the same basic right of parental educational direction was reaffirmed, primarily on the basis of the Free Exercise Clause, U.S. CONST., amend. I, in Wisconsin v. Yoder, 406 U.S. 205 (1972). There the Court concluded that enforcement of Wisconsin's compulsory education statute would impinge upon Amish parents' rights to direct their children's religious upbringing. See Id. at 215-219. The Court's holding further determined that the involved State interests in compulsory education could not, override the parents' legitimate claims under the Free Exercise Clause. See Id. at 219-236.

The above discussion demonstrates most clearly that Catholic parents place a great value on their right and responsibility to educate their children in a manner comporting with their religious faith. They recognize that this right and responsibility is primarily theirs, cannot be completely alienated to another entity, requires careful and deliberate exercise and should be protected against any deleterious state action. They further recognize that this right and responsibility is not a creation of a Church, but a basic trait of parenthood. Accordingly, Baptist parents enjoy the same basic right and responsibility in the education of their children and this right and responsibility must be protected from adverse state interference. The above discussion further demonstrates that the United States Supreme Court has recognized the basic right and responsibility parents have for the education of their children in accordance with their religious beliefs as inhering in the Constitution and subject to State interference only when necessary to protect a compelling state interest. With this background we now consider the sectarian school systems which have arisen from the exercise of constitutionally protected parental educational

choice and the particular examples of State interference with these sectarian schools which are alleged to infringe upon this parental choice.

II.

CONSTITUTIONALLY PROTECTED CATHOLIC PARENTAL EDUCATIONAL CHOICES, LIKE CONSTITUTIONALLY PROTECTED PROTESTANT EDUCATIONAL CHOICES, HAVE RESULTED IN SECTARIAN SCHOOLS WITH DIFFERENT EDUCATIONAL PURPOSES AND REGIMENS THAN PUBLIC SCHOOLS. THUS, TEACHER OR CURRICULUM REQUIREMENTS TAILORED FOR PUBLIC SCHOOLS ARE UNSUITABLE FOR SECTARIAN SCHOOLS AND CAN IMPAIR CONSTITUTIONALLY PROTECTED PARENTAL EDUCATIONAL CHOICES.

In efforts to exercise their constitutional rights to educate their children in accordance with their religious beliefs, Catholic and Protestant parents have each formed school systems which serve as alternatives to the public school system. In their brief and the trial record, the Plaintiff-Appellees have made this court aware of the pervasively Christian character of the Fundamentalist Protestant school. It is interesting to note that the Catholic school, like the Fundamentalist Protestant school, is founded upon a distinctly Christian approach to education.

A description of the distinctly Christian approach of the Catholic school may be found in The Sacred Congregation for Catholic Education's document, THE CATHOLIC SCHOOL, issued March 19, 1977. The Sacred Congregation makes clear that the distinctive feature of a Catholic school is "its reference to a Christian concept of life centered on Jesus Christ." SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE CATHOLIC SCHOOL (1977), at no. 33. "Christ is the foundation of the whole educational enterprise in a Catholic school," Id. at no. 34, and "The Catholic School is committed . . . to the development of the whole man, since in Christ, the Perfect Man, all human values find their fulfillment and unity." Id. at no. 35. The goal at which the Catholic school aims is "forming in the Christian those particular virtues which will enable him to live

a new life in Christ and help him to play faithfully his part in building up the Kingdom of God." Id. at no. 36. Based on these premises the Catholic school has the tasks of synthesizing culture and faith and faith and life. Id. at no. 37. "The first [of these two tasks] is reached by integrating all the different aspects of human knowledge through the subjects taught, in the light of the Gospel; the second in the growth of the virtues characteristic of a Christian." Id.

This description of the Catholic school, like the descriptions of the Baptist schools this Court has been provided with in Plaintiffs' briefs and the trial record, requires one clear conclusion. That is that private sectarian schools, including Catholic schools, have as their central purpose to "instruct a child in the way he should go"[1] through bringing a child to a point of informed adherence to and practice of basic Christian values. Accordingly, a private sectarian school, like a Catholic school, will fundamentally differ from a public school by including the instruction of Christian values as they relate to every phase of the curriculum. The important presence of Christian values in sectarian school courses means that these courses may often not clearly resemble courses taught in a public school. Further, the qualifications necessary to teach these value laden subjects in a sectarian school will differ from those needed to teach the same type of courses in a public school in which transmission of religious values is forbidden. This means that the constitutional guarantee of parental educational choice can only be preserved if parents opting for sectarian education are permitted to choose sectarian schools which have teachers and curricula which may substantially differ from those found in public schools. State regulations which attempt to require private schools to

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[1] Proverbs 22:6.

conform to requirements which may be appropriate for public schools, thus, can significantly impair the constitutionally protected parental choice of sectarian education. As will be seen more fully in succeeding pages, the state requirements at issue in this case have this unconstitutional effect.

III.

THE REQUIREMENT OF 1921 MICH. PUB. ACTS 302, SECTION 3, MICH. COMP. LAWS ANN. § 388.553 (1976), THAT TEACHERS IN PRIVATE SCHOOLS HOLD A TEACHING CERTIFICATE EQUIVALENT TO THAT REQUIRED OF PUBLIC SCHOOL TEACHERS IS AN IMPINGEMENT UPON PARENTS' CONSTITUTIONALLY PROTECTED RIGHTS TO EDUCATE THEIR CHILDREN IN ACCORDANCE WITH THEIR RELIGIOUS BELIEFS WHICH DOES NOT ADVANCE A COMPELLING STATE INTEREST NOR CONSTITUTE THE LEAST RESTRICTIVE MEANS TO ACHIEVE ANY ARGUABLY PRESENT STATE INTEREST.

In 1921 P.A. 302, Section 3, MICH. COMP. LAWS ANN. § 388.553 (1976), the State has enacted a "certification" requirement for private school teachers, which reads in relevant part:

> No person shall teach or give instruction in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state . . . .

In approaching the issue of whether this proposal unconstitutionally interferes with rights guaranteed by the Free Exercise Clause of the U.S. CONST., amend. I, it is first necessary to examine whether there exists any burden on the free exercise of religion. See Sherbert v. Verner, 374 U.S. 398, 403 (1963). The free exercise right involved is that of parents of private school children to effectively exercise their constitutionally protected right to choose a sectarian education for their children. If this right is burdened by the state regulation, the State will be required to prove that this regulation implements a compelling state interest, and that the regulation is the means placing the least restriction on parents' free exercise rights which can implement this interest. See Sherbert, 374 U.S. at 406-408.

Addressing the question of whether the proposal burdens free exercise requires a further examination of the role of the teacher in the sectarian school context. As Plaintiffs' brief and trial testimony makes clear, a teacher in the Baptist schools is involved in a ministry in which he or she is shaping young people in accordance with Christian values. The teacher in the Catholic school has this same responsibility. In the first of the two tasks of the Catholic school explained supra, the integration of faith and culture, the teacher plays a critical role. The Sacred Congregation for Catholic Education noted in this respect:

> Since the educative mission of the Catholic school is so wide, the teacher is in an excellent position to guide the pupil to a deepening of his faith and to enrich and enlighten his human knowledge with the data of the faith. While there are many occasions in teaching when pupils can be stimulated by insights of faith, a Christian education acknowledges the valid contribution which can be made by academic subjects towards the development of a mature Christian. The teacher can form the mind and heart of his pupils and guide them to develop a total commitment to Christ, with their whole personality enriched by human culture.
>
> SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE CATHOLIC SCHOOL (1977), at no. 40.

The specific qualifications and duties of the teacher in the sectarian Christian school have been further explained by the Sacred Congregation in these manners:

> The school considers human knowledge as a truth to be discovered. In the measure in which subjects are taught by someone who knowingly and without restraint seeks the truth, they are to that extent Christian. Discovery and awareness of truth leads man to the discovery of Truth itself. A teacher who is full of Christian wisdom, well prepared in his own subject, does more than convey the sense of what he is teaching to his pupils. Over and above what he says, he guides his pupils beyond his mere words to the heart of total Truth.
>
> The cultural heritage of mankind includes other values apart from the specific ambient of truth. When the Christian teacher helps a pupil to grasp, appreciate and assimilate these values, he is guiding him towards eternal realities. This movement towards the Uncreated Source of all knowledge highlights the importance of teaching for the growth of faith.
>
> Id. at nos. 41, 42.

Finally, the Sacred Congregation emphasized the crucial role of the teacher in the process of integrating faith and culture:

> The achievement of this specific aim of the Catholic school depends not so much on the subject matter or methodology as on the people who work there. The extent to which the Christian message is transmitted through education depends to a very great extent on the teachers. The integration of culture and faith is mediated by the other integration of faith and life in the person of the teacher. The nobility of the task to which teachers are called demands that, in imitation of Christ, the only Teacher, they reveal the Christian message not only by word but also by every gesture of their behaviour. That is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.
>
> Id. at no. 43.

Although the Sacred Congregation places special emphasis on the Catholic school teacher's critical role in the pupils' integration of faith and culture, it emphasizes that the teacher's role also extends into the very central matter of the pupils' integration of faith and life: "The fundamental aim of teaching is the assimilation of objective values, and, when this is undertaken for an apostolic purpose, it does not stop at an integration of faith and culture but leads the pupil on to a personal integration of faith and life." Id. at no. 44. More specifically, the Sacred Congregation directs:

> The Catholic school should teach its pupils to discern in the voice of the universe the Creator Whom it reveals and, in the conquests of science, to know God and man better. In the daily life of the school, the pupil should learn that he is called to be a living witness to God's love for men by the way he acts, and that he is part of that salvation history which has Christ, the Saviour of the world, as its goal.
>
> Id. at no. 45.

This background of the Catholic school, as part of the species of sectarian schools this proposal attempts to regulate, illustrates the absolutely crucial role of the unabashedly Christian teacher to the successful working of the school. Thus, any state regulation which would restrict this pool of Christian

teachers will burden religious protections guaranteed by the Free Exercise Clause, U.S. CONST., amend. I. By substantially diminishing the pool of available teachers with the requisite Christian qualifications, the State's certification requirement impedes the carrying out of sectarian school parents' Free Exercise right to select the teachers who would most effectively fulfill the crucial role of a sectarian school teacher. More specifically, the sectarian school is required to forego the services of many teachers who would superiorly transmit to students the authentic Christian approach to both religious and secular subjects. Instead, the school is required to select teachers who are less capable, and perhaps almost unqualified, on the important basis of their religious convictions, but who possess valid teaching certificates which, even in secular subjects, bear little relationship to their ability to effectively teach. Thus, when sectarian schools choose to comply with the type of certification requirements found in this case, the result can be a lessening of the schools' ability to effectively transmit Christian values to students. Because transmission of these values constitutes the central and unique mission of the sectarian school, and the purpose for which parents would choose a sectarian school to effectuate their Free Exercise rights to educate their children in accordance with their religious beliefs, the statute's impairment of the sectarian school's ability to effectively transmit Christian values is an unconstitutional interference with these parents' rights, under the Free Exercise Clause, U.S. CONST., amend. I.

While the teacher certification requirement wreaks havoc with parents' rights to effectively choose a sectarian school for their children, it is not an appropriate means to accomplish any interests the State may have in insuring that sectarian school children receive a proper education. Although the State may have a compelling interest in compulsory school attendance generally, it

does not follow that the state has carried its burden of proving that its certification requirements achieve this interest in the manner least restrictive to parental rights to educate their children in accordance with their religious beliefs. Initially, the fact that only a handful of the states have been shown to require certification for private school teachers is strong evidence that a certification requirement is unnecessary to satisfy the educational interests all states share. Further, the State has offered little clear empirical evidence to demonstrate that a certification requirement is necessary to guarantee high quality education. Finally, there are undoubtedly means which place fewer restrictions on free exercise rights, such as requiring parents to educate their children, requiring schools to provide the acknowledged universal "basics" of education and limiting any gross parental abuse of their educational duty through child abuse statutes, which could effectively monitor and guarantee the reception of quality education. Accordingly, the requirement for certification of private school teachers is an unconsitutional infringement upon sectarian school parents' rights to educate their children in accordance with their religious beliefs.

IV.

THE REQUIREMENT OF 1921 MICH. PUB. ACTS 302, SECTION 1, MICH. COMP. LAWS ANN. § 388.551 (1976), THAT COURSES OF STUDY IN PRIVATE SCHOOLS BE OF THE SAME STANDARD AS THOSE PROVIDED BY THE GENERAL SCHOOL LAWS OF THE STATE IMPERMISSIBLY IMPINGES UPON PARENTS' FREE EXERCISE RIGHTS UNDER THE U.S. CONST., AMEND. I, TO EDUCATE THEIR CHILDREN IN ACCORDANCE WITH THEIR RELIGIOUS BELIEFS, IS NOT NECESSITATED BY A COMPELLING STATE INTEREST AND IS NOT THE METHOD TO ACHIEVE ANY PURPORTED GOVERNMENTAL INTEREST WHICH HAS THE LEAST EFFECT UPON THE PROTECTED RIGHTS.

The curriculum regulations present much the same problems as the teacher certification requirements, and are unconstitutional for very similar reasons.

Curriculum, like teacher qualities, is a central feature distinguishing sectarian private schools from public schools and parental preferences for a private school are often based upon this distinction. It is well known that public schools are generally restricted in their ability to transmit Christian values. See Abington Township School District v. Schempp, Murray v. Curlett, 374 U.S. 203 (1963) (Prohibiting Bible reading in public schools except when studied as literature); Engel v. Vitale, 370 U.S. 421 (1962) (Prohibiting recitation of government composed prayer in public schools). In sharp contrast, sectarian schools are very concerned with the transmission of these values. In the case of Catholic schools it has been noted:

> The specific mission of the school, then, is a critical, systematic transmission of culture in the light of faith and the bringing forth of the power of Christian virtue by the integration of culture with faith and of faith with living. Consequently, the Catholic school is aware of the importance of the Gospel-teaching as transmitted through the Catholic Church. It is, indeed, the fundamental element in the educative process as it helps the pupil towards his conscious choice of living a responsible and coherent way of life.
>
> SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE CATHOLIC SCHOOL (1977), at no. 49.

The pervasive importance of gospel teaching is further emphasized in its lack of confinement to specific religion courses in a sectarian school and its role in insuring that students obtain more than a mere intellectual appreciation of the truths of Christ:

> Without entering into the whole problem of teaching religion in schools, it must be emphasized that, while such teaching is not merely confined to "religious classes" within the school curriculum, it must, nevertheless, also be imparted explicitly and in a systematic manner to prevent a distortion in the child's mind between general and religious culture. The fundamental difference between religious and other forms of education is that its aim is not simply intellectual assent to religious truths but also a total commitment of one's whole being to the Person of Christ.
>
> Id. at no. 50.

Obviously, sectarian schools, including Catholic schools, must have significant latitude in the development of their curricula if they are to serve as effective objects of parents' constitutionally protected rights to educate their children in accordance with their religious beliefs. However, the framework of state regulation of private school curricula in this case has great potential to impair this required freedom. The "same standard" language of the involved statute is construed to require comparison to the local public school curriculum,[2] but is sufficiently vague to permit a number of different modes of enforcement. If the enforcing entity were to interpret this language only to require a review of course titles to see that the sectarian school curriculum included instruction in the acknowledged universal "basics" of education, there would normally not be significant impairment of religious freedom. But, even under this minimal review there would be a potential for significant potentially objectionable courses in areas such as sex education or "values clarification" which can be found in many public school curricula.

Further, the language of the involved statute does not require the enforcing entity to limit its inquiry into whether private schools are of the "same standard" as public schools to an examination of course titles. If an enforcing entity were to determine that the "same standard" requirement extended to the content of courses in each school, significant infringement of parental rights would result. This would occur because the content of a sectarian school course, in which the Gospel should be emphasized, could differ in major respects from similar courses in public schools in which the Gospel is not emphasized.

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[2] See Sheridan Road Baptist Church v. State, No. 80-26205-A2, slip op. at 7 (Ingham Co. Cir. Ct. Dec. 29, 1982).

Thus, the ambiguous language of the statute, standing alone, results in great potential for infringement of parental rights under the Free Exercise Clause to educate their children in accordance with their religious beliefs. However, the significant difficulties inherent in this ambiguous statute are aggravated by the fact that the body enforcing the statute is not an "impartial" governmental body. Instead, the superintendent of the school district in which the sectarian school is located has enforcement responsibilities. See Sheridan Road Baptist Church v. State, No. 80-26205-A2, slip op. at 7 (Ingham Co. Cir. Ct. Dec. 29, 1982). It is not difficult to imagine the potential for abuse which may exist when a public school superintendent, whose system is losing students and state aid by the presence of vibrant sectarian schools, is given the responsibility to enforce the standards these sectarian schools must meet. Accordingly, the statute in this case represents a significant infringement of parents' constitutional rights to educate their children in accordance with their religious beliefs.

Although the statute significantly infringes upon parents' constitutional rights, there exists little relationship between the statute and the state's expressed purpose of "quality education." Initially, the trial judge correctly noted that the statute does not guarantee quality education on a state-wide basis, but instead merely insures that the private school will match the quality of the local public school. Further, if the statute only requires an inspection of course titles, it is difficult to see what major positive or negative impact it would have on the quality of education. Finally, if the statute requires a significant conformity between the content of private and public school courses, it could actually have the effect of reducing educational quality by forcing superior sectarian school courses to resemble inferior public school courses. In any event it is clear that the statute is neither an appropriate means to

achieve the stated purpose of quality education nor the "least restrictive means" to achieve this end. Accordingly, the statute is an unconstitutional infringement of sectarian school parents' Free Exercise rights to educate their children in accordance with their religious beliefs.[3]

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[3] Although this brief's focus has been on parental Free Exercise rights to educate their children in accordance with their religious beliefs, it appears that both the teacher certification and curriculum requirements create an unconstitutional excessive entanglement between government and sectarian schools. In noting that a more indirect regulation, involving sectarian school teachers' collective bargaining rights, could pose "entanglement" problems, the United States Supreme Court noted:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." Meek v. Pittenger, 421 U.S. 349, 370 (1975). Cf. Wolman v. Walter, 433 U.S. 229, 244 (1977). Good intentions by government --or third parties--can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in Lemon, Meek, and Wolman.
>
> NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-502 (1979).

The thrust of the Catholic Bishop language would appear to be that, even if government regulation of sectarian school teacher qualifications and curricula did not impinge upon parental Free Exercise rights, pervasive regulation of these matters, which appears to be actually or potentially present in this case, could present an unconstitutional "excessive entanglement" between the state and sectarian schools. It would further appear that this rationale formed much of the basis of the ruling under review in this matter.

RELIEF

Based upon the foregoing discussion, the Catholic League for Religious and Civil Rights requests that this Court rule that 1921 Mich. Pub. Acts 302, Sections 1 and 3, MICH. COMP. LAWS. ANN. §§ 388.551 and 388.553 (1976), violate the Free Exercise Clause of the U.S. CONST., amend. 1, and award the Plaintiff-Appellees any relief to which they are entitled in this action.

Respectfully submitted, this 5th day of July, 1983.

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ATTORNEYS FOR CATHOLIC LEAGUE
FOR RELIGIOUS AND CIVIL RIGHTS

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEC 2. 81 [illegible]

BY: [illegible]
DEPUTY CLERK

BANGOR BAPTIST CHURCH,
BANGOR CHRISTIAN SCHOOLS,
GRACE BAPTIST CHURCH,
GRACE BAPTIST CHURCH SCHOOLS,
FALLS ROAD BAPTIST CHURCH,
FALLS ROAD CHRISTIAN SCHOOL,
FIRST UNITED BAPTIST CHURCH,
LEE CHRISTIAN SCHOOLS,
VICTORY BAPTIST CHURCH,
VICTORY CHRISTIAN SCHOOLS,
SEBEC CORNER CHRISTIAN CHURCH,
SEBEC CHRISTIAN ACADEMY,
CHURCH OF THE OPEN BIBLE,
ATHENS CHRISTIAN ACADEMY,
CHURCH OF THE BLESSED HOPE
OF JESUS CHRIST,
NEW LIFE ACADEMY,
WINDHAM ASSEMBLY OF GOD,
WINDHAM ASSEMBLY CHRISTIAN ACADEMY,
CALVARY FOURSQUARE CHURCH,
GARDINER CHRISTIAN ACADEMY,
REVEREND HERMAN C. FRANKLAND,
REVEREND HARRY P. BOYLE,
REVEREND JOHN HATFIELD,
REVEREND JOHN ALLEN,
REVEREND GLENN SPEED, JR.,
REVEREND DANIEL DUNPHY,
REVEREND GERALD DENNIS,
ESMERALDA J. DENNIS,
REVEREND ADRA LOVELY, JR.,
RICHARD RYERSON,
REVEREND ISAIAH HILL,
CHESTER L. DANA, JR.,
REVEREND WALTER E. FORDYCE,
REVEREND JEFFREY CLARK,
JOHN D. LINNEHAN, JR. and
HEATHER M. LINNEHAN,
ALFRED R. ROUSSEL and
LIANNE M. ROUSSEL,
THOMAS M. OBEY and MARY L. OBEY,
DAVID LAVWAY,
BONNIE C. BOYINGTON,
EUGENE ST. CLAIR, JR., and MAINE
ASSOCIATION OF CHRISTIAN SCHOOLS,

Plaintiffs;[1]
Defendants in
Counterclaim

CIVIL NO. 81-0180-B

vs.

STATE OF MAINE, DEPARTMENT OF EDUCATIONAL AND CULTURAL SERVICES, COMMISSIONER OF EDUCATIONAL AND CULTURAL SERVICES and MEMBERS OF THE MAINE STATE BOARD OF EDUCATION,

Defendants;
Counterclaimants

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CYR, C.J.

The plaintiffs challenge the constitutionality of various Maine statutes and regulations governing compulsory education and the approval of private schools. The counterclaim against the ten church schools and their pastors or administrators demands a judicial declaration that their failure or refusal to provide defendants with school approval information violates Maine law, and permanent injunctive relief requiring plaintiffs to provide the information "as a condition to continued operation of their respective schools with compulsory school age children" during the hours such children would otherwise be attending an approved school. Partial summary judgment has been granted in favor of the defendants. See Bangor Baptist Church v. State of Maine, 549 F. Supp. 1208, 1232 (D. Me. 1982).

On the stipulations of the parties and on the exhibits[2] and the testimony received during the eight-day trial the Court makes the findings of fact and conclusions of law contemplated by Fed. R. Civ. P. 52(a).

I. History of Present Dispute

The earliest evidence of the present dispute is a March 24, 1977 letter from the administrator of Bangor Christian Schools (Bangor Christian) requesting the Maine Department of Educational and Cultural Services (Department) to exempt Bangor Christian from a Department regulation requiring private schools to submit a five-year plan for basic approval. Describing Bangor Christian as an integrated auxiliary of the Bangor Baptist Church, the administrator informed the Department that Bangor Christian believed that the regulation requiring the submission of a five-year plan went "beyond the legitimate responsibility of the State to see that each municipality provides suitable education for their [sic] youth." The administrator represented that Bangor Christian, an approved school,[3] had "always adhered to . . . governmental control" respecting the maintenance of certain minimal standards "in order to qualify as a safe, healthful, bona fide school," but that it objected to "the increasing involvement of government in the lives of private individuals and private institutions." Expressing concern that the request would "eventually

involve" unnecessary and unacceptable state "control [of] religious instruction" and that the "humanistic and secular approach of the public education system" is diametrically opposed to the "integrated, Christian approach" at Bangor Christian, the administrator asked that Bangor Christian be permitted to control its own educational planning and direction.

Plaintiff Maine Association of Christian Schools (MACS) was founded in the spring of 1979 to promote and improve Christian school education in Maine and to defend Christian schools against perceived encroachments by state regulation.[4] Plaintiff Herman C. Frankland, the pastor of Bangor Baptist Church, became President of MACS, and Ralph Yarnell became its Executive Director.

On May 15, 1979, MACS called a general meeting of its member schools to discuss the "right position of Christian Schools in Maine" with respect to state approval. Defendants' Exhibit 1. At that meeting MACS members[5] voted to pay $1,200 to have two lawyers and an educator address them the following month and "to give . . . counsel with regard to philosophy, strategy etc.," id. Meanwhile, MACS members unanimously voted to take no official position regarding state approval. Schools choosing "to buck state approval in the meantime would be doing so without any backing from MACS." Id.

On June 8, 1979 John McLario, Esq., a Wisconsin attorney specializing in the representation of Christian schools, addressed the MACS Board of Directors and the MACS constituency. On June 23, 1979

Dr. Paul Cates, an evangelist and former vice president of the American Association of Christian Schools (AACS), addressed the administrators and pastors of all MACS-member schools, as well as many church aud church school-board members. On June 29, 1979 the group was addressed by David Gibbs, Esq., of Gibbs & Craze (Cleveland), which specializes in representing religious schools involved in disputes with state regulators. These three individuals informed the MACS administrators and pastors as to the constitutional standards governing state regulation of church schools.

On August 1, 1979 Wallace LaFountain, a consultant to the Department, invited the administrators of all Christian schools in Maine to an August 13, 1979 conference to discuss the certification of Christian-school principals, the approval of Christian-school curricula and the church-school approval process itself. As of August 5, 1979 all Christian schools known to be operating in Maine with compulsory-school-age children in attendance during normal public-school hours had obtained state approval.[6] At that time several new Christian schools proposed to operate during the 1979-80 school year without obtaining state approval.

On August 5, 1979 Reverend Frankland notified all MACS-member pastors and administrators of an emergency meeting to be held August 10, 1979 for the purpose of determining the position MACS should take at a meeting scheduled with state officials for August 13.

On August 7, 1979 the MACS Board of Directors drafted a four-point

plan for presentation to the Department as an alternative to formal school approval of the eight new Christian schools scheduled to open that fall. The plan called for a one-year moratorium on the state school-approval requirements, during which the new Christian schools would

1. receive the approval of the Department of Public Safety and the Department of Human Services prior to opening;

2. permit Department officials to conduct on-site observation of the schools in operation;

3. teach a "bona fide curriculum" meeting the requirements of Maine law; and

4. employ teachers qualified for state certification.

During the one-year moratorium MACS would seek legislative exemption from the statutory requirement of school approval. Tr. at 66.

On August 8, 1979 Department consultant LaFountain met with MACS representatives to determine their position regarding state approval of church schools. MACS officials informed LaFountain that their church schools were integral parts of their religious ministries and not susceptible, either on constitutional or biblical authority, to state control, because acquiescence to any form of state approval of church-school teachers, principals or curricula would violate their biblically-based religious conviction that Christ, not the state, is sole sovereign in such matters. The MACS representatives announced that the as-yet unapproved church schools would reject state approval

because acquiescence to state approval might imply a state right-of-control, and because acquiescence might later be used in court to demonstrate that their professed religious beliefs regarding state control were based on nonreligious preferences, rather than religious conviction. LaFountain was then informed of the MACS four-point plan. See Defendants' Exhibit 4.

The factors which influenced plaintiffs to adopt the position taken at the August 8, 1979 meeting included: (1) a January 1978 statement issued by NERAACS, setting forth objections to state approval; (2) an increase in the number of requirements for school approval; (3) the nationwide growth of the teaching program known as Accelerated Christian Education (ACE);[7] (4) a growing awareness that fundamentalist Christians in other states were involved in challenges to similar statutes; (5) a concern that the approval laws were vague; and (6) a maturation of fundamentalist Christian convictions regarding the total sovereignty of Christ over the church and its ministries. Tr. at 20-21, 219-21, 241-43, 504-13.

When the unapproved church schools planning to open in the fall of 1979 expressed their desire to join MACS, but advised that they could not accept state approval, the members of MACS decided to stand beside the new church schools in opposition to state approval. Tr. at 221.

On August 13, 1979, 88 Christian educators and pastors attended a conference with Department officials, who expressed satisfaction with the request that Christian school principals not be required to obtain state certification.

On August 16, 1979, MACS officials met with the newly-appointed Commissioner of Education, Harold Raynolds (Commissioner), and presented a more detailed version of their four-point plan for dealing with the new unapproved church schools during the 1979-80 school year. See Defendants' Exhibit 9. The MACS proposal stated that MACS would (1) act as a catalyst to have new MACS-member schools inspected for health and safety purposes prior to opening; (2) arrange visitations to MACS-member schools by Department officials; (3) assure the Department that each MACS-member school was presenting a bona fide curriculum consistent with state requirements; and (4) assure the Department that each MACS-member school employed teachers who were qualified for state certification. These proposals were intended as an interim substitute for state approval while MACS pursued a legislative resolution of the problem.

Plaintiff Frankland wrote the Associate Commissioner of the Department on August 16, 1979 in response to a request for an explanation of the religious objection to state approval. Reverend Frankland described the church schools as the teaching arms of the Church, integrally connected with it. He characterized state licensure of church schools, their curriculum or their staff as tantamount to licensing the churches, their ministers and the subject matter taught in church, stating that to permit such regulation would be to render unto Caesar that which belongs to God. In order to avoid having their religious conviction regarding state regulation diluted in the eyes of

the law to a mere preference, wrote Reverend Frankland, the churches must object to state regulation of their schools.[8]

On August 30, 1979 the Commissioner informed MACS of the Department's position that the minimum standards required of public and private schools "do not impose an onerous burden upon schools which seek approval." The Commissioner described as "reasonable" the regulations requiring minimum hours of instruction, employment of only "qualified instructors" and instruction in prescribed subjects. The Commissioner advised that the Department would -

> carry out its mandate to approve public and non-public schools in accordance with the laws of the State of Maine [and] . . . only consider waiving part or all of the minimum standards utilized in the approval process if it can be established that the standards in question violate an individual's constitutionally protected rights and that the State's interest in adhering to those standards is not of sufficient magnitude to override the claimant's rights.

The Commissioner went on to say that "[u]nder no circumstances will the Department waive the requirement that all public and non-public schools be approved in order to be able to operate as schools in the State of Maine." (Emphasis added.)

On September 11, 1979, after meeting with representatives of MACS, the Department issued a press release captioned, "Statement Regarding the Approval of Private Schools," which asserts that the Department "is presently reviewing the curriculum, the educational programs, and the credentials of the teachers of certain private schools which

object on constitutional grounds to the formal school approval mandated by law." The press release further stated -

> [i]t is the Department's position that during the school year 1979-80 each of these schools will meet the minimum standards for approval required by law. If the Department is satisfied that the schools have met the minimum standards for approval, then the Department will treat these schools as having been approved for attendance purposes during the school year 1979-80.

Defendants' Exhibit 10. When this press release was issued MACS was informed that the four new schools would "not risk truancy litigation" provided the requirements outlined in the press release were satisfied.

On September 12, 1979, in response to a request from the Department, MACS agreed to submit sanitation information regarding three schools and to update the sanitation and fire safety information relating to a fourth school. MACS agreed to answer all questions on the school approval form as to which there were no constitutional objections.

On September 17, 1979, MACS notified its members of a "sensitive . . . meeting" scheduled for September 21, 1979 with Charles Craze, Esq., of Gibbs & Craze.[9] MACS members were advised that they must "decide what their convictions are regarding state approval in advance of the meeting." The letter instructed MACS members to read the enclosed articles regarding religious convictions and state licensure of Christian schools. One article, by Paul Cates, states that its purpose is to enable the reader "to give Biblical explanations for the

stand you take" against state regulation of religious entities. The article emphasizes that in order for beliefs to be constitutionally protected they must be convictions as opposed to preferences.

The second article MACS members were asked to read before the September 21, 1979 meeting described constitutional, educational and scriptural reasons for opposing state licensure of Christian schools. The article identifies the following risks of state regulation:

1. the state will impose its "child-centered" teaching methodology upon church-school students in contravention of the "subject-centered . . . methodology" of the Christian schools;

2. the state will impose a secular humanist philosophy upon the church schools;

3. the state will mandate sex education courses and other programs and approaches offensive to Christian values;

4. the state will ban the types of student discipline required by the Bible; and

5. the state will prescribe textbooks of poor quality.

The scriptural bases for opposing state licensure were stated as follows:

> The responsibility for training a child is first laid on the parents (Pro. 22:6 and Eph. 6:4). Human government is ordained by God to suppress those who work violence and evil in society (Rom. 13:3-4). The mission of the church is clearly to preach and teach. The home, church and state must maintain their proper roles.
>
> . . . .
>
> Christians are certainly commanded to obey laws of their nation (I Pet. 2:13). Advocates of civil disobedience find little encouragement in scripture. The only

> scriptural justification for a Christian to disobey his government would be in the case where the law of Caesar conflicts with the law of God. Yet, one might point out that Paul faced jail and punishment by the state in most of his ministry. Again, however, his offence was only preaching and teaching, and he obeyed God rather than Caesar.

At the September 21, 1979 meeting with Attorney Craze, separate letters were drafted in behalf of 19 MACS-member schools[10] for delivery to the Commissioner, each letter advising in substance that after much contemplation the church-school authorities had concluded that their biblical convictions compelled them to reject state regulation of their schools and teachers, which are integral and inseparable parts of the religious ministry of their churches.

On September 28, 1979, Department officials met with MACS representatives and Attorney Gibbs, and the 19 letters were presented to the Commissioner. In anticipation of a legislative resolution of the problem in 1980 the Commissioner assured MACS that the new church schools could continue to operate during the 1979-80 school year without fear of state action.

On October 11, 1979, MACS advised all of its members of the identity of the 19 MACS-member schools which had already submitted letters to the Commissioner, and urged five other MACS-member schools to submit letters.[11]

During November and early December, 1979, six more churches operating Christian schools wrote the Commissioner, rejecting state approval. See Defendants' Exhibits 15a - 15f.

In 1980, MACS drafted and sponsored two bills for presentation to the 109th Maine Legislature. Both bills provided that church schools which declare their religious convictions against state approval would be exempt from state approval requirements. The legislature rejected both bills in March 1980.

After the defeat of these bills, MACS formally prohibited its members from accepting or retaining school approval.

The Department wrote the unapproved church schools requesting the information needed to determine their eligiblility for approval.

On May 29, 1980, MACS' new attorney, William Ball, Esquire, wrote the Commissioner requesting information concerning the Maine compulsory education statutes and regulations. Attorney Ball asked the Commissioner to explain the statutory basis for regulations requiring private schools, as a prerequisite to approval, to submit a statement of (1) educational philosophy, goals and objectives, and a plan for accomplishing the same; (2) the "methods and procedures" to be utilized to measure attainment of school goals; (3) financial position and policies; and (4) the program of instruction. Attorney Ball asked if the Commissioner interpreted the state regulations as requiring that private schools request an inspection of their facilities, curricula and staff qualifications prior to commencement of operations. Attorney Ball inquired whether the Department regulation prohibiting the operation of unapproved schools was directed only at public schools and, if not, what the statutory basis was for such a regulation, pointing out that though Maine statutes do provide for penalties

against parents who enroll their children in a school not approved for attendance purposes, there were no statutes "directed at schools" and no statutes forbidding the operation of unapproved private schools.

During the 1980-81 school year the dispute between the church schools and the defendants remained at a standoff. The Department attempted to obtain compliance, clarify the approval application form, and determine whether any particular requirement burdened any school. MACS failed to respond to any of defendants' requests for substantive comments on how the approval regulations could be made less offensive to the religious beliefs of its constituency.

In September, 1980 the Commissioner advised the appropriate public school superintendents that nine Christian schools had opened without state approval. "In order to prevent the students from becoming victims [of the] approval controversy" (Defendants' Exhibit 35), the Commissioner recommended that the superintendents forward to those unapproved church schools, on request, copies of the necessary student records in the possession of the public schools, but retain the original student records.

On October 14, 1980 the Commissioner instructed all public school superintendents to indicate separately in their 1980-81 enrollment reports those students residing within their school administrative districts who were attending unapproved schools. The Commissioner concluded his letter by stating - "[u]ntil you hear further from this office, you should not take any legal steps to enforce the truancy

laws against students attending these unapproved schools." See Defendants' Exhibit 36.

On October 9, 1981 the Commissioner formally advised nine unapproved church schools[12] of the Department's intention to "commence a legal action" in state court unless certain information was furnished by October 20, 1981. The Commissioner insisted that "a private school may provide education to children of compulsory school age during hours of the day when such children would otherwise be attending public schools only if it is approved by the Commissioner." The Commissioner stated that approval must be obtained in accordance with the rules adopted by the Department, copies of which had been sent to the schools on September 25, 1981. Enclosing an application form, the Commissioner informed the church schools that the minimum information required to obtain Department approval to operate consisted of evidence that the school

> 1. has been inspected by the Department of Human Services for compliance with state health and sanitation standards;
>
> 2. has been inspected by the Fire Marshal for compliance with the Life Safety code;
>
> 3. offers a course of study meeting the minimum curriculum requirements;
>
> 4. has an instructional staff which is either certified or qualified for certification; and
>
> 5. maintains and safeguards adequate attendance, health and academic records.

The Commissioner allowed that the required information could be provided by authorizing Department representatives to visit the schools, observe their operations and inspect their records.

The original complaint in this action was filed on October 16, 1981.[13] The complaint was amended on October 28, 1981 by adding, as plaintiffs: Bangor Christian, Grace Baptist Church Schools, five churches and the five affiliated unapproved church schools which had received the Commissioner's letter of October 9, 1981.

On October 30, 1981, defendants agreed to refrain from undertaking any enforcement action against the five church schools added as plaintiffs two days earlier.

On November 20, 1981, defendants withdrew their earlier motion that this Court abstain from hearing this case.

On December 4, 1981, defendants filed their answer and a counterclaim against the five plaintiff church schools which had received letters from the Commissioner, as well as four nonplaintiff church schools which had received letters. Plaintiffs joined the latter four church schools as plaintiffs on December 28, 1981.

Prior to trial the parties agreed that although the provisions of Title 20-A of the Maine Revised Statutes Annotated were not to become effective until July 1, 1983, plaintiffs' claims and defendants' counterclaim were to be adjudicated as if those provisions were in effect at the time of trial, since Title 20-A was merely a recodification of pertinent provisions of Title 20.[14]

II. Counterclaim

The counterclaim presents the ripest controversy and its resolution controls the context in which the Court must determine the ripeness and substance of the claims asserted by the plaintiffs.

The counterclaim alleges that each plaintiff church school: (1) is operating with compulsory-school-age children in attendance, and without state approval; (2) has failed or refused in the past and will refuse in the future to respond to Department requests for information needed to determine its approvability; and (3) if unapprovable, is threatening the health, physical safety and welfare of the children in attendance.

Defendants demand that the Court (1) declare that the failure or refusal to complete and submit the 'Basic School Approval' application or to provide the information requested thereon in some other manner is violative of Maine law; and (2) enjoin the church schools from operating with compulsory-school-age children in attendance during normal public school hours until the church schools submit or make available to the Commissioner the information necessary to demonstrate compliance with state school-approval requirements.

Plaintiffs admit that the plaintiff church schools are unapproved and operating with compulsory-school-age children in attendance, but deny that they have failed or refused to respond to requests for information relating to school health, sanitation and fire safety.[15]

Plaintiffs affirmatively assert that defendants have an adequate remedy at law and that several of plaintiffs' constitutional claims, including their constitutional claim that various state regulations are ultra vires, bar relief under the counterclaim.

Consideration of the counterclaim begins with an examination of the relationship between the Maine statutes governing school attendance, Chapter 211 of Part 3 of Title 20-A, as amended by P.L. 1983 c. 435, 1983 Me. Legis. Serv. 2583-93, and the statutes relating to private schools, Chapter 117 of Part 2 of Title 20-A.

Compulsory Attendance and Private Schools

The core requirement of the compulsory attendance section (§5001) of Chapter 211 of the Maine education statutes is that persons age seven or older must attend a public school during its regular annual session until they reach age 17. 20-A M.R.S.A. §5001(1), as amended by P.L. 1983 c. 485 §21, 1983 Me. Legis. Serv. at 2590-91. Exemption from the public-school attendance requirement is accorded students who obtain "equivalent instruction in a private school . . . and if the equivalent instruction is approved . . ." 20-A M.R.S.A. §5001(2)(D)(1) (emphasis added), provided that the appropriate local public school officials receive a certificate reflecting the name and residence of the student seeking exemption and the name of the private school the student is attending, signed by the person or persons in charge of the private school.[16] 20-A M.R.S.A. §5001(2)(D)(2).

Local public school officials make the initial determination as to whether a student is receiving equivalent instruction in a private school. If local public school officials deny the exemption because the private school instruction is not considered "equivalent," an appeal may be taken to the Commissioner. Id. §5001(2)(D)(2).

In order to come within the relevant [paragraph (D)(1)] statutory exception to the compulsory public-school education requirement, a child must not only receive equivalent instruction, but the instruction must be "approved by the Commissioner."[17] An "approved private school" is defined in Title 20-A, section 1(2), as "a private school approved for attendance purposes under chapter 117," 20-A M.R.S.A. §1(2) (1983); a reference to section 2901, where it is provided that -

> [a] private school may operate as an approved private school for meeting the requirement of compulsory school attendance under section 5001 if it:
>
> 1. Hygiene, health, safety. Meets the standards for hygiene, health and safety under Titles 22 and 25; and
>
> 2. Is either:
>
> A. Currently accredited by the New England Association of Colleges and Secondary Schools; or
>
> B. Meets the department's requirements for approval for attendance purposes under section 2902.[18]

20-A M.R.S.A. §2901 (1983).

Under a delegation of authority from the Maine Legislature, see 20-A M.R.S.A. §405(3)(E), the Board of Education (Board) has promulgated regulations expressly made applicable to "[p]rivate schools approved for attendance purposes by the department . . ." by section 2902 of Title 20-A.[19]

Informed by the statutory definition of the term "approved private school" appearing in sections 2901 and 2902, the Board promulgated a new regulation during the course of the trial of the present action.

> A private elementary or secondary school shall not operate for purposes of meeting the statutory compulsory school attendance requirements unless it has been approved by the Commissioner of Educational and Cultural Services prior to commencing operation with students present.

05-071 CMR 125, section 1-A, subsection (A)(1) (as amended February 10, 1983) (Defendants' Exhibits 72 & 100-102) (emphasis added).

The Board regulations further provide that:

> Nine months preceding the day on which the school plans to begin operations, it shall file with the Commissioner a notice of intent to operate a school for purposes of meeting the compulsory school attendance requirements.

Id., subsection (A)(2) (emphasis added).

The Board regulations relating to private-school health and safety requirements provide that:

> A private school may not operate unless it complies with the health and safety requirements of Maine law applicable to schools generally, including the standards for hygiene, health, and safety under Titles 22 and 25 of the Maine Revised Statutes Annotated.[20]

Id., subsection (D)(1) (emphasis added).

Subsection I(4) of the Board regulations provides:

> Whenever the Commissioner determines that a private school is operating with compulsory school-age children in attendance and (a) does not meet the requirements for approval, or (b) has failed or refused to provide information for approval, he may institute proceedings in a court of competent jurisdiction to seek injunctive relief to prevent the non-public school from operating until such time as it meets the requirements for approval or provides information sufficient to demonstrate that it meets the requirements for approval.

Id., subsection (I)(4).

Defendants rely upon Title 20-A, the Board regulations and the equity powers of the Court in support of their requests for declaratory and injunctive relief.

A. Application of the Erie Doctrine

Although the counterclaim invokes the Court's ancillary, rather than its diversity, jurisdiction, the choice of law is governed by the Erie doctrine, see Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

> [I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. . . . Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. . . . Likewise, the Erie doctrine is inapplicable to claims or issues created and governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship.

19 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4515, at 275 (1982), quoting Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) [emphasis in original; elipses by Wright, Miller & Cooper]. Maine law

is the source of the rights asserted in the counterclaim.

According to the great weight of authority,[21] absent a contrary federal constitutional or statutory provision, see Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674 (1949) [availability of declaratory relief in diversity case is controlled by 28 U.S.C. §2201], federal rule, see Hanna v. Plumer, 380 U.S. 460 (1965), or some overriding federal policy, see Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 533-40 (1958) [invoking strong federal policy favoring jury trial], federal courts should afford whatever equitable remedy would be available in state court for the enforcement of a right created by state law. See System Operations, Inc. v. Scientific Games Devel. Corp., 555 F.2d 1131, 1143 (3d Cir. 1977); Franke v. Wiltschek, 209 F.2d 493, 494-95 (2d Cir. 1953); Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952); 2 Moore, Federal Practice ¶2.09, at 2-58 (1983); 19 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4513, at 214.

Since in this instance the standards governing the appropriateness of equitable relief are essentially similar under Maine law and federal law,[22] no important federal policy and no federal statute or rule will be contravened as a result of the choice of Maine law.

B. Relief Under Statutory and Regulatory Provisions

Defendants apparently contend that section 2901 empowers the Court to enjoin the operation of the plaintiff church schools during normal

public-school hours, regardless of whether injunctive relief would be appropriate under the Court's inherent equity powers. The Maine Law Court recognizes, see Town of Shapleigh v. Shikles, 427 A.2d 460, 464 (Me. 1981), that where "a statute provides for injunctive relief upon the showing of a violation, the party seeking such relief need not make a showing of irreparable harm in the normal equity sense," UV Industries, Inc. v. Posner, 466 F. Supp. 1251, 1255 (D. Me. 1979). But since the "historic injunctive process has been one of great flexibility in administering practical equity, . . . [such a provision] should not be lightly implied by the court in construing legislation." Town of Shapleigh v. Shikles, 427 A.2d at 464. Cf. Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co., ___ U.S. ___, 52 U.S.L.W. 4007, 4009 (November 1, 1983) ["the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose"].

Sections 2901 and 2902 neither impose nor delegate the power to impose direct sanctions against unapproved private schools, nor do the compulsory attendance provisions of Chapter 211 purport to empower direct action against unapproved private schools.[23] The plain legislative design of the Maine Education Law is to ensure that each child attends public school or obtains an equivalent education. One means[24] of obtaining an equivalent education is to attend an approved private school, that is, a private school which has demonstrated that it is in compliance with sections 2901 and 2902.[25]

Administrative Interpretation of Approval Requirements

The unmistakable import of the statutory school-approval scheme notwithstanding, the defendants have insisted from the outset[26] that it is implicit in the language of section 2901, which provides that a private school "may operate as an approved private school for meeting the requirements of compulsory school attendance. . . ," that an unapproved private school may not operate at all during normal public school hours with compulsory-school-age children in attendance. See Defendants' Memorandum Regarding Ultra Vires Issue, at 6.

Although courts do "not lightly disregard the interpretation given a statute by those charged with its administration, an administrative construction is not conclusive." Soucy v. Board of Trustees, 456 A.2d 1279, 1281 (Me. 1983). "[S]uch deference 'must yield to the fundamental approach of determining the legislative intent, particularly as it is manifest in the language of the statute.'" Central Maine Power Co. v. Maine Public Utilities Commission, 458 A.2d 739, 741 (Me. 1983), quoting Central Maine Power Co. v. Maine Public Utilities Commission, 436 A.2d 880, 885 (Me. 1981). An administrative agency construction, even one put forth by those who participated in drafting the statute, may be rejected upon consideration of the plain language of the statute, "the context in which it must be read," Stewart v. Inhabitants of Durham, 451 A.2d 308, 310 (Me. 1982), or the fact that a different construction will avoid "constitutional difficulties,"[27] id. [construction of grandfather clause by town selectmen conflicted with

plain meaning and with overall purpose of mobile home ordinance and gave rise to "serious constitutional questions"]. See also Clardy v. Town of Livermore, 403 A.2d 779, 782 (1979) [ordinance construed by court contrary to interpretation of town officials since it was "fairly open to an interpretation making decision (of the constitutional question) unnecessary"]; Farmington Dowel Products Co., Inc. v. Forster Manufacturing Co., Inc., 153 Me. 265, 272 (1957) [Law Court avoids constitutional question by concluding that a ten-word phrase "crept into the law by some inadvertence. . ."].

The plain language of section 2901 is entirely consistent with its long legislative history,[28] leaving no room for an administrative interpretation at odds with both.

Language of Statute

If the legislature had meant to ban the operation of unapproved private schools, "it would have said so in clear and unmistakable language. It is not for [the Court] to read into the statute an intent which is obviously not there," Squires v. Inhabitants of Augusta, 155 Me. 151, 167 (1959). Especially in view of the fact that the present action was commenced months before the 110th Legislature completed its debate on the recodification of the Education Laws,[29] i.e., Title 20-A, it would not have been difficult to draft section 2901 so as to provide that "no private school may operate with

compulsory-school-age children in attendance unless it meets the private-school approval requirements."[30]

The defendants essentially invite the Court to ignore all language in the opening clause of section 2901 following the phrase "[a] private school may operate. . . ."[31] "Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979). But cf. Farmington Dowel Products Co., Inc. v. Forster Manufacturing Co., Inc., supra. All of the language rendered mere surplusage under defendants' interpretation becomes imbued with both "meaning and force" by construing section 2901 as a description of the criteria prescribed for private schools which may be considered adequate alternatives to public schools for compulsory attendance purposes.

The Statutory Scheme

The Maine statutory scheme of compulsory education is an historically enlightened legislative response to the important parental and public interests inherent in the education of the young; one not lightly to be disregarded by courts, see Squires v. Inhabitants of Augusta, 155 Me. at 167, by municipalities, see id., or by administrators, cf. Central Maine Power Co. v. Public Utilities Commission, 458 A.2d at 741; Maine School Administrative District No. 15 v. Raynolds, 413 A.2d 523, 529-31 (Me. 1980). See Squires v.

Inhabitants of Augusta, 155 Me. at 159 ["The State educational policy cannot and must not be interfered with by any subordinate governing body."] In order to determine the legislative intent in relation to a particular section of a comprehensive statute, courts should consider the statutory scheme in its entirety and "interpret[] [the] statute . . . so that all of its provisions are read in harmony and are effectuated." Seven Islands Land Company v. Maine Land Use Regulation Commission, 450 A.2d 475, 480 (Me. 1982). Yet defendants' construction of section 2901 ill serves, indeed it dramatically alters, the long-standing legislative scheme underlying compulsory education in Maine.[32]

Compulsory-school-age children who fail to establish their entitlement to an exemption from the requirement of public school attendance are considered "habitual truants" if "[a]bsent from school without excuse for the equivalent of 10 full days, or for at least 1/2 day on 7 consecutive days, within any 6-month period." 20-A M.R.S.A. §5051(1). Any person who has control over an habitual truant and bears primary responsibility for that truancy is guilty of a "civil violation" and "shall be punished by a forfeiture of not more than $200," 20-A M.R.S.A. §5053(4)(A)(1), payable "to the treasurer of the school administrative unit in which the offense was committed for the support of its public schools." 20-A M.R.S.A. §5053(4)(B).

The Maine Legislature has prescribed detailed procedural safeguards and placed primary reliance upon local public school officials for the conciliation of truancy disputes and for the enforcement of

the truancy laws. Local public school officials are directed, under the Commissioner's guidance, to promulgate reasonable rules for the enforcement of the truancy laws. 20-A M.R.S.A. §5003.

It is the statutory duty of the public school principal to report an habitual truant to the public school superintendent, whose statutory duty it is to attempt to resolve the problem informally and, if unsuccessful, to refer the matter to the local school board, together "with the principal's report and any other useful information." 20-A M.R.S.A. §5051(2)(A)-(B). It is the duty of the school board to hear the matter after giving seven days' written notice to the parent or guardian of the alleged truant, stating the date, time and purpose of the hearing, the necessity that parents and child attend, and the right to inspect the child's attendance records and the principal's report. 20-A M.R.S.A. 5051(2)(C).

After considering the facts and discussing the matter with the child and with the parent or guardian, the local board is required either (1) to direct the child to attend school as required by statute and inform the parent or guardian of the legal responsibility to assure the child's attendance, or (2) to waive the compulsory attendance requirement, provided the child is at least 14 years old. 20-A M.R.S.A. §5051(2)(D).

A decision adverse to the parent or guardian may be appealed to the Commissioner, who is required to appoint "a fair hearing officer" to hear the appeal and report on the testimony presented, recommending

a disposition to the Commissioner, who is required to affirm, modify or reverse the decision of the local school board.[33] 20-A M.R.S.A. §5051(2)(E).

Attendance officers elected yearly by the school board are required to investigate alleged habitual truancies and report to the school board. Upon the written direction of the school board or the superintendent, attendance officers are required to file a complaint in Maine district court seeking imposition of the forfeitures prescribed by section 5053. 20-A M.R.S.A. §5052(2).

Defendants' interpretation of the education laws would arrogate to the Commissioner the powers and responsibilities entrusted by the legislature to local public school authorities, see 20-A M.R.S.A. §2 (1981), and eliminate entirely the sensitive administrative safeguards of notice, hearing and conciliation which are prerequisite to the commencement of any judicial proceeding for the enforcement of the truancy laws.

The 110th Legislature recodified, without substantive change,[34] the various long-standing statutory provisions prescribing truancy sanctions against parents, see 20-A M.R.S.A. §§2901, 2902, 5001(1), (2)(D), & 5051-53, notwithstanding the fact that plaintiffs' present counsel pointed out to the Commissioner as early as May 1980 that there did not appear to be any statutory basis for prohibiting the operation of unapproved schools.

Under its scheme for the governance of compulsory education the 110th Legislature has mandated that local public school officials

make every reasonable effort at conciliation with the parents of alleged truants prior to the commencement of administrative action. Next, the legislature has prescribed several levels of administrative proceedings in advance of any recourse to judicial action. Nowhere in this elaborate statutory scheme is there the slightest indication that the legislature meant to permit the circumvention of these procedural requirements merely because the Commissioner or any other defendant may consider the closing of private schools more appropriate than truancy-law enforcement against parents.

Inviting Unnecessary Constitutional Issues

Defendants' construction is not only at odds with the legislative scheme, it gratuitously raises grave constitutional problems. See United States v. Lee, 455 U.S. 252, 257-58 (1982) [limitations on religious liberty must be "essential to accomplish an overriding governmental interest"]; Johnson v. Robison, 415 U.S. 361, 384-86 (1974) [distinguishing between direct and indirect burdens on religion]; Braunfeld v. Brown, 366 U.S. 599, 605-07 (1961) [plurality opinion] [regulation of secular activity, so as indirectly to make religious practice more expensive, "wholly different" from legislative attempts to make religious practice unlawful]; Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) [statute seriously (though indirectly) impairing value of property of private schools, held unconstitutional]. See also Southeastern Promotions, Ltd. v. Conrad,

420 U.S. 546, 558-59 (1975) ["presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties"]; Kunz v. New York, 340 U.S. 290, 293-95 (1951) [ordinance giving police commissioner unbridled discretion to grant or refuse permits to speak on religious matters in public streets was invalid prior restraint on exercise of First Amendment rights]; Martin v. City of Struthers, 319 U.S. 141, 146-49 (1943) [ordinance forbidding knocking on doors or ringing doorbells in order to distribute handbills or circulars was invalid as applied to Jehovah's Witness seeking to advertise religious meeting, despite state claim of nuisance]. See generally Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 409 (1983).

Legislative Acquiescence

Struggling against the clear language, history and legislative scheme of the compulsory education statutes and disregarding the serious constitutional difficulties raised by their efforts to close church-affiliated schools, defendants contend that their construction of section 2901 is binding on the Court because the 109th Legislature acquiesced in their construction.

Legislative acquiescence offers a precarious perch from which to construe a statute even in the best of circumstances. Legislative acquiescence is "significant" in assessing the intent of a Maine legislature, if the administrative interpretation is reasonable, has

been called to the attention of a legislature subsequent to the enacting legislature and if it is reasonably inferable that the administrative interpretation was recognized by the later legislature as a valid construction. See In re Spring Valley Development, 300 A.2d 736, 743-45 (Me. 1973) [after attention of 105th Legislature had been specifically directed to administrative interpretation of bill enacted by 104th, actions of 105th became "significant" in assessing intent of 104th]. See also Androscoggin County Savings Bank v. Campbell, 282 A.2d 858, 865 (Me. 1971) [ambiguous statutory amendments in 1969 not to be construed as contrary either to 1917 Attorney General's opinion or to interpretation given by banking commissioners since 1917].

MACS sponsored two bills before the 109th Legislature (L.D. 1817 and L.D. 1980) to exempt church-sponsored schools from the school approval requirements. Since each bill stated that it was designed to "make approval optional for church-sponsored schools," and would have exempted these schools from approval and their students from compliance with the compulsory public-school attendance law, it is fair to infer either that someone involved in drafting these bills knew of the Commissioner's interpretation or that the drafter thought that approval was or might be considered a condition precedent to the lawful operation of a private school. But both the trial record and the legislative record make clear that these bills were sponsored, and, at least initially, probably drafted, by MACS, which was well

aware of the Commissioner's consistent contention that an unapproved private school cannot operate at all with compulsory-school-age children in attendance, see, e.g., pp. 13-15 supra. See 1980 Me. Leg. Rec. 387 (House, March 10, 1980) [Senator Trotzky stating, "This bill was brought in by (MACS)"].

Much of the floor debate centered on the right and duty of the state to influence or control sectarian schools, see id., at 344-50 (House, March 10, 1980); id., at 386-87 (Senate, March 11, 1980), but it does not follow that the legislature was aware that the Commissioner considered Department approval to be a precondition for lawful operation.[35] Certainly, subjecting the parents of children attending church schools to truancy actions (the legislatively-contemplated response to nonapproval, which has only since been disavowed by the Commissioner) would have a significant affect on the schools, thereby affording the state substantial de facto control over the church schools. Furthermore, there is not the slightest indication in the record of this case or in the legislative record from which it reasonably could be inferred that the 109th Legislature recognized the Commissioner's interpretation as valid.

In the context of the present case there is no ambiguity requiring resort to "legislative" acquiescence, no pertinent administrative interpretation was called to the attention of the 109th Legislature and its reasons for rejecting L.D. 1817 and L.D. 1980 were unrelated to whether the Commissioner is or ever has been empowered by statute to close unapproved private schools.

The Court is therefore satisfied that neither section 2901 nor any other statutory provision prohibits private schools from operating merely because they are unapproved or refuse to seek or accept approval. A fortiori, no statutory provision requires the Court to fashion injunctive remedies against the operation of unapproved private schools without due regard for the public and private interests involved.

The Regulatory Scheme

Subsection I(4) of the regulations purports to authorize the Commissioner to "seek" injunctions against the operation of unapproved private schools. The Board regulations neither expressly prohibit nor purport to empower injunctive relief against the operation of unapproved private schools; any such regulation would be invalid.

A "legislative" rule[36] is valid only if the legislature has authorized its promulgation. Anheuser-Busch, Inc. v. Walton, 135 Me. 57 (1937). See Maine School Admin. Dist. No. 15 v. Raynolds, 413 A.2d at 529; State v. Dube, 409 A.2d 1102, 1104 (Me. 1979); Frank v. Assessors of Skowhegan, 329 A.2d 167, 170 (Me. 1974). Thus a legislative rule is void if it extends, modifies or conflicts with the enabling statute. Anheuser-Busch, Inc. v. Walton, 135 Me. at 66-68; 1 Cooper, State Administrative Law 254 (1965). See Frank v. Assessors of Skowhegan, 329 A.2d at 170. The relevant enabling statute, see 20-A M.R.S.A. §405(3)(E), merely directs the Board to "[a]dopt or

amend rules on requirements for approval and accreditation of elementary and secondary schools." 20-A M.R.S.A. §405(3)(E). The statutory directive to adopt rules governing "approval" and "accreditation" is designed to ensure greater definition of the criteria for exemption from compulsory public school attendance available to students attending approved private schools, and forms a comfortable fit within the legislative scheme of the compulsory education laws, by focusing enforcement efforts upon the individual student and parent.

The defendants apparently assert that the Board is empowered to authorize the Commissioner to bypass the elaborate truancy-law enforcement scheme put in place by the legislature by proceeding directly to court for injunctive relief against the operation of unapproved private schools. Although the defendants may consider the closing of unapproved private schools in these circumstances a more efficient and expeditious means of securing compliance with the compulsory education laws on the part of private school students and their parents,[37] it is not for the defendants, but for the legislature, if and when it chooses, to do so, and the legislature has not chosen to do so.

In its recent recodification of the education laws the 110th Legislature manifested no intention to redirect enforcement sanctions from the parents of students attending unapproved private schools to

the unapproved private schools themselves. See pp. 26-30 supra. As the Law Court has held in an analogous context:

> [The Commission's] power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature. What the [Commission] has attempted to do in this instance constitutes a flagrant usurpation of a prerogative which belongs to the legislature, and is subversive of those principles which are the foundation of orderly government. The regulations in question are invalid. . . .

Anheuser-Busch, Inc. v. Walton, 135 Me. at 67-68 [involving rules and regulations of State Liquor Commission].

Similarly, to the extent that the board regulations attempt to institute a scheme whereby private schools can operate only if approved, the Board has exceeded its power and its regulations are invalid.[38]

C. Relief Under the Inherent Equity Powers of the Court

Requests for injunctive relief are addressed "to the conscience of the chancellor. . . ," Town of Shapleigh v. Shikles, 427 A.2d at 465, who is guided by the balance between the needs of the party requesting injunctive relief and the hardship which injunctive relief would visit upon the party enjoined, Town of Shapleigh v. Shikles, 427 A.2d at 464; Natale v. Kennebunkport Board of Zoning Appeals, 363 A.2d 1372, 1377 n.9 (Me. 1976), and by the public interest, see Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982);[39] Note, Developments In The Law - Injunctions, 78 Harv. L. Rev. 994, 1001

(1965). The Law Court "has always been conservative" in its approach to the appropriateness of injunctive relief, Haskell v. Thurston, 80 Me. 129, 132 (1888), which is "extraordinary [relief] only to be granted with the utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case." Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 79 (Me. 1980). Thus, the need for injunctive relief is per se insufficient, unless the moving party "show[s] plainly that [his] right is clear," Haskell v. Thurston, 80 Me. at 132, and that absent injunctive relief the violation of that right will cause irreparable injury, Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d at 79.

Defendants' Need

(i) The Right Violated

The contention that the operation of unapproved private schools contravenes section 2901 must fail for the reasons previously discussed. The other relevant respect in which the plaintiff church schools are alleged to have acted unlawfully is by "inducing habitual truancy."

The defendants assert that "the record evidence . . . demonstrates beyond any question that . . . [the ten church schools and the pastors and administrators in charge of these schools] induce their students to attend their unapproved schools." Defendants' Memorandum Regarding Ultra Vires Issue, at 10. On the basis of the entire record in this

case there appear to be but two plausible forms which any such "inducement" of habitual truancy might take: first, that the very operation of an unapproved church school with compulsory-school-age children in attendance constitutes an inducement of habitual truancy; and second, that the pastors or administrators induce students to attend their church schools by communicating their religious belief that the Bible commands Christians to establish schools in order to instill biblical principles and that Christ is the sole sovereign in such matters. See Plaintiffs' Proposed Findings, ¶¶11, 13, 17, 21-25, 27, 31, 63-64, and transcript citations therein.

Title 20-A M.R.S.A. §5053(1)(B) provides that it shall be a "civil violation" to induce a student to violate section 5051, subsection 1 (defining habitual truancy). See State v. McDonough, Doc. No. Pen-83-252 slip op., at 8 n.5 (Me. December 8, 1983) [offense of being primarily responsible for the habitual truancy of a student under one's control is a civil violation]. "A person guilty of" inducing habitual truancy "shall be punished by a forfeiture of not less than $500," 20-A M.R.S.A. §5053(4)(A)(2), payable "to the treasurer of the school administrative unit in which the offense was committed for the support of its public schools," id. §5053(4)(B). (Emphasis added.)

Under Maine law the operation of an unapproved church school attended by compulsory-school-age children does not constitute an inducement of habitual truancy. The Maine Supreme Judicial Court authoritatively defines the term "induce" as follows:

> Webster's New International Dictionary, 2d Ed., defines 'induce' as 'to bring on or about; to effect; cause.' Black's Law Dictionary, 4th Ed., defines 'induce' as 'to bring on or about, to effect, cause to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on.' The term induce signifies a successful persuasion; that the act has been effective and the desired result obtained. State v. Stratford, 55 Idaho 65, 37 P.2d 681 (1934); Hautau v. Kearney & Trecker Corporation, 179 F. Supp. 490 (D.C. 1959); Vol. 21 Words and Phrases, Permanent Ed., p. 481.

State v. Miller, 252 A.2d 321, 324-35 (Me. 1969) [inducing one to take indecent liberties means that persuasion has resulted in the doing of the indecent act]. Other courts similarly hold that to "induce" requires some form of persuasion. International Brotherhood of Electrical Workers v. National Labor Relations Board, 341 U.S. 694, 701-04 & n.7 (1951) ["induce" in N.L.R.A. means to lead on; to influence; to prevail on; to move by persuasion or influence]; United States v. Burkley, 591 F.2d 903, 917 (D.C. Cir. 1978) [relative to entrapment defense, inducement refers to government persuasion, harassment or other pressure on defendant to commit the crime]; Fromberg, Inc. v. Thornhill, 315 F.2d 407, 411 (5th Cir. 1963) [under statute forbidding active inducement of patent infringement, inducement "has connotations of active steps knowingly taken . . . as distinguished from accidental or inadvertent]; In the Matter of Kearney Chemicals, Inc., 468 F. Supp. 1107, 1111 (D. Del. 1979) [in tort case for inducing breach of contract, "induce" refers to causing one by persuasion or intimidation to choose one course of conduct over another].

These judicial definitions conform to the meaning commonly given the term "induce," which involves some form of persuasion or influence as an essential element.

The fact that "inducing" habitual truancy carries a substantially more stringent penalty (forfeiture of not less than $500) than does the offense of being primarily responsible for the truancy of a child under one's control (forfeiture of not more than $200) makes clear that the legislature considers inducing habitual truancy to be a more serious matter than "being responsible" for truancy. Indeed, the Statement of Fact accompanying the 1981 bill, which reduced the penalties for these offenses, stated, "This bill . . . would change the penalty section for a parent responsible for truancy to a civil violation punishable by either a $200 or a $500[40] forfeiture, depending on the nature of the offense." 110th Me. Leg., H.P. 1177, L.D. 1401, [emphasis added], enacted as amended P.L. 1981 c. 391 §1, 1981 Laws of Maine at 620. An interpretation removing the element of persuasion from the ordinary meaning of "induce" would disregard the clear legislative directive that the penalty for "inducing" habitual truancy should apply only to conduct more severe than merely "being responsible" for truancy.

In recognition of the judicial "obligation to avoid constitutional decisions when other grounds are available," Morris v. Travisono, 707 F.2d 28, 33 (1st Cir. 1983), the Court concludes that mere operation of these unapproved church schools with compulsory-school-age children

in attendance does not constitute an inducement of habitual truancy.[41] Indeed, since defendants allege that the plaintiffs "operate schools for compulsory school age children . . . and . . . induce their students to attend," Defendants' Memorandum Regarding Ultra Vires Issue, at 10, it is not entirely clear that defendants contend that the mere operation of an unapproved school constitutes an "inducing." And, even assuming the contrary, under the equities of this case injunctive relief is inappropriate.

Irreparable Injury

There can be no irreparable injury where adequate relief is available at law. Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d at 79; 11 Wright and Miller, Federal Practice and Procedure §2944, at 392 (1973). "If the legal remedy available to the plaintiff would be as effective as . . . [injunctive] relief, there is no need for the court to invoke its equity jurisdiction."[42] Id. at 396.

An available legal remedy generally is considered inadequate if it can be secured only through a multiplicity of actions, as when the conduct is likely to be of a recurring nature. Id. at 397-98. But even if the operation of unapproved schools does constitute an inducement of habitual truancy, there is no reason to suppose that prosecutions under section 5053(1)(B) would be inadequate or need be multiplicitous. It does not appear that the authorized penalty, i.e., a forfeiture of not less than $500, is inadequate to prevent recurring

violations. Cf. City of Tupelo v. Walton, 237 Miss. 892, 116 So.2d 808 (1960) [owner enjoined from operating store in violation of Sunday closing law where authorized fine was insignificant, and owner had 75 prior convictions and statute authorized injunction]; State v Preuss, 217 Minn. 100, 13 N.W.2d 774 (1944) [25 prior convictions].

There are two principal reasons advanced in explanation of the customary judicial reluctance to enjoin the commission of a crime, see, e.g., United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983); Dommer v. Crawford, 638 F.2d 1031, 1047 (7th Cir. 1980); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969); 11 Wright & Miller, Federal Practice and Procedure §2942, at 386 (1973); Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. at 1013. The first reason, i.e., "concern for rights [of the alleged offender] to the safeguards of criminal procedure," United States v. Zenon, 711 F.2d at 479, has been criticized, with some justification, as illogical,[43] and, in any event, may be inapposite here.[44] But the second justification: to prevent frustration of the legislatively-prescribed sanction and circumvention of prosecutorial discretion, 11 Wright & Miller, Federal Practice and Procedure §2942, at 386 (1973); Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. at 1016, relates to the adequacy of the available legal remedy. The complex enforcement scheme crafted by the legislature and the great latitude left to "prosecutors" under that scheme, see pp. 28-29 supra, speak forcefully in favor of a finding that the sanction selected by the

legislature is adequate, regardless of whether inducing habitual truancy be deemed a criminal or civil violation.

Burden of Injunctive Relief on Plaintiffs

There is a strong presumption against the constitutional validity of any restraint of future expression. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). See also Near v. Minnesota, 283 U.S. 697, 713-23 (1931) [statute permitting public officials to bring publisher before judge to obtain injunction against publication of scandalous and defamatory matter was an unconstitutional prior restraint].

Religious worship and discussion, integral aspects of the curricula of the plaintiff church schools, constitute forms of speech and association entitled to full First Amendment protection. Widmar v. Vincent, 454 U.S. 263, 269-70, n.6 (1981) [state-university regulation prohibiting use of facilities for religious worship and teaching was content-based discrimination against religious speech, not narrowly drawn to serve a compelling state interest]. "[T]he regulation of a communicative activity . . . must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 315 (1980) [per curiam]. "[T]he burden of supporting an injunction against a future [communication] is even heavier than the burden of justifying the imposition of a criminal sanction for a past

communication." Id. at 315-16. "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Id. at 316 n.13 [emphasis in original].[45]

At first glance it may seem superficial to draw a distinction between closing down unapproved church schools, on the one hand, and multiple truancy prosecutions against the parents of unapproved church-school students, on the other. But aside from the singularly sufficient reason that the Maine Legislature has mandated truancy-law enforcement and has never authorized the closing of a private school by courts or administrators for any reason relevant to the present action, there is a vital difference between the two approaches and it goes to the heart of the plaintiffs' objections in this case.

Defendants claim a right to close[46] schools which plaintiffs assert are "pervasively sectarian" institutions, Cuesnongle v. Ramos, 713 F.2d 881, 883 (1st Cir. 1983),[47] in order to protect the state's interest in the compulsory education of Maine children. Without a doubt the closing of a "pervasively sectarian" school would burden the First Amendment rights of more individuals (those teaching and preaching at, and those supporting and attending, the institution) in a more direct and substantial manner than truancy actions against the parents or guardians of the "habitual truants" whose education the state seeks to promote.[48] Therefore, the requested injunctive relief raises far more problematic constitutional questions than those

brought into play by the truancy-prosecution scheme prescribed by the legislature.

And from a purely practical perspective as well injunctive relief would impose substantially greater burdens on all of the plaintiffs, the churches, schools, parents and staff, than would enforcement under the legislative scheme. The requested injunctive relief (apparently) would prohibit the operation of an unapproved church school during public school hours if a single compulsory-school-age child were in attendance, in derogation of the religious liberties of the nonschool-age students and despite the fact that the school-age child might be otherwise exempt from the requirement of compulsory attendance at a public school. For example, the local school board may excuse compliance with the compulsory education laws for students 14 years of age or older. 20-A M.R.S.A. §§5002(1)(E), 5051(2)(D)(2). Alternatively, a compulsory-school-age child attending an unapproved church school may have obtained an exemption by establishing that the school (which may be unapproved solely because it refused to seek approval) provides "equivalent instruction," or by establishing that the child receives "equivalent instruction" "in any other manner" for which the approval of the Commissioner has been obtained. 20-A M.R.S.A. §5001(2)(D).[49]

The Public Interest

The Maine legislature perceives the public interest as requiring that truancy-law enforcement be commenced at the local level by local officials who are directed to consider and address the needs of the individual student, whereas the requested injunctive relief would relegate the individual student to the backgr und of the constitutional controversy between church and state.

It does not appear that the plaintiff church schools have acted unlawfully;[50] if they have acted unlawfully, it does not appear that defendants' remedy at law is inadequate; and injunctive relief would pose a severe risk of burdening protected First Amendment rights. Accordingly, injunctive relief against the church schools is not warranted.

D. Dismissal of Counterclaim

There being no relevant legislative prohibition and no legislative delegation of the power to prohibit the operation of private schools, the defendants are no more entitled to the requested declaratory relief than to injunctive relief. There being no obligation to seek approval, the plaintiff church schools are not required to provide the information n cessary to obtain approval. Whether unapproved schools may be required to furnish to the state the names, addresses and attendance records of their students is not before the Court, since it

does not appear that there has been any attempt to impose such a requirement.[51]

Except for possible prosecution under the truancy laws, nonapproval is the only direct consequence of the failure or refusal of the plaintiff church schools to provide the school approval information demanded by the Department.

The counterclaim is therefore DISMISSED.

III. COMPLAINT

There being no legislative license to close unapproved private schools, the Court must next determine whether the complaint presents a "case or controversy."

Article III, section 2, of the United States Constitution restricts the exercise of the judicial power of the United States to "[c]ases . . . [and] [c]ontroversies." U. S. Const. art. III, §2, cl. 1.

A. Ripeness of Claim for Relief Enjoining Truancy Actions Against Parents[52]

The doctrine of "ripeness" has undergone significant transformation from the days when the term "advisory opinion" was afforded a sweeping definition. See International Longshoreman's and Warehousemen's Union v. Boyd, 347 U.S. 222 (1954). Since the watershed decision in Abbott Laboratories v. Gardner, 387 U.S. 136

(1967), ripeness jurisprudence has assumed a decidedly practical bent.[53] Absent congressional action curtailing jurisdiction, "[t]he problem [of the ripeness of a challenge to a statute, regulation or rule] is best seen in a twofold aspect, requiring . . . evalua[tion of] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149.

Fitness of Issues for Judicial Decision

The existence of a sufficiently developed factual record is essential to any determination that problematic constitutional issues are ripe for judicial review. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 301, 304 (1979); Abbott Laboratories v. Gardner, 337 U.S. at 149; American Committee for Protection of Foreign Born v. Subversive Activities Control Board, 380 U.S. 503, 505 (1965) [per curiam]. Due to the fact-specific nature of the constitutional claim asserted by the parent-plaintiffs, Bangor Baptist Church v. State of Maine, 549 F. Supp. at 1216-20, their claim cannot be considered ripe without a fully developed record, cf. Abbott Laboratories v. Gardner, 387 U.S. at 149 [sparse factual record no obstacle to ripeness where "issue tendered is a purely legal one"]. Although the parties have labored to develop the record, most of their efforts have focused upon whether the state's interest in either "licensing" or closing the various plaintiff church schools overrides the plaintiffs' religion-

based interest in insulating their church schools from the state approval requirement. Much of that evidence is rendered valueless since Maine law simply establishes a private-school approval scheme for the purpose of determining the eligibility of private school students to an exemption from the public-school compulsory attendance requirement. What remains to be decided under the parent-plaintiffs' request that the defendants be enjoined from prosecuting parents under the truancy laws is whether the compulsory education law, despite its flexibility and myriad exceptions, impermissibly burdens the exercise of the religious beliefs of the plaintiff-parents.[54] The present record relevant to these issues is extraordinarily sparse.

The very existence of this flexible, in some respects fairly new, and largely untested, statutory scheme, itself militates against judicial review. Although the Board's present approach to the implementation of the statutory scheme implicates serious First Amendment concerns, those constitutional concerns are mooted by the Court's ruling that the Board's present approach is invalid under the statutory scheme. See p. 36 supra. Presumably, new Board regulations implementing a different approach will follow. How the new Board regulations may comport with the statutory scheme and affect plaintiffs' constitutional rights are questions which time, not speculation, can best answer. See California Bankers Association v. Shultz, 416 U.S. 21, 55-56 (1974) [challenge to statutory record-keeping requirement, on grounds that it "could possibly be used to obtain" protected information, held nonjusticiable].

Hardship To The Parties

Affecting both the fitness of the challenge for judicial review and the hardship to the parties in the absence of judicial review, the likelihood of enforcement is central to the ripeness of an anticipatory challenge to a statute prohibiting conduct arguably entitled to constitutional protection.

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. O'Shea v. Littleton, 414 U.S. 488, 494 (1974). But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923); see Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974); Pierce v. Society of Sisters, 268 U.S. 510, 526 (1925).
>
> When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.' Steffel v. Thompson, 415 U.S. 452, 459 (1974); see Epperson v. Arkansas, 393 U.S. 97 (1968); Evers v. Dwyer, [358 U.S. 202,] at 204. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' Doe v. Bolton, 410 U.S. 179, 188 (1973). But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.' Younger v. Harris, 401 U.S. 37, 42 (1971); Golden v. Zwickler, 394 U.S. 103 (1969). When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court. Younger v. Harris, [401 U.S.] at 42.

Babbitt v. United Farm Workers National Union, 442 U.S. at 298-99 (1979).[55]

The First Circuit recently found no "case or controversy" where a juvenile brought a First and Fourteenth Amendment facial challenge against a city curfew ordinance directed against persons under age 16. McCollester v. City of Keene, 668 F.2d 617, 621-22 (1st Cir. 1982). The court considered the action unripe because the juvenile plaintiff failed to allege the conduct in which she intended to engage and because the challenged ordinance was susceptible to an interpretation by local officals which would limit its reach to after-curfew conduct posing a risk of injury or disturbance to others. Id. at 620-21. The First Circuit said that "there is no case or controversy unless the plaintiff is subject to something more than a speculative risk of prosecution." Id. at 621.

> There must be 'a credible threat of prosecution' of the plaintiff personally, Babbitt, supra, which means, in the words of Justice Brennan - a justice whose opinion in Steffel shows him sympathetic to a broad construction of Article III in connection with complaints seeking a federal court declaratory judgment with respect to the constitutionality of state statutes - a 'likelihood that a prosecution will actually ensue.' Regional Rail Reorganization Act Cases, supra.

Id. at 621. See also City of Los Angeles v. Lyons, ___ U.S. ___, 103 S.Ct. 1660, 51 U.S.L.W. 4424, 4426-28 (1983); Munoz-Mendoza v. Pierce, 711 F.2d 421, 426-30 (1st Cir. 1983); High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980) [plaintiff must demonstrate "a genuine threat of imminent prosecution"]; Bickham v. Lashof, 620 F.2d

1238, 1247 (7th Cir. 1980) ["case or controversy" requirement satisfied by showing that state intended to prosecute act plaintiff expressed intention to commit]; St. Martins' Dress, Inc. v. Carey, 605 F.2d 41, 44-45 (2d Cir. 1979) [no "case or controversy" in challenge to child pornography statute where prosecutors declared that they would not enforce statute in regard to the book which was the object of plaintiff's complaint]; Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 4-6 (9th Cir.), [absent some relevant history of prosecution, statements made by deputy sheriffs to Indians, that gambling ordinance was applicable to all in the county, and by the sheriff, that all laws would be enforced, were insufficient threats of prosecution to give rise to "case or controversy" in challenge to enforcement of ordinances on Indian reservations], cert. denied, 419 U.S. 1008 (1974). See generally Comment, Threat of Enforcement - Prerequisite to a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962).

There is no threat by any state or local official to enforce the truancy laws against any of these plaintiff parents. The record reveals that defendants expressly disavow any intention to institute, encourage or permit truancy actions against the parents of church-school students. See Babbitt v. United Farm Workers National Union, 442 U.S. at 302. The Commissioner testified that, if it were held that truancy actions against the parents of children attending unapproved church-schools offered the only means of enforcing the

school approval laws and regulations, he would "act through the courts" rather than institute truancy actions, Tr. at 1085, 1139, and that before he could pursue truancy actions against parents he would first have to obtain legislative authorization for additional funding and staff, id. at 1144.[56] Enforcement of the truancy laws against the parents of children attending unapproved church-schools was characterized by the Commissioner as a "misuse" of the truancy laws, and "inappropriate, if not harmful," Tr. at 1139-41. The trial testimony was corroborative of an earlier affidavit in which the Commissioner stated that he had "discouraged" local officials from undertaking truancy enforcement against the parents of the students of these unapproved church schools.[57] Second Supplementary Affidavit of Commissioner Raynolds, ¶13 (filed April 20, 1982). On October 14, 1980 the Commissioner instructed school superintendents that, "[u]ntil [they] hear from . . . [the Commissioner's] office, [they] should not take any legal steps to enforce the truancy laws against students attending these unapproved schools." Defendants' Exhibit 36.

These representations by the Commissioner, together with the position consistently taken throughout these proceedings by the defendants, through their counsel, see, e.g., Defendants' Post-Trial Brief, at 59 ["truancy actions are an inappropriate, ineffective and unacceptable . . . way of dealing with the issues in this case"], demonstrate that the defendants do not contemplate, even if they are empowered to pursue or "direct,"[58] truancy prosecutions against the

parents of children attending the plaintiff church schools.

Furthermore, the record is devoid of evidence that a truancy proceeding has ever been commenced, even to this day, against a parent or guardian of any child attending any unapproved private school, much less one of the unapproved plaintiff church schools. Moreover, there is no evidence that there has ever been a threat, by local public school officials or by any of the defendants, to bring, encourage or permit any such truancy action. Instead, the record reveals: (1) repeated disavowals by the Commissioner of any intention to proceed with truancy actions against either students or parents; (2) instructions by the Commissioner to all public school superintendents to refrain from truancy actions against those students and parents "until [the Superintendents] hear from . . . [the Commissioner's] office;" (3) uniform compliance by local public school officials with the instructions of the Commissioner; (4) uncontradicted evidence that, before resorting to truancy actions against the parents of students attending these unapproved schools, the Commissioner would first have to obtain legislative authorization for additional staff and funding; and (5) no intimation whatever that any of the defendants would resort to truancy actions to enforce the compulsory education laws once it had been finally determined by the courts that direct action to close unapproved private schools is ultra vires.

Finally, the complaint does not allege and the record does not indicate that any potential truancy-action prosecution against the

plaintiff parents has chilled the exercise of their First Amendment rights or affected the actions of those parents or any other plaintiff. See Doe v. Bolton, 410 U.S. at 188-89 [challenge to Connecticut abortion statute justiciable since doctors alleged that the statute "chilled and deterred" practice of their profession].

Since the defendants deny any intention to institute truancy actions against the parents of students attending these unapproved church schools, neither plaintiffs nor defendants can point to any relevant hardship resulting from the Court's refusal to enjoin.

B. Claim for Relief Enjoining Actions Against Schools for Inducing Truancy by Mere Operation

In dismissing defendants' counterclaim, the Court has held that mere operation of an unapproved private school does not violate the prohibition against inducing habitual truancy. See pp. 36, 46-47 supra. Accordingly, and in view of the judicial obligation to avoid serious constitutional issues when other grounds are available, p. 40 supra, the Court does not reach the issue as to whether a statute authorizing such an action would violate the constitutional rights of the plaintiffs. Moreover, the Court is satisfied that enjoining the defendants from instituting such actions under the current statute would be inappropriate.[59] "[T]here is no evidence before [the Court] that would indicate that defendants will not accept in good faith" the Court's holding as to the meaning of the word "induce." Wulp v. Corcoran, 454 F.2d 826, 835 (1st Cir. 1972).

C. The Claim for Relief
Enjoining Actions Against Pastors

Ripeness

The only other credible prospect of truancy prosecution which might be considered sufficient to present a "case or controversy" under the complaint in this action results from the absence of any express disavowal of an intention to commence actions against the plaintiff pastors for inducing habitual truancy in violation of 20-A M.R.S.A. §5053(1)(B). See Babbitt v. United Farm Workers National Union, 442 U.S. at 302. Although the Commissioner did not actually threaten any such prosecution of the pastors in the letters which precipitated the present action, the language of those letters, see Defendants' Exhibits 46a-i [Attorney General will "commence legal action"], is broad enough to encompass an action under the "inducing" statute, and, as of February 16, 1983, defendants' attorneys considered the statute applicable to the conduct of at least some of the plaintiffs. See Defendants' Memorandum Regarding Ultra Vires Issue, at 10-11. Moreover, actions against the plaintiff pastors would fit neatly into the strongly held view of the Commissioner, see pp. 52-53 supra, and defense counsel, see p. 53 supra, that enforcement of the compulsory education laws should be directed at the plaintiff schools, rather than at their students or the parents of their students. Indeed, defendants' threatening assertion, that "the plaintiffs . . . induce their students to attend their unapproved schools," [Defendants Memorandum Regarding Ultra Vires Issue, at 10], appears to refer to

the religious edification of parishioners by the plaintiff pastors. The record is adequately developed as to the nature and basis of this religious instruction. There can be little doubt that in every sense of the word pastors do "induce" parishioners to send their children to church-affiliated schools . that the threatened enforcement actions raise serious constitutional questions.

Accordingly, the claim for injunctive relief protecting the right of the pastors to preach the Gospel is ripe.

Merits

Prosecution of the pastors or the administrators of church schools for inducing truancy, whether in sermons or in other communications with students or parents in the congregation, would raise fundamental free speech and free exercise concerns.[60]

In 1945 the Supreme Court observed that in establishing the boundary "where the individual's freedom ends and the State's power begins . . . the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 529-30 (1945). When First Amendment rights are implicated,

> [t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion

> for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceful assembly.

Id. at 530. "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Id. See also id., at 532 (intrusion permitted "only if grave and impending public danger requires" it). "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978). Government authorities may not "forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (footnote omitted) [per curiam]. See also Hess v. Indiana, 414 U.S. 105 (1973) [disorderly conduct statute unconstitutionally applied to anti-war protester since there could be no rational inference "that his words were intended to produce, and likely to produce imminent disorder"]. Courts must balance the magnitude and imminence of the danger posed by the speech, against "the need for free and unfettered expression," as well as the "possibility that other measures will serve the State's interests." Landmark Communications, Inc. v. Virginia, 435 U.S. at 843. See also State v. John W., 418 A.2d 1097, 1102 (Me. 1980) [constitutionality of

disorderly conduct conviction must be tested by balancing magnitude and character of evil, as well as its likelihood, against need for free and unfettered expression].

Any action brought against plaintiff pastors, administrators or church schools for inducing truancy by "preaching" that the Bible commands fundamentalist Christians to send their children to schools regulated solely by fundamentalist Christians would certainly "restrain orderly discussion and persuasion," Thomas v. Collins, 323 U.S. at 530. Such a restraint would also hinder the right of assembly and the free exercise of religion. Defendants have not suggested any "grave[] abuses, endangering paramount interests," id., which would justify the threatened restraints. Clearly, there are other, less problematic measures, i.e., enforcement of the truancy laws, which would serve the state interests involved.

Plaintiffs therefore are entitled to declaratory and injunctive relief[61] precluding defendants from bringing actions against them on the grounds that they induce truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children.

Dated at Bangor, Maine this 20th day of December, 1983.

United States District Judge

1/The plaintiffs are: ten independent fundamentalist Christian churches and their affiliated schools and pastors; the chief administrators of four of the plaintiff church schools; four parents whose children attend either Bangor Christian Schools or the Grace Baptist Church Schools; two parents of pupils attending Ellsworth Christian School, which is a member of plaintiff Maine Association of Christian Schools (MACS); a Bangor Christian Schools teacher and its principal; a Grace Baptist Church Schools teacher; and MACS.

Calvary Foursquare Church and Gardiner Christian Academy appear to have been omitted from the Second Amended Complaint through inadvertence, after having been added as plaintiffs on December 28, 1981. The chief administrator of Gardiner Christian Academy (Reverend Allen) was named as a plaintiff in the Second Amended Complaint. After defendants counterclaimed against Gardiner Christian Academy, it responded and Gardiner Christian Academy is treated as a plaintiff in the trial stipulation filed with the Court on January 30, 1983. Accordingly, the pleadings are hereby amended to conform to the evidence, pursuant to Fed. R. Civ. P. 15(b).

Also dropped as a party plaintiff is Reverend William Greenwood, the administrator of Kingfield Christian Academy, which has ceased operations and was dropped as a party, along with its affiliate, First Baptist Church, on January 25, 1983.

2/Plaintiffs' 'Revised List of Exhibits,' as supplemented at trial, contains 98 exhibits. Defendants' 'Final Revised List of Exhibits,' as supplemented at trial, contains 102 exhibits. All exhibits were admitted into evidence, except plaintiffs' Exhibit 38, which was withdrawn, and defendants' Exhibits 89 and 90.

3/See note 6 infra.

4/Prior to the spring of 1979 many of the schools which founded MACS belonged to its regional predecessor, Northeast Region American Association of Christian Schools [NERAACS], an organization of Christian schools in New England and New York. NERAACS was gradually phased out of existence as its members formed state associations.

5/Thirteen of the 23 Christian school members of MACS in 1979 are no longer members:

South Hope Christian School
Clinton Christian School
Blaisdell Baptist Academy
Lisbon Falls Christian Academy
Penobscot Valley Christian Academy

Tabernacle Christian Academy
Heritage Christian Academy
Mid-Coast Christian School
Hermon Christian School
Limestone Christian Academy
Enfield Christian School
Central Maine Christian School
Ossippee Valley Christian School.

The ten schools which have remained MACS members since 1979 are

Bangor Christian Schools
Grace Baptist Church Schools
Wayside Christian School
Downeast Christian School
Ellsworth Christian School
West Sumner Christian School
Calvary Christian Academy (Turner)
Kennebec Valley Christian School
Northwoods Christian School
Wiscasset Christian Academy.

Of these, only Bangor Christian and Grace Baptist Church Schools are plaintiffs in this action.

The following seven schools, the first five of which are plaintiffs, have since joined MACS:

Falls Road Christian School
Lee Christian Schools
Victory Christian Schools
Sebec Christian Academy
Athens Christian Academy
Calvary Hill Christian School
Hartland Christian School.

6/Bangor Christian, which began operating in 1970, obtained state approval for each of its first eight years of operation and in 1978 received a five-year approval certificate which expired in June, 1983. Until at least 1975 Bangor Christian displayed its certificate of state approval in the school catalogs and expressed pride in having achieved the academic quality evidenced by state approval. See Defendants' Exhibit 67. Reverend Frankland testified that the certificate was displayed in order to demonstrate to parents that "we weren't some fly-by-night organization." Tr. at 285.

Grace Baptist Church Schools obtained initial state approval in 1976 and renewed approval in 1977 and 1978.

7/The ACE teaching program, marketed by a Texas-based company, consists of a series of booklets on various subjects, each of which is called a Packet of Accelerated Christian Education (PACE). Each PACE contains Bible-oriented instructional information and self-test questions on a particular subject. Students work at their own speed in each subject. After completing the booklet and passing the self-test and a supervised test, students move on to the next sequentially-numbered PACE until they reach the twelfth level of achievement. The supervisors who administer the tests do not teach regularly, but remain available to maintain discipline and to assist students on request.

8/Reverend Frankland wrote as follows:

> This brings us to the crux of the matter. The United States Constitution and the Maine Constitution guarantees (sic) us certain religious liberties under the First Amendment, if these beliefs and practices are convictions on our part and not preferences. In order for the courts to rule it is a conviction rather than preference, we must be willing to go to jail for, or die for said beliefs.
>
> Some judges and state agencies are asking, 'Why was this not an issue 10 years ago?' Our reply is, 'We were in unchartered waters endeavoring to be good citizens and actually not aware we were rendering unto Caesar that which belongs to God.' After 200 successful court cases across the nation and a refining of our own philosophy, we are forced to act immediately, or we have no guarantees under the First Amendment. In the judge's eyes, these things are not a conviction with us if we continue allowing the State to have jurisdiction in this area, when we know in our heart it is wrong. Therefore, we have several new schools starting this fall which believe this to the point they are willing to go to jail for their convictions, and we who had previously accepted basic approval and state licensure are convinced we must stand with them.

Defendants' Exhibit 8.

9/The notice states that it is late in going out "because MACS has been waiting for the tape and the sample letter from David Gibbs." It goes on to state "that the tape will be made while Charles Craze is here. The letters will be drafted at the same time."

10/The ten schools which have belonged to MACS since 1979, see n.5 supra, were among the 19 schools whose pastors or administrators wrote letters to the Commissioner.

11/These five schools were located in Hermon, Canaan, Limerick, Clinton and North Whitefield. The latter three were described as "not [having] a conviction against state approval."

12/These nine schools were Kingfield Christian Academy, Farmington Christian School, Lee Christian Schools, Sebec Christian Academy, Victory Christian Schools, Athens Christian Academy, Gardiner Christian Academy, New Life Academy and Windham Assembly Christian Academy. Eight of these schools are plaintiffs in this action. Kingfield Christian Academy has ceased operations. Farmington Christian School is now known as Falls Road Christian School, a plaintiff.

13/The original plaintiffs were Bangor Baptist Church and Grace Baptist Church, the pastor of each church, four parents whose children were attending either Bangor Christian or Grace Baptist Church Schools, the principal of Bangor Christian, one teacher from Bangor Christian and one from Grace Baptist Church Schools, and MACS. Bangor Christian and Grace Baptist Church Schools were added as plaintiffs on October 28, 1981.

14/Disputes as to the constitutionality of legislative enactments are not necessarily unripe merely because the enactments are not effective as of the commencement of the action, see Colautti v. Franklin, 439 U.S. 379, 383 (1979) [permitting challenge of abortion statute before statute became effective]; Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102, 142-43 (1974); Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925); Arizona v. Atchison, T. & S. F. R. Co., 656 F.2d 398, 402-03 (9th Cir. 1981), rather their ripeness is determined by considering whether, in view of the need for judicial economy, the surrounding circumstances warrant judicial relief, see Blanchette v. Connecticut General Insurance Corp., 419 U.S. at 144-48. Of the many factors militating in favor of interpreting and testing the constitutionality of the provisions of Title 20-A, the most significant is that the provisions of Title 20-A went into effect on July 1, 1983. The Supreme Court has considered, as relevant to the issue of ripeness, events which took place after the entry of a judgment by a circuit court of appeals. Buckley v. Valeo, 424 U.S. 1, 115-17 (1976). A fortiori, events occurring after the commencement of an action and before any decision by the trial court are appropriate for consideration in testing ripeness. See Lynch v. Dukakis, No. 82-1884 slip op., at 10 (October 12, 1983) [district court acted permissibly in finding that defendant "would not comply" with, and in conforming equitable relief to, strictures of statute effective 11 days after the entry of the court's order].

Furthermore, from the outset of this action the validity and intendment of various regulations and statutes, both those which were

then, and those which are now, in force, have affected the ongoing relationship between the plaintiff church schools and the defendants. See Blanchette v. Connecticut General Insurance Corp., 419 U.S. at 144. Finally, the parties have developed the present record in light of the strictures of Title 20-A. See id., at 143.

Accordingly, the Court is satisfied that the mere fact that Title 20-A went into effect following the commencement of this suit does not bar judicial review of its provisions. Of course, this does not mean that the Court should or must resolve all disputes arising under Title 20-A. "'Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality.'" Id. at 145-46, quoting Communist Party v. SACB, 367 U.S. 1, 71 (1961).

In reviewing the provisions of Title 20-A the Court will consider the clarifying amendments made by P.L. 1983 c. 485, 1983 Me. Legis. Serv. 2583, which became effective on June 24, 1983.

15/It was stipulated at trial that all of the plaintiff schools are now in compliance with all Maine laws regarding health, sanitation and safety. Tr. III, at 469.

16/Also exempt from compulsory attendance at public schools are:

(1) persons who graduate from high school before age 17, see 20-A M.R.S.A. §5001(2)(A);

(2) persons who have (a) completed the 9th grade (or reached age 15), (b) obtained their parents' and their school board's permission to leave school [denial by the board is appealable to the Commissioner, see 20-A M.R.S.A. §5001(3)], and (c) agreed in writing to meet annually until age 17 to review educational needs, 20-A M.R.S.A. §5001(2)(B);

(3) persons who obtain "equivalent instruction . . . in any other manner arranged for by the school committee or the board of directors," provided such instruction is approved by the Commissioner, 20-A M.R.S.A. §5001(2)(D);

(4) persons age 14 or older participating in a "suitable program of work, work study or training" who have the consent of their parents or guardians and the approval of their principal (appealable to the school board), 20-A M.R.S.A. §§5001(2)(E), as amended by P.L. 1983 c. 485, §21, 1983 Me. Legis. Serv. at 2591, & 5002; and

(5) persons age 14 or older as to whom the local school board has waived the compulsory education requirement, 20-A M.R.S.A. §§5001(2)(E), as amended by P.L. 1983 c. 485 §21, supra, & 5051(2)(D)(2).

17/As originally adopted 20 M.R.S.A. §5001(2) provided as follows:

> 2. Exceptions. Compulsory attendance shall not apply to the following:
>
> A. Persons who graduate from high school before their 17th birthday;
>
> B. Persons who have:
>
> (1) Reached the age of 15 or completed the 9th grade;
>
> (2) Permission to leave school from their parent or legal guardian;
>
> (3) Permission to leave school from the school board or its designee; and
>
> (4) Agreed in writing with their parent or legal guardian and the school board or its designee to meet annually until their 17th birthday to review their educational needs;
>
> C. Students who obtain equivalent instruction in an approved private school shall be credited with attendance at a private school only if a certificate showing their names, residence and attendance at the school, signed by the person or persons in charge of the school, has been filed with the school officials of the administrative unit in which the students reside;
>
> D. Equivalent instruction is as follows:
>
> (1) A child shall be excused from attending a public day school if he obtains equivalent instruction in a private school or in any other manner arranged for by the school committee or the board of directors and if the equivalent instruction is approved by the commissioner; and

(2) If any request to be excused is denied by a local school committee or board of directors, an appeal may be filed with the commissioner. The commissioner shall review the request to be excused to determine whether the local school committee or board of directors has been correct in its finding that no equivalent instruction is available. If the commissioner finds that equivalent instruction is available to the child, he shall approve the request to be excused; or

E. Children shall be credited with attendance at a private school only if a certificate showing their names, residence and attendance at the school, signed by the person or persons in charge of the school, has been filed with the school officials of the administrative unit to which the children reside.

Chapter 485, section 21, of the Maine Public Laws (1983), supra, however, repealed paragraph (C) [without relettering paragraphs (D) or (E)]. The amendment also added to subsection (2) new paragraph (E), which makes clear that the compulsory attendance requirement shall not apply to "[a] person whose absence is excused under section 5002 or 5051."

18/Private schools approved for attendance purposes by the department shall:

1. Immunization. Comply with the immunization provisions under section 6351;

2. Language of instruction. Use English as the language of instruction except as specified under section 4602;

3. Courses required by statute. Provide instruction in history as specified under section 4601, subsection 1 and English as specified in section 4601, subsection 2;

4. Commissioner's basic curriculum. Provide instruction in the basic curriculum established by rule by the commissioner under section 4601, subsection 4;

5. Certified teachers. Employ only certified teachers;

6. Secondary schools. For private secondary schools:

A. Meet the requirements of a minimum school year under section 4801;

B. Provide a school day of sufficient length to allow for the operation of its approved education program;

C. Have a student-teacher ratio of not more than 30 to one;

D. Include not less than 2 consecutive grades from 9 to 12; and

E. Maintain adequate, safety (sic) protected records; and

7. State board rules. Meet the requirements applicable to the approval of private schools for attendance purposes established by the state board pursuant to section 405, subsection 3, paragraph E.

20-A M.R.S.A. §2902 (1983).

19/Section 2902, subsection 7, requires that

> [p]rivate schools approved for attendance purposes by the department shall:
>
> . . . .
>
> Meet the requirements applicable to the approval of private schools for attendance purposes established by the state board pursuant to section 405, subsection 3, paragraph E.

20-A. M.R.S.A. §2902(7) (emphasis added). Not surprisingly and as expressly stated in the statute itself (see italics), "private schools approved for attendance purposes by the Department" must meet the Board requirements "applicable to . . . approval of private schools for attendance purposes. . . . (Emphasis added.)

20/There appears to be statutory authority for forbidding the operation of schools which are not in compliance with state health, safety and hygiene standards.

Title 25, section 2392 of Maine Revised Statutes Annotated authorizes the State Fire Marshal or state fire inspectors to "forbid the use of any building or other structure which, (sic) does not conform to the laws, ordinances, rules and regulations promulgated by the Commissioner of Public Safety . . . [and] which creates a danger to other property or to the public." (Supp. 1982-83). An order to repair, remove or vacate a structure must be in writing, state a reasonable time within which to undertake such action and be served on the owner and the occupant. 25 M.R.S.A. §2392. The owner or occupant may within 24 hours of receiving such an order appeal to the Commissioner of Public Safety who is required to hold a hearing regarding the order and render a final decision on the issue within 30 days after such hearing. Failure to comply with a final order is a Class E crime punishable by a fine of not less than $100. See also 25 M.R.S.A. §§2357, 2358, 2360 [building inspectors, fire inspectors, municipal officers may order removal or rectification of inflammable conditions dangerous to safety of a building or surrounding premises].

Title 22, section 42(3), authorizes the Department of Human Services to seek to enjoin violations of its rules and regulations relating to plumbing and subsurface sewage disposal.

The local health officer is authorized by statute to require occupants to quit any dwelling place which is unfit for occupancy due to "want of cleanliness or other cause" and which is a cause of sickness to the occupants or the public. 22 M.R.S.A. §461. He may close the premises until restored to a sanitary condition, id., and in doing so, if he seeks the assistance of "any constable, that constable is required to render assistance." 22 M.R.S.A. §462. See also 22 M.R.S.A. §1015 [district and superior court judges authorized to issue any order necessary for proper enforcement of statutes and rules relating to communicable diseases]; 22 M.R.S.A. §1016 [Department of Health and Human Services authorized to order dismissal of all students and employees of any school in the event of an actual or threatened outbreak of communicable disease]; 22 M.R.S.A. §1561 [local health officer may order removal or discontinuance of any source of filth deemed potentially injurious to health].

21/Forty-five years after the Supreme Court decided Erie, uncertainty still exists as to the extent to which state law controls the power of the federal courts to enjoin violations of state substantive law. Indeed, Guaranty Trust Company v. York, 326 U.S. 99 (1945), which interpreted Erie as requiring a federal court to apply a state statute of limitations to an equitable claim arising under state law, provides seemingly conflicting directives. York declares that in resolving disputes in diversity actions the federal court is, "in effect, only another court of the State [and] cannot afford recovery if the right to recover is made unavailable by the State, nor can it substantially

affect the enforcement of the right as given by the state." Id. at 108-09 [emphasis added]. It can scarcely be doubted that the availability of alternative or additional equitable remedies in federal, as opposed to state, court may "substantially affect the enforcement of the right." Yet York contains the following dictum which may be read as divorcing equitable remedies from rights, leaving only the latter to be controlled by state law:

> This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery; a plain, adequate and complete remedy at law must be wanting; explicit Congressional curtailment of equity powers must be respected; the constitutional right to trial by jury cannot be evaded. That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts. State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.

Id. at 105-06 [citations omitted].

That dictum has confounded a number of commentators, see 19 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §4513, at 208, and notes and comments cited therein.

22/As is the case under Maine law, see pp. 22-23, 36-37 infra, absent a contrary statute a request for injunctive relief under federal law implicates the court's discretion and is to be granted only if no adequate remedy at law exists and the competing interests of the parties so indicate, and generally only if the right to relief is clear. See 11 Wright & Miller, Federal Practice and Procedure §2942, at 367-68 (1973). However, the reluctance to grant injunctive relief, still prevalent in federal courts, see id. at 369-78, appears yet greater in the Maine judicial system. See p. 37 infra. Whereas the parameters of judicial discretion to enjoin "crimes" are relatively well defined in the First Circuit, see United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983), the Court is unaware of any instance in which the Maine Law Court has addressed this issue.

23/The failure or refusal of a private school to obtain Department approval is not necessarily without indirect consequences, since in some instances nonapproval could deter attendance.

24/See n. 16 supra.

25/Additional approval requirements apply to private schools receiving public funds, see 20-A M.R.S.A. §§2951-55; to those serving only nonresidents, see 20-A M.R.S.A. §3051; and to those offering special or vocational education programs, 20-A M.R.S.A. §3001-02. The plaintiff church schools do not come within any of these special provisions.

26/Defendants were clearly informed of the Court's concern as to the sufficiency of the statutory basis for the Board regulations no later than October 26, 1982, when the Court denied their motion for summary judgment:

> These [Board] regulations may have transformed the scheme selected by the Legislature for the enforcement of the compulsory education laws, i.e., the truancy laws, into an unauthorized administrative system for the licensing of private schools.

Bangor Baptist Church v. State of Maine, 549 F. Supp. 1208, 1231-32 (D. Me. 1982).

27/"Courts must construe legislative enactments so as to avoid the danger of unconstitutionality . . . [since] [t]he cardinal principle of statutory construction is to save, not to destroy," State v. Davenport, 326 A.2d 1, 5-6 (Me. 1974); a principle "fully consistent with the general rule" of giving effect to legislative intent, since drafters of laws are assumed to have intended those laws to have constitutional sway, Stewart v. Inhabitants of Durham, 451 A.2d 308, 311 (Me. 1982).

28/The legislative history reveals that "the Education Committee [meant] to make [no] . . . substantive changes at all in this recodification." 1982 Me. Leg. Rec. 315, 539-40 (House, March 23, 1982 & April 5, 1982) (comments of Rep. Connolly - Chairman of Education Committee). See also id. at 315 (comments of Rep. Murphy) [during drafting process, any proposed change that any member of public thought would possibly change meaning was left in its original language]; id. at 483-84, 533-34 (Senate, March 31, 1982 & April 1, 1982) (comments of Sen. Trotzky - Chairman of Joint Standing Committee on Education) [no substantive changes were made during drafting process]; id. at 539 (House, April 5, 1982) (comments of Rep. Thompson - member of Education Committee) [all agree that the

recodification makes no substantive changes]. In fact, in response to objections made to the 110th Legislature by Christian schools, it was specifically stated by legislative leaders that the recodification did not alter the governance of state approval of private schools, id. at 315 (comments of Rep. Connolly), and that the recodification was "not intend[ed] to affect the consideration of issues in [this action]," id. at 532 (comments of Sen. Trotsky).

See also n.32 infra.

29/See 1982 Me. Leg. Rec. 540 (House, April 5, 1982).

30/Instead, the terminology used in section 2901 contrasts sharply with that used in the statutes enacted in 1975 regulating day care facilities and nursery schools. See 22 M.R.S.A. §§7801-04, 8301, 8404. Whereas section 2901 provides that "[a] private school may operate as an approved private school. . . ," the statutes regulating day care facilities and nursery schools provide that "[n]o person, firm, corporation or association shall operate a nursery school [or day care facility] without having . . . a written license therefor from the Department of Human Services." 22 M.R.S.A. §§7801, 8402.

Also conspicuously absent from the subchapter of the statutes governing basic approval of private schools are provisions limiting administrative discretion in prescribing licensing requirements, see 22 M.R.S.A. §8402(1), requiring prompt issuance of licenses, see 22 M.R.S.A. §8402(4), setting license fees and terms, see 22 M.R.S.A. §§7801(2), 8303, 8402(2) & (5), authorizing the issuance of temporary or conditional licenses, see 22 M.R.S.A. 7802(2)-(4), authorizing hearings under the Maine Administrative Procedure Act for any person whose initial application for a license has been denied, see 22 M.R.S.A. §7802(c) (compare 20-A M.R.S.A. §§2904-05 [hearings for nonrenewal and removal of approval], with 05-071 CMR 125 section 1-A (I)(2) [Commissioner makes final determination as to initial approval]), requiring an Administrative Court proceeding prior to suspension or revocation of a license, see 22 M.R.S.A. §7803(1); 5 M.R.S.A. §10051(2), and granting regulators the right of entry to inspect licensed facilities for compliance, see 22 M.R.S.A. §7804.

A comparison of the elaborate protective provisions in the statutes governing day care facilities and nursery schools further demonstrates that Chapter 117, subchapter 1, of the education laws was not viewed by the legislature as establishing a private-school licensing scheme. Had such a licensing scheme been intended by the legislature it seems inconceivable that something at least remotely similar to the restrictive language and procedural safeguards of Title 22 would not have been used.

31/Defendants would read section 2901 as though written: "A private school may operate ~~as an approved private school for meeting the requirement of compulsory school attendance under section 5001~~ if it: . . ."

32/Defendants' construction of section 2901 is also at odds with the crystal clear language of the private-school approval section as it existed from its legislative inception in 1955 until the recodification of the education statutes in 1982. As originally enacted, see P. L. 1955, c. 369, §1, and as it remained through 1981, the approval section read "no school shall be given basic approval for attendance, tuition or subsidy purpose . . . unless it meets the following requirements. . . ." See 20 M.R.S.A. §1281 (1982-83 Supp.) (emphasis added). There was not the slightest legislative intimation that this provision empowered the closing of any unapproved school by anyone, whether administrator or judge.

The 1982 recodification separated the matter contained in 20 M.R.S.A. §1281 into five sections of title 20-A. See 20-A M.R.S.A. §§2901, 2951, 4401, 4404, 4801. Section 1281 was amended, by section 2901, to read: "A private school may operate as an approved private school for meeting the requirement of compulsory school attendance under section 5001 if it. . . ." 20-A M.R.S.A. §2901 (1981). There is not a whisper in its legislative history which would hint that this amendment represented a departure from the legislative intent of section 1281 as it had existed for over 25 years. See, e.g., n.28 supra. Similarly, the preamble to P.L. 1983 c. 485, indicates that the amendments made by that law were intended to resolve "existing ambiguities."

33/There is no right of appeal to the Commissioner if the local board waives the compulsory attendance requirement.

34/See nn.28 & 32 supra.

35/The following paragraph from the statement submitted to the Education Committee by the Department contains the only hint in the legislative history of these bills that the legislature may have been aware of the Commissioner's interpretation of the compulsory education laws:

> In conclusion, the Department recognizes that private, religious schools have a place in the State and that they provide a legitimate alternative to public schools. However, the Department also feels it is essential that these schools meet the minimum standards required by the Maine Constitution and by the Legislature which all schools must abide by to be able to operate in the State of Maine.

But since the statutory provisions then in force provided absolutely no basis for the power the Commissioner claims to have had (and still have), see n.32 supra, it is inconceivable that the legislature understood and accepted the full import of this assertion, without discussion. Indeed, the remainder of the Department's Statement indicates that the Department understood the approval scheme to mean only that "if non-public, private schools are going to be used to satisfy the compulsory attendance law, then these schools must comply with certain minimum standards and be approved. . . ." (Emphasis added.)

The statement by the Commissioner before the Education Committee on February 14, 1980 likewise indicates that the proposed amendments were an effort to chart an optional path for certain church-affiliated schools to qualify as suitable alternatives to public day schools, rather than to repeal any existing law which might be perceived as authorizing direct action to close unapproved private schools. See Defendants' Exhibit 19, Statement of Commissioner Raynolds (February 14, 1980) [in order to satisfy compulsory attendance requirement through attendance at private school, the private school must meet certain standards].

Moreover, had the 109th Legislature understood, agreed with and "acquiesced" in the Commissioner's interpretation, the 110th Legislature could have adopted unambiguous language to that effect as part of its recodification of the education laws, without doing violence to its policy of making no substantive change, see nn.28 & 32 supra. Instead, the wording of sections 403(3)(E), 2901, 2902, 5001(1) and 5051-53 of new Title 20-A makes clear that private school "approval" is, as it has always been, merely the means of satisfying one of the exceptions to compulsory public school attendance. See n.16 supra & p. 45 infra. Under these circumstances a finding of "legislative acquiescence" would represent a reckless approach to statutory construction.

36/Legislative rules are products of the exercise of delegated power to create law through rules. 2 K. Davis, Administrative Law Treatise §7:8 (2d ed. 1979). If valid, legislative rules are binding on courts. On the other hand, interpretative rules, which merely represent the administering agency's interpretation of existing law, may issue without an express delegation of authority. Id.

37/The Commissioner states that although children attending unapproved private schools may be considered habitual truants, he has discouraged local school superintendents from truancy actions, because their parents might be acting in the "good faith belief that their children [were] receiving the benefits and protections of the State's compulsory education laws," and because truancy actions on a broad scale would be "unduly burdensome" and expensive for local school officials,

the Department and the courts. See Affidavit of Commissioner Raynolds, dated April 20, 1982, at 5.

38/If considered interpretative, as opposed to legislative, the regulations, of course, are not binding on the Court. See Soucy v. Board of Trustees, 456 A.2d 1279, 1281 (Me. 1983); General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); 2 Davis, Administrative Law Treatise §7:10, supra. Cf. Maine School Admin. Dist. No. 15 v. Raynolds, 413 A.2d 523, 531 (Me. 1980) [indicating that an administrator's interpretation of regulation does not bind courts].

39/The Ingraham court stated,

> Before granting a preliminary or permanent injunction, the Court must find that four criteria are met:
>
> (1) that plaintiff will suffer irreparable injury if the injunction is not granted,
>
> (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant,
>
> (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility),
>
> (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982). But although the Law Court referred to "preliminary" and "permanent" injunctions, it does not appear that Ingraham establishes a four-point talismanic test for determining the propriety of permanent injunctive relief. Rather, the court was defining the test controlling its power to grant injunctions under Me. R. Civ. P. 62(g). This conclusion finds support in the Law Court's citation to Women's Community Health Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979), which summarized the test in the First Circuit for granting a preliminary injunction, and further support in the reference to "a likelihood of success on the merits." (Emphasis added.)

40/L.D. 1401 prescribed forfeitures of not less than $200 and not less than $500, but was changed by Committee Amendment A, 110th Me. Leg., Filing No. H-396, to provide that the penalty for being responsible for a child's truancy is a forfeiture of "not more than $200."

41/Whether the plaintiff-pastors in some other way may have induced habitual truancy within the meaning of the statute is irrelevant to this counterclaim. "The 'principles of equity jurisprudence' suggest that 'the scope of injunctive relief is dictated by the extent of the violation established . . . [and] the relief afforded [may not be] more burdensome than necessary to redress the complaining parties.'" Lynch v. Dukakis, supra at 21, quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979). See Town of Shapleigh v. Shikles, 427 A.2d at 464. Enjoining the operation of unapproved church schools would be an overbroad response to the transgressions of individuals encouraging attendance at those schools.

42/Of course, the state need not show the inadequacy of a criminal law remedy were it to appear that the legislature has authorized civil injunctive relief against future violations of the substantive law. United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974).

43/The nature of the sanction is central to the determination as to whether a proceeding is criminal. See n.44 infra. Obviously, injunctive relief is not a sanction endemic to criminal law. Nothing is gained by noting that violation of the injunction may lead to a finding of contempt and to eventual imprisonment, for that is so irrespective of the nature of the conduct (civil or criminal) forming the basis for the injunction.

> The argument [that the constitutional rights of criminal defendants preclude injunctions against crimes] contains a more fundamental weakness: it assumes that one of the purposes in enacting a criminal statute is to give special protection to the defendant or to the conduct the statute proscribes. Suppose, for example, that state A makes criminal the maintenance of a certain nuisance and that state B does not, but will issue an injunction against it. It is anomalous that state A, which has manifested its policy by penal legislation, should be thought to be more solicitous of the defendant's welfare than state B, whose legislature has not acted. Yet, according to the argument, a court of state A should be disabled from enjoining the nuisance. Assuming, arguendo, that trial by jury would be a desirable feature of either the civil or criminal aspects of injunction procedure, it is hard to see why the injunction defendant whose conduct is also criminal has a greater claim to jury trial than an injunction defendant whose conduct is not criminally proscribed.

Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. 994, 1019 (1965).

44/Whether conduct proscribed by statute is "criminal," thereby implicating the protections of criminal procedure, is, in the first instance, a matter of statutory construction to be determined conformably with the legislative intent. State v. Anton, 463 A.2d 703, 705 (Me. 1983). See United States v. Ward, 448 U.S. 242, 248-49 (1980). Where the legislature intends the offense to be considered civil, courts must inquire further whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." State v. Anton, 463 A.2d at 706, quoting United States v. Ward, 448 U.S. at 249.

The 1981 amendment [ch. 391, 1981 Me. Laws 620] to the predecessor of section 5053, i.e., 20 M.R.S.A. §911, may have been designed to constitute the proscribed conduct (i.e., inducing habitual truancy) a civil violation rather than a criminal offense.

Prior to 1981, inducing habitual truancy had been considered a criminal offense. See Shaw v. Small, 124 Me. 36, 40 (1924). However, the relevant portion of chapter 391 amended 20 M.R.S.A. §911(8), as follows:

> Any person who induces a chil to absent himself from school, or harbors or conceals such child when he is absent ~~shall be punished by a fine of not more than $25 or by imprisonment for not more than 30 days for each offense If the~~ commits a civil violation for which a forfeiture of not less than $500 shall be adjudged. The court ~~imposes a sentence of probation, it~~ may ~~in its sentence, as a condition of probation~~ require that the ~~convicted~~ person receive professional counseling by a qualified professional counselor who shall be selected by the convicted person, with the approval of the court, or by the court.

The Statement of Fact accompanying the bill, L.D. 1401 (1981), provided in part, "This bill . . . would change the penalty section for a parent responsible for truancy to a civil violation punishable by either a $200 or $500 forfeiture, depending on the nature of the offense."

In the process of recodifying the education laws, the legislature inserted the words "guilty" and "punishable," language which might suggest that inducing habitual truancy was to be considered a criminal offense. See State v. Clayton, 584 P.2d 1111, 1113 (Alaska 1978). Clayton is clearly distinguishable. The Alaska legislature had declared that certain traffic infractions are "not considered criminal." But by focusing on, inter alia, the use of certain criminal phraseology in the relevant provisions, the Clayton court

concluded that the legislature intended the infractions to be "quasi-criminal offenses," not "civil in nature." State v. Clayton, 584 P.2d at 1113. Section 5053 expressly declares that inducing habitual truancy is a "civil violation." In short, the language embodied in and accompanying the 1981 amendment to 20 M.R.S.A. §911, the fact that section 5053 declares the "offenses" listed therein to be "civil violations" and the further fact that the subsequent recodification was not intended to effect substantive change, nn.28 & 32 supra, may well warrant the conclusion that the Maine legislature intended that inducing habitual truancy be considered a civil violation.

If so, the safeguards of criminal procedure apply in prosecutions for inducing habitual truancy only if "the statutory scheme . . . is 'so punitive in purpose or effect as to negate [the legislature's] intent.'" State v. Anton, 463 A.2d at 706, quoting United States v. Ward, 448 U.S. at 248. The considerations used to determine whether constitutional guarantees apply to 'civil' penalty provisions include:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 706, quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Thus, the degree of severity of the penalty is important. Id. In addition to these factors, courts consider "the nature of the conduct, whether adverse collateral consequences may arise and whether there exists the possibility of pretrial arrest and detention." Id. Finally, legislative "use of terminology associated with the criminal law" may undercut the intent to create a civil offense. Id. at 708.

Sanction

Although inducing habitual truancy is no longer punishable by incarceration, it is at least arguable that the authorized "forfeiture" (minimum of $500; with no maximum) is "so unreasonable or excessive that it transform[s] what was clearly intended to be a civil penalty into a criminal penalty." State v. Anton, 463 A.2d at 707. Certainly the threat of an unlimited fine provides significant deterrence, a "traditional aim[] of punishment," id. at 706.

Scienter

As previously discussed, the term "induce," both in legal and lay parlance, connotes intent. Therefore, scienter appears to be an element of the offense of inducing habitual truancy. See pp. 38-40 supra. On the other hand, since it does not appear that an inducement of truancy violates any other "criminal" statute, the conduct to which the prescribed "forfeiture" applies is not "already a crime."

Statutory Language

The incorporation in section 5053 of the terms "guilty" and "punishment" arguably evidences a legislative determination that inducing habitual truancy is to be condemned, a concept endemic to criminal and not civil law. Brown v. Multnomah County Dist. Court, 570 P.2d 52, 59 (Or. 1977). See State v. Anton, 463 A.2d at 708.

Arrest and Detention

Although 20-A M.R.S.A. §5053(3) makes reference to "[w]arrants and legal process" for the enforcement of section 5053, it does not appear that arrest warrants may issue against persons who induce habitual truancy, see Me. R. Crim. P. 1, 4 & 9 and Me. R. Crim. P. (district court) 1 & 4. For the purpose of obtaining credible identification, a law enforcement officer may detain a person the officer has probable cause to believe has committed a civil violation. 17-A M.R.S.A. §17. But a formal arrest is permitted only if the person refuses or intentionally fails to supply credible identification. Id.

Thus, the factors relevant to determining whether a person charged with inducing habitual truancy is entitled to the protections of criminal procedure do indeed "point in different directions," State v. Anton, 463 A.2d at 706.

The fact that the offense of being primarily responsible for the habitual truancy of a child who is under one's control has been held to be a civil violation, State v. McDonough, Doc. No. Pen-83-252 slip op. at 8 n.5 (Me. December 8, 1983), is not dispositive of the characterization of the offense of inducing habitual truancy. Although both offenses are defined in 20 M.R.S.A. §5053, the offense of "inducing" habitual truancy carries a much more stringent sanction ("forfeiture" of not less than $500) than the offense of being primarily responsible for habitual truancy ("forfeiture" of not more than $200), and scienter appears to be an element of inducing, but perhaps not of being primarily responsible for, habitual truancy. Therefore, the characterization of the offense, a matter which was neither raised nor

briefed by the parties, is better left to the state courts. For present purposes it is sufficient to note that the possibility that inducing habitual truancy is a "crime" provides yet another reason to withhold injunctive relief.

45/See also Hunter, Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton, 67 Cornell L. Rev. 283, 284-87, 292-96 (1982).

46/Of course, the defendants do have the right to request the courts to close unapproved schools, both by virtue of their "standing" in the present action and by virtue of a Board regulation, see 05-071 CMR 125, section I-A, subsection I(4) (as amended Feb. 10, 1983). Thus viewed, however, their assertion of right is without that legislative sanction which would reduce the heavy burden of proof incumbent upon any private litigant seeking similar drastic relief in the face of severe equitable and constitutional obstacles.

47/In order to be considered "pervasively sectarian" a school must not only be run directly by a church, but have "attributes such as integration of secular and religious education, mandatory religious instruction, religious based admission policies [and have] as a central purpose the inculcation of religious values [or the preparation of] students for a religious career." Cuesnongle v. Ramos, 713 F.2d 881, 883 (1st Cir. 1983).

48/A burden on the free exercise of religion may be justified only "by showing that it is the least restrictive means of achieving some compelling state interest," Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 718 (1981). Although it is unnecessary to decide on the present record (there being no authority for defendants' attempt to close the church-schools), the closing of pervasively religious institutions does not appear to be "the least restrictive means" of achieving the state's interest in assuring that children between 7 and 17 attend adequate schools for a minimum number of hours during 175 days per year or obtain equivalent instruction in some other manner. While administrative convenience has at times justified some burdens on religious exercise, see United States v. Lee, 455 U.S. 252, 259-61 (1982) [inconvenience of accommodating "the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs"], it is highly unlikely that the administrative burden of pursuing numerous prosecutions under an existing truancy system could be considered sufficient justification for directly burdening these plaintiffs, particularly since it is not unreasonable to expect that the general deterrent effect likely to flow from the initiation of exemplary prosecutions against a few truancy law violators may well promote improved compliance with the compulsory school attendance laws.

49/Of course, injunctive relief would have to be limited so as to reflect these possibilities. See Lynch v. Dukakis, No. 82-1884 slip op. at 21 (1st Cir. October 17, 1983). But drafting such an injunction would be a cumbersome and perilously difficult undertaking. Certainly the defendants' proposal is overbroad. More importantly, injunctive relief would burden the plaintiff church schools with the task of determining which students are (and perhaps which students may be) exempt from the compulsory attendance requirement. Finally, since the essence of their free exercise claim is that plaintiffs should not be made to answer to the state for their ("biblically-mandated") educational activities, any requirement that the plaintiff schools assume an active role in the enforcement of the truancy laws against the parishioners of their affiliated churches would heighten significantly the threatened intrusion upon plaintiffs' asserted religious convictions.

50/The Maine compulsory education scheme differs importantly from that considered in State ex rel. Douglas v. Faith Baptist Church, Neb., 301 N.W.2d 571 (1981), appeal dismissed sub nom. Faith Baptist Church v. Douglas, 454 U.S. 803 (1981), where the Nebraska Supreme Court upheld a judgment enjoining the operation of a church school for refusal to comply with statutory requirements imposed upon "[a]ll private, denominational, and parochial schools in the State of Nebraska. . . ," Neb. Rev. Stat. §79-1701. The Nebraska statutes governing private schools provide that "[a]ny person violating any of the provisions of [Article 17, governing private, denominational and parochial schools] shall be guilty of a Class III misdemeanor." The Nebraska Supreme Court held that injunctive relief was not foreclosed merely because state law prescribed penal sanctions. 301 N.W.2d at 575. The United States Supreme Court summarily dismissed the appeal. 454 U.S. 803. The essential distinction here is that Maine law neither requires private schools to obtain approval as a condition precedent to their right to operate nor does it imply any sanction (except possible prosecution for inducing habitual truancy) for operating as an unapproved school.

51/Private schools which seek approval are required to disclose their "policy with respect to" attendance records. Regulations under the heading "Procedures and Standards for Basic School Approval of Private Schools" provide that "[t]he school shall maintain a register of the daily attendance of all pupils throughout the school year . . . [and] notify the superintendent of [local] schools . . . if a pupil withdraws from school or is habitually truant from school." 05-071 CMR 125, section 1-A, subsection (F)(1)(3), as amended February 10, 1983. The regulations apparently impose no such requirement on schools which do not seek approval.

52/The second Second Amended Complaint prays for a declaration that the requirements of the compulsory education law and school approval

scheme are contrary to the First, Ninth and Fourteenth Amendments to the Constitution, and for relief enjoining "defendants . . . from taking any action in an attempt to impose upon plaintiffs [those requirements]." [Emphasis added.] It has been clear throughout that plaintiffs' primary concern is with the state's alleged right to license or close unapproved schools. That concern is answered by the Court's holding that Maine law establishes only an optional approval system, not a licensing scheme. Therefore, in determining whether the complaint raises any justiciable issues the Court must consider seriatim the other "actions" which defendants conceivably could take "in an attempt to impose upon the plaintiffs [the requirements of the compulsory education law and the school approval scheme].

Title 20-A M.R.S.A. section 13003(2) provides that a person teaching at a public school without a teacher's certificate "shall be barred from receiving pay or wages for that teaching." No penalty is prescribed for teaching at a private school without a certificate.

Plaintiff teachers have not even alleged, much less "demonstrate[d,] a realistic danger of sustaining a direct injury as a result of the . . . enforcement," Babbitt v. United Farm Workers National Union, 442 U.S. at 298, of any statutory or regulatory provision other than those directed against the church-schools. See n.55 infra.

53/For a discussion of the development of the law of ripeness, see 4 K. Davis, Administrative Law Treatise 349-93 (2d ed. 1983).

54/The justiciability of plaintiffs' request to enjoin actions against schools and pastors for inducing habitual truancy is considered below. See pp. 55-59 infra.

55/On occasion the Supreme Court has found the likelihood of enforcement of a challenged statute too remote to give rise to a "case or controversy." See Poe v. Ullman, 367 U.S. 497 (1961) [challenge to legislation prohibiting use of, or giving medical advice as to, contraceptive devices was nonjusticiable, because no one had been prosecuted since its enactment in 1879 despite open and notorious sales of contraceptives]; United Public Workers v. Mitchell, 330 U.S. 75, 88-89 (1947) [action by federal employees challenging constitutionality of Hatch Act prohibition of political activity was nonjusticiable, since plaintiffs merely alleged their desire to engage in politics and their fear of dismissal, but failed to allege an actual violation or an actual threat of disciplinary action].

56/This testimony reflects the Commissioner's consistent misconception as to the legislative placement of primary responsibility for the enforcement of the truancy laws. It is clear beyond doubt from the statutes that the Maine legislature has imposed that responsibility

primarily upon local public school officials. See 20-A M.R.S.A. §§5051, 5052 & 5053. See nn.57 & 58 infra.

57/Subchapter I of Chapter 211 of Title 20-A, M.R.S.A., dealing with compulsory attendance (§5001), alternate programs (§5002) and administration (§5003), expressly provides that the local public school boards "shall administer" subchapter I, see §5003(1), and adopt rules "to carry out this subchapter," see §5003(2). Subsection (3) of section 5003 provides that "[t]he Commissioner shall guide school boards in adopting these rules." 20-A M.R.S.A. §5003(3).

58/Section 254 provides:

> The Commissioner shall have the following duties.
>
> 1. General duty. The commissioner may inspect and have general supervision over all public schools and shall advise and direct superintendents and school boards in the discharge of their duties, by circular letters and personal conferences.

20-A M.R.S.A. §254.

The Court need not decide whether section 254 empowers the Commissioner to "direct superintendents and school boards" to refrain from "the discharge of their duties," as well as "direct" those officials "in the discharge of their duties." If the Commissioner does not have the authority to direct superintendents and school boards to refrain from truancy actions, those officials who might pose more than a speculative risk of prosecution to the plaintiffs (i.e., local superintendents and school boards) are not before the Court.

59/No declaratory relief is granted on this point because none is requested.

60/The principles applicable to speech in general are clearly applicable as well to religious speech. "[S]peech about religion is speech entitled to the general protections of the First Amendment." Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981). See also Heffron v. International Society for Krisna Consciousness, Inc., 452 U.S. 640, 647 (1981).

61/The right of these pastors to preach their interpretation of the Bible is clear. The requested injunction would ensure the preservation of that right and protect the pastors (and the public) from the expense of presenting (and resolving) this same constitutional claim as a defense to a state court action for "inducing" habitual truancy. On the other hand, injunctive relief will impose no burden on the

defendants, who remain free to pursue legislatively-prescribed means for the protection of the interests of the state. Accordingly, injunctive relief is appropriate under the standards relevant to this federal claim, see n.22 supra.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BANGOR BAPTIST CHURCH, ET AL.,
Plaintiffs

v.

STATE OF MAINE, ET AL.,
Defendants

CIVIL 81-0180-B

JUDGMENT

In accordance with the Court's Order for Entry of Judgment entered this date in the above matter,

JUDGMENT is hereby entered (1) for the defendants against the plaintiffs on plaintiffs' claims for declaratory and injunctive relief, except as otherwise provided in clauses (3) and (4) hereof; and (2) dismissing plaintiffs' claims, except as otherwise provided in clauses (3) and (4) hereof; (3) for the plaintiffs as against the defendants on plaintiffs' claim for a judicial declaration that the bringing of actions against the plaintiff pastors, administrators or church schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children would violate the rights secured to the plaintiffs by the First and Fourteenth Amendments of the United States Constitution; (4) for the plaintiffs against the defendants on plaintiffs' claim for injunctive relief enjoining the defendants from bringing actions against the plaintiff pastors, administrators or schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that

the state should have no role in regulating the education of Christian children; (5) for the plaintiffs as against the defendants on defendants' counterclaim; and (6) dismissing the counterclaim.

Dated at Bangor, Maine this 20th day of December, 1983.

WILLIAM S. BROWNELL, CLERK

By Linda L. Jacobson
Linda L. Jacobson
Deputy Clerk

A TRUE COPY
ATTEST: William S. Brownell, Clerk
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BANGOR BAPTIST CHURCH, et al.,

Plaintiffs

vs.

STATE OF MAINE, et al.,

Defendants

CIVIL NO. 81-0180-B

ORDER FOR ENTRY OF JUDGMENT

In accordance with the Court's 'Findings of Fact and Conclusions of Law', entered this date, judgment shall enter: (1) for the defendants against the plaintiffs on plaintiffs' claims for declaratory and injunctive relief, except as otherwise provided in clauses (3) and (4) hereof; and (2) dismissing plaintiffs' claims, except as otherwise provided in clauses (3) and (4) hereof; (3) for the plaintiffs as against the defendants on plaintiffs' claim for a judicial declaration that the bringing of actions against the plaintiff pastors, administrators or church schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children would violate the rights secured to the plaintiffs by the First and Fourteenth Amendments of the United States Constitution; (4) for the plaintiffs against the defendants on plaintiffs' claim for injunctive relief ENJOINING the defendants from bringing actions against the

plaintiff pastors, administrators or schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children; (5) for the plaintiffs as against the defendants on defendants' counterclaim; and (6) dismissing the counterclaim.

SO ORDERED.

Dated at Bangor, Maine this 20th day of December, 1983.

Edward Gignoux
Chief Judge

A TRUE COPY
ATTEST: William S. Brownell, Clerk
By _____
Deputy Clerk