

H B

357

COMMITTEE REPORT

SENATE

FURTHER:

FINANCE

5/25/83

Date:

June 14, 1983

Mr. President:

The Committee on

FINSS

has had

CS 357 (R/S)

Regulation of religious schools.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for CS 357 (R/S) same title
 new title
- and recommends do not pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

MEMORANDUM

TO: JOE
FROM: NANCY
RE: REGULATION OF RELIGIOUS SCHOOLS

FATHER STEVE MOORE CALLED ME YESTERDAY AFTERNOON AND SAID THAT THE ARCHDIOCESE WILL HAVE A FORMAL POSITION PREPARED BY MONDAY. THEY PLAN TO OPPOSE THE PRESENT FORM OF THE BILL AND WERE DISTRESSED TO FIND THAT THEY HAD NOT BEEN NOTIFIED OF THE HOUSE HESS TELECONFERENCE WHEN THEY HAD MADE A SPECIFIC REQUEST.

ALSO, THE CHANGES MADE IN HOUSE RULES REMOVES RELIGIOUS PRESCHOOLS AND NURSERIES FROM ALL REGULATION BY EDUCATION AND HEALTH AND SOCIAL SERVICES - THIS INCLUDES ALL FIRE/LIFE SAFETY, IMMUNIZATION, STAFF TIME TESTING ETC. WHICH IS INCONSISTENT WITH THE REST OF THE BILL. THE DEPT. OF EDUCATION WILL HAVE A POSITION ON THIS ISSUE.

IN YOUR FOLDER:

SECTION ANALYSIS OF THE BILL

A LEGAL OPINION ON THE CONSTITUTIONALITY OF THE BILL

HOUSE RESEARCH INFO ON REGULATION OF RELIGIOUS SCHOOLS IN OTHER STATES.

A MEMO FROM RANDY PHILLIPS WITH SUGGESTED AMENDMENTS

NEA POSITION PAPER

RELEVANT MEDIA ARTICLES

AN ISSUE REPORT FROM THE EDUCATION COMMISSION OF THE STATES ON COMPULSORY ED AND NONTRADITIONAL EDUCATION

BILL COMMENTS FROM PAUL GLOVER

BILL COMMENTS FROM CHERI JACOBUS

A COPY OF RELEMENTARY SCHOOL REGULATIONS

A POSITION PAPER PRESENTED TO THE HUMAN SERVICES REGULATORY ADMINISTRATION IN VIRGINIA ON RELIGIOUS EXEMPTIONS

A COPY OF THE BRIEF FROM THE ARKANSAS LAWSUIT ON EXEMPTIONS FROM PREELEMENTARY REGULATION.

Alaska State Legislature



IN SESSION:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4949

BOX 142
EAGLE RIVER, ALASKA
99577

Representative Randy Phillips

HOUSE DISTRICT 15

MEMORANDUM

TO: Senator Joe Josephson
Chairman, Senate HESS Committee

FROM: Representative Randy Phillips

DATE: May 25, 1983

RE: CS HB 357 (RLS)

*Joe -
we would have
to change the title
to do this*

During the House floor debate on the captioned bill, Representative Koponen and I offered the attached amendments for consideration. These amendments failed the House.

The amendments were offered so that this bill would apply equally to all nonprofit private schools (to include religious schools). I have some real concern that the bill as is presently drafted could open the door to some lawsuits concerning the constitutionality of singling out religious schools for special treatment. It was my feeling that by extending the provisions to all nonprofit private schools, this problem could be avoided.

I would appreciate it if you and your committee would take the attached amendments into consideration when you review this legislation.

If you have any questions, please do not hesitate to contact me.

RECEIVED

MAY 25 1983

Josephson.

OFFERED IN THE HOUSE:

BY: Koponen and Phillips

To: CS HOUSE BILL No. 357 (RULES)

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 1, LINE 6

Delete: "religious"

Insert: "private"

PAGE 1, LINE 14, following "by a"

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 6, following "by a "

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 10, following "A"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 23, following "in a"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 25, following "in the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 29, before "school"

delete: "religious"

insert: "private nonprofit"

OFFERED IN THE HOUSE:

By: Koponen and PhillipsTo: CS HOUSE BILL No. 357 (RULES)

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 1, LINE 6

Delete: "religious"

Insert: "private"

PAGE 1, LINE 14, following "by a"

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 6, following "by a "

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 10, following "A"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 23, following "in a"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 25, following "in the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 29, before "school"

delete: "religious"

insert: "private nonprofit"

OFFERED IN THE HOUSE:

By: _____

To: _____ HOUSE BILL No. _____

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 3, LINE 1, following "The"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 3, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 4, following "a"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 12, before "school"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 14, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 18, following "A"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 22, following "A"

Delete: "religious"

Insert: "private nonprofit"

OFFERED IN THE HOUSE:

By: _____

To: _____ HOUSE BILL No. _____

SENATE BILL No. _____

PAGE: _____ LINE: _____

PAGE 3, LINE 25, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 26, following "chapter"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 27, following "by a "

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 4, LINE 8, following "by a"

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

AMENDMENT #2

OFFERED IN THE HOUSE:

By: KOPONEN AND PHILLIPS

To: CS HOUSE BILL No. 357 (RULES)

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 1, LINE 15

Delete: "direct"

PAGE 2, LINE 8

Delete: "direct"

PAGE 3, LINE 29

Delete: "direct"

PAGE 4, LINE 10

Delete: "direct"

WAKE FOREST LAW REVIEW

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VOLUME 16

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NUMBER 1

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STATE REGULATION OF PRIVATE RELIGIOUS SCHOOLS IN NORTH CAROLINA — A MODEL APPROACH

INTRODUCTION

The growth of private Christian schools in the Southeast and the increase in the number of religious schools in general have generated controversy about whether and to what extent state governments will be allowed to regulate these schools. The present tension between state control and freedom of religion has a history dating from biblical times¹ as well as the revolutionary period.² Recently the battle has moved from the treatise and the pulpit to legislatures and the courtroom.

Seeking both to protect religious liberty and to satisfy the state's interest in education, the North Carolina General Assembly on April 24, 1979, enacted legislation that exempts private religious schools of North Carolina from state regulation of secondary and elementary schools.³ This statute is the first in the nation to balance in this way state interests in education against the religious liberty of its citizenry and may serve as a model for other states as they confront the persistent issue of regulation of the rapidly emerging private religious schools.⁴

This comment reviews the new statute, examining its background and construction. The comment then considers whether the statute is constitutional under the free-exercise and establishment clauses of the first amendment, applicable to the states through the fourteenth.⁵ Its

1. See *Matthew* 22:21 ("Render unto Caesar the things that are Caesar's, and unto God the things that are God's.")

2. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 206 (1963) (Goldberg, J., concurring) ("[M]any of our legal, political and personal values derive historically from religious teachings."); *Engle v. Vitale*, 370 U.S. 421, 435 n.21 (1962) ("[T]here are many manifestations in our public life of belief in God."); *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952) ("[W]e are a religious people whose institutions presuppose a Supreme Being."); *Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892) ("[T]his is a religious nation."). Indeed, the Declaration of Independence states, "All men are endowed by their Creator with certain inalienable rights" See generally B. GOTHARD, 6 *INSTITUTE IN BASIC YOUTH CONFLICTS* (1979).

3. N.C. GEN. STAT. § 116-257.6-.13 (Cum. Supp. 1979).

4. Private Christian schools have been sprouting up at a phenomenal rate across the country. One commentator has estimated, "[I]f the present rates of growth continue, Christian schools will outnumber public schools by 1990." See Raney, *Public School vs. Christian School--Which Is Right for Your Child?*, *MOODY MONTHLY*, Sept. 1978, at 42. Because of this phenomenal rate of growth, and because the bulk of litigation dealing with the issue raised in this comment has concerned Christian schools, the scope of this discussion will deal predominantly with Christian schools.

5. The first amendment's religion clauses prevent Congress from passing a law "respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. 1. Both prohibitions apply to the states through the fourteenth amendment. *Everson*

constitutionality under the North Carolina Constitution is also considered. The comment suggests that the statute reflects a proper compromise between the interests of church and state, whose representatives have been battling recently in the courts.

I. THE NORTH CAROLINA STATUTE

North Carolina in 1955 enacted an educational law that governed nonpublic as well as public schools.⁶ Pursuant to this law, the state gradually expanded its regulatory powers by the State Board of Education promulgating so-called "minimum educational standards" that had to be met by all nonpublic schools.⁷ These regulations required that all private schools have, among other things, approval by the state,⁸ substantially equivalent textbooks⁹ and courses of study,¹⁰ identical teacher qualifications,¹¹ and the same health and safety standards¹² as those for public schools.

The 1979 North Carolina General Assembly amended article 32 of chapter 115 of the General Statutes to add two new articles, article 32A and article 32B.¹³ Article 32A deals exclusively with private church schools and schools of religious charter. It establishes the requirements that must be met by each private religious school in order to ensure that parents comply with the State's compulsory attendance laws. The purpose of the statute is to protect the religious liberty of these schools and, at the same time, to ensure that each student attending a religious school is offered a quality education.¹⁴

v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free-exercise clause).

6. N.C. GEN. STAT. § 115-225 (1955) (repealed 1969). This section provides in part: "The State Board of Education . . . shall always protect the right of every parent to have his children attend a non-public school by regulating and supervising all non-public schools serving children of secondary-school age." *Id.*

7. See 16 N.C. ADMIN. CODE § 2C.0700-.0704 (1978).

8. *Id.* § 2C.0703.

9. *Id.* § 2C.073(b)(4) ("Materials of instruction, including textbooks, shall be substantially equal to materials provided for public schools.")

10. *Id.* § 2C.0703(b)(2) ("The course of study shall be equal to or substantially the same as that provided for children of corresponding age and grade in the public schools."). Former G.S. 115-256 provided in part: "[T]he instruction [given in the nonpublic schools] . . . shall have courses of study for each grade conducted therein substantially the same as those given in the public schools." N.C. GEN. STAT. § 115-256 (1955) (repealed 1969).

11. 16 N.C. ADMIN. CODE 2C.0703(b)(3) (1978) ("Teachers shall be qualified "in accordance with the provisions of law governing public school teachers . . .") Former G.S. 115-256 provided in part: "No person shall be employed to teach in a non-public school who has not obtained a teacher's certificate entitling such teacher to teach corresponding courses or classes in public schools." N.C. GEN. STAT. § 115-256 (1955) (repealed 1969).

12. 16 N.C. ADMIN. CODE 2C.0703(e)(6) (1978) ("Health laws shall apply to children attending nonpublic schools in the same manner as they apply to children in public schools.")

13. Article 32B deals exclusively with private "secular" schools. This comment will deal only with the regulatory scheme imposed on private religious schools under article 32A.

14. The policy of the new statute is set out in G.S. 115-257.1, which reads:

The private religious school immunization require that the s them available with the require compulsory scho regular schedule subject to reason authorities as re

Each religio ally standardize ninth grades.¹⁶ in his discretion standardized eq ment in English school must kee inspection by a nor.²¹ In addition competency test to the school may tionally standar bal and quantita tablish a minim graduation from made available a nor's representa

The statute any state progr

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15. N.C. GEN.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* § 115-

20. *Id.*

21. *Id.*

22. *Id.* § 115-

23. *Id.*

24. *Id.*

25. *Id.*

The private religious schools must meet minimal requirements. Each religious school must make and maintain annual attendance and disease immunization records for each pupil.¹⁵ The statute does not explicitly require that the school either furnish these records to the State or make them available for inspection. If a child attends a school which complies with the requirements of article 32A, he satisfies the requirements of compulsory school attendance.¹⁶ The school must be in operation on a regular schedule for a minimum of nine calendar months per year¹⁷ and is subject to reasonable fire, health, and safety inspections by governmental authorities as required by law.¹⁸

Each religious school is required to administer annually some nationally standardized test to students in the first, second, third, sixth, and ninth grades.¹⁹ The chief administrative officer of the school may select, in his discretion, either a nationally standardized test or other nationally standardized equivalent measurement, provided that it measures achievement in English, grammar, reading, spelling, and mathematics.²⁰ The school must keep records of the results of the tests, subject to annual inspection by a duly authorized representative appointed by the governor.²¹ In addition, every religious school must administer annually a competency test to all eleventh graders.²² The chief administrative officer of the school may opt for either a nationally standardized test or other nationally standardized equivalent measure, provided that it measures verbal and quantitative competencies.²³ The private religious school must establish a minimum score for the test to be attained by a student before graduation from high school.²⁴ The records from these tests must be made available at all reasonable times for annual inspection by the governor's representative.²⁵

The statute allows voluntary participation by any religious school in any state program that would otherwise be available to the religious

In conformity with the Constitution of the United States and of North Carolina, it is the public policy of the State in matters of education that "No human authority shall, in any case whatever, control or interfere with the rights of conscience or with religious liberty and that religion, morality and knowledge being necessary to good government and the happiness of mankind . . . the means of education shall forever be encouraged.

The language is similar to that used in several state constitutions, including North Carolina's, and is adopted from "An Ordinance for the Government of the Territory of the United States north-west of the river Ohio," art. III, 1 Stat. 51 n.(~) (1787). See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (quoting the ordinance).

15. N.C. GEN. STAT. § 115-257.2 (Cum. Supp. 1979).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* § 115-257.3.

20. *Id.*

21. *Id.*

22. *Id.* § 115-257.4.

23. *Id.*

24. *Id.*

25. *Id.*

school.²⁶ Voluntary participation by the religious schools in the high school testing and statewide testing programs is expressly allowed.²⁷

In order to qualify as a school under article 32A, an organization must send a notice to a duly authorized representative of the State indicating an intent to operate, the name and address of the school, and the name of the school's owner and chief administrator.²⁸ The school must notify the State upon its termination.²⁹ The private religious school that complies with the requirements set out in article 32A is not subject to any other provision of law relating to education except those requirements of law relating to fire, safety, sanitation, and immunization.³⁰

II. THE CONSTITUTIONAL PRINCIPLES

The North Carolina statute symbolizes the culmination of a church-state conflict that has been addressed in both the federal and state courts. The right to impose minimum requirements on private religious schools is very limited because of the countervailing constitutional safeguards of the first amendment.³¹ Since *Pierce v. Society of Sisters*,³² the courts have recognized only a limited state authority to regulate nonpublic schools.³³ This authority is not the right to control, but only one to accomplish a few compelling state interests.³⁴ Constitutional protection is afforded parents who provide their children educational opportunities in private religious schools.³⁵ The first amendment also protects the free-

26. *Id.* § 115-257.5.

27. *Id.*

28. *Id.* § 115-257.6(a).

29. *Id.* § 115-257.6(b).

30. *Id.* § 115-257.8.

31. See note 5 *supra*.

32. 268 U.S. 510 (1925).

33. The Court stated:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534.

34. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1970). The *Lemon* Court stated, "A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.*

35. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents' right to control child's education). The Supreme Court spoke of *Pierce* as resting on the first amendment in *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965). The Court also referred to *Pierce* as "a charter of the rights of parents to direct the religious upbringing of their children" in *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). *Pierce* reflects a free exercise right. See Bird, *Freedom from Establishment and Neutrality in Public Schools: Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125, 187 n.281 (1979) (citing E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 115 (1951)). See also Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76, 81 (1976) (the most frequent area in which subsequent

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36. See no

37. *Wolm*
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38. 392 U.

39. *Id.* at

40. *Levitt*

v. Allen, 392 U.

41. See no

42. 374 U.

43. *Id.* at

44. *Id.* at

45. 406 U.

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exercise right of churches to offer religion-centered education as an element of their ministries.³⁶ On the other hand, states have a legitimate interest in ensuring that all children receive a basic education.³⁷ The Supreme Court in *Board of Education v. Allen*³⁸ indicated that states have a proper interest in the manner in which nonpublic schools perform this basic educational function.³⁹ A state may require schools utilized to fulfill the state's compulsory education requirements to meet some minimal basic standards.⁴⁰ It is against this backdrop that states have attempted to impose minimum regulations on the nonpublic schools.

A. Federal Law

1. The free-exercise clause of the United States Constitution

The bulk of case law in the area of private religious school regulation has been devoted to treatment of free-exercise claims. The free-exercise clause of the first amendment protects religious schools.⁴¹ Any state legislation that burdens parents', children's, or a church's exercise of religious beliefs is unconstitutional unless, as the Court in *Sherbert v. Verner*⁴² stated, the state can demonstrate "a compelling state interest in the regulation of a subject within the state's constitutional power to regulate."⁴³ The Court illuminated the concept of "compelling state interest": "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"⁴⁴ The state must also demonstrate that it is utilizing the least burdensome means to satisfy a compelling state interest.

The Supreme Court applied its compelling interest test in the landmark decision of *Wisconsin v. Yoder*.⁴⁵ *Yoder* involved Amish parents who wanted to keep their children out of the public schools because of religious objections. The Court held for the parents, stating:

[O]nly those interests of the highest order and those not otherwise served can overbalance claims to the free exercise of religion. We can

cases have cited *Pierce* is "religious freedom in schools").

36. See notes 190-91 *infra* and accompanying text.

37. *Wolman v. Walter*, 433 U.S. 229, 240 (1977) ("There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate education.") See also *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 479 n.7 (1973) (state claimed an interest in assuring "that its youth receive an adequate education.")

38. 392 U.S. 236 (1968).

39. *Id.* at 247.

40. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 479 n.7 (1973); *Board of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968).

41. See notes 50-55 *infra* and accompanying text.

42. 374 U.S. 398 (1963).

43. *Id.* at 403.

44. *Id.* at 406.

45. 406 U.S. 205 (1972).

accept it as settled, therefore, that however strong the state's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.⁴⁶

In giving approval to the Amish's alternative vocational educational program, the Court recognized that the form of the particular religious education need not be similar to that of the public schools.⁴⁷

Since *Yoder* widespread attacks have been launched against burdensome regulation of private religious schools. State regulation has tended to concentrate on health and safety requirements, textbook approval, teacher certification, mandatory testing, participation in community programs, and the overall licensing of the schools themselves. One commentator, Wendell Bird, has suggested that state regulation in most of these cases abridges the free-exercise clause.⁴⁸ Many state courts have relied on

46. *Id.* at 215. The Court implicitly followed the compelling-interest test. Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 540 n.121 (1978). The *Yoder* Court sustained the burdened religious exercise, and so it did not find a compelling interest in compulsory education after the eighth grade. See *Wisconsin v. Yoder*, 406 U.S. 205, 211-12, 221-22 (1972). The state is not constitutionally required to provide public education, and there is no fundamental right to such education. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973). Hence the state does not have any compelling interest in creating and implementing public education, *Johnson v. New York State Educ. Dep't.*, 449 F.2d 871, 879 (2d Cir. 1971) (existence of compelling interest involved in issue of mootness), *vacated on other grounds*, 409 U.S. 75 (1972), at least other than in the basic subjects of reading, writing, arithmetic, and patriotic citizenship. See Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 957 (1977). Therefore, the state does not have any compelling interest in regulating the operation of private religious schools, at least outside of these basic secular subjects.

47. 406 U.S. at 211 (sustaining vocational training required by religious exercise as sufficient education to satisfy compulsory attendance although not held in public schools, not held in approved educational institutions, and not conformed to state minimum educational standards). The Vermont Supreme Court in a subsequent decision overturned prosecution of students at a religious school that did not comply with the requirement that educational quality and teacher qualifications in nonpublic schools be "equivalent" to those in public schools, and said that *Yoder* had required that regulation accompanying compulsory attendance laws must "yield to First Amendment concerns." *State v. LaBarge*, 134 Vt. 276, 280, 357 A.2d 121, 124 (1976). The New Hampshire Supreme Court similarly applied *Yoder* to religious schools different from informal Amish education but equally burdened by state regulation. See also *City of Concord v. New Testament Baptist Church*, 382 A.2d 377, 379 (N.H. 1978); Bird, *supra* note 35, at 183 (citing sources).

48. In summary, regulation of religious schools abridges free religious exercise of parents, students, and churches if it burdens provision of religious-centered instruction by an accreditation requirement that compels compliance with intrusive standards to operate as a school and to satisfy the compulsory education law; by a textbook approval requirement that forces use of objectionable texts approved by state officials; or by a teacher certification requirement that prevents securing instructors with the requisite religious-based education and disqualifies teachers with the requisite theological convictions. Regulation of religious schools also abridges free exercise if it restrains provision of religious-centered education by a minimum curriculum standard that compels instruction in objectionable subjects or allocates excessive time away from religious instruction; by intrusive periodic reports that demand disclosure of nonessential infor-

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49. *E.g.*, *Ken*

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50. 134 Vt. 2

51. *Id.* at —,

52. *Id.* at —,

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54. *Id.* at —,

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Yoder in striking down comprehensive regulatory systems. The following sections deal with these discrete areas of regulation.

a. *The approval power.* The broadest attack by the states upon private religious schools' free exercise has been in the broad area of "licensing," "approval," or "accreditation" requirements. Religious schools have been forced to meet state-mandated regulations before they could be granted approval to operate as a school. Denial of licensing or approval may render parents of children remaining in unlicensed religious schools subject to criminal prosecution.

The assertion of a comprehensive licensing or approval power by the states has been struck down in three different state courts of last resort.⁴⁹ A unanimous Vermont Supreme Court in *State v. LaBarge*⁵⁰ held that parents were not subject to truancy violations for sending their children to a private Christian school that was not "approved."⁵¹ The court said, "In light of what was involved in 'approval' the state would be hard put to constitutionally justify limiting the right of normal, unhandicapped youngsters to attendance at 'approved' institutions."⁵² In a case presenting an almost identical factual situation, the Ohio Supreme Court in *State v. Whisner*⁵³ held unanimously that imposition of state "minimum standards" on private church schools was unconstitutional as violative of both the free-exercise clause and the due process clause of the fourteenth amendment.⁵⁴ The court found that the minimum-standard scheme was "so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and nonpublic education."⁵⁵ Furthermore, a recent unanimous Kentucky Supreme Court decision in *Kentucky State Board for Elementary and Secondary Education v. Rudasill* overturned the state regulatory scheme imposed on private religious schools as violative of that state's constitution.⁵⁶

An unreported North Carolina trial court decision which held in

mation or that consume excessive amounts of administrative time; or by minimum facility requirements that inflict great expenses for nonessential structural surroundings.

Bird, *supra* note 35, nt 194-95.

49. *E.g.*, Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); *Vermont v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976).

50. 134 Vt. 276, 357 A.2d 121 (1976).

51. *Id.* at ___, 357 A.2d at 125.

52. *Id.* at ___, 357 A.2d at 123.

53. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

54. *Id.* at ___, 351 N.E.2d at 771.

55. *Id.* at ___, 351 N.E.2d at 768; *cf. Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only").

56. 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980). The court based its decision on section 5 of the Kentucky Constitution which states that "[no] man [shall] be compelled to send his child to any school to which he may be conscientiously opposed"

favor of the state regulatory scheme, *State v. Columbus Christian Academy*,⁵⁷ has been criticized as departing from the weight of authority. Commentator Bird pointed out that this decision was based on several "erroneous assumptions" by the court, notably: that "religious instruction does not pervade all subjects in religious schools," that a textbook-approval requirement does not "restrain or chill selection of religious-centered texts," that a teacher-certification requirement does not "hinder or prevent locating theologically acceptable instructors, and that extensive reporting requirements do not "demand unnecessary information."⁵⁸ Bird noted that the court's reasoning that "Fundamentalist Christianity contains no specific prohibition against doing any of the state requirements" was based on a misconception of the issues; while religious beliefs do not prohibit hiring certified teachers and the presentation of basic instruction, they do require "hiring theologically acceptable teachers" and "use of texts that were religiously acceptable and might not be substantially equivalent to public school texts;" thus, such beliefs were unconstitutionally burdened.⁵⁹ He also noted that the court erred in basing its holding upon any compelling interest, because "these regulations went well beyond basic educational courses in which the state possibly has a compelling interest."⁶⁰

b. *Teacher certification requirement.* Perhaps the greatest controversy regarding the state's assertion of general approval power has been its requirement of teacher certification for instructors in the private church schools. The religious schools have objected to having to use only state-qualified teachers in their schools because teachers necessarily impart values to the students they teach⁶¹ and religious schools object to a lessening of control over those values. Teacher-certification requirements for religious schools have been struck down as burdensome on the free exercise of religion.⁶²

Teacher certification burdens the religious schools' free exercise of religion in two ways: first, the schools must locate teachers who are both theologically and "state" qualified; second, certification is not rationally related, much less related by the least burdensome means, to pedagogical quality.⁶³ At present, only five states, including North Carolina, require

57. No. 78-CVS-1678 (Wake County, N.C., Super. Ct. Sept. 5, 1978), noted in 47 U.S.L.W. 2212 (Oct. 3, 1978).

58. Bird, *supra* note 35, at 191 n.301.

59. *Id.*

60. *Id.*

61. Trial Transcript at 233, *State v. Columbus Christian Academy*, No. 78-CVS-1678 (Wake County, N.C., Super. Ct. Sept. 5, 1978).

62. *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980); see *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). See also *Michigan v. Nobel*, No. S-75-0114-A (Mich. Dist. Ct. Dec. 12, 1979).

63. See, e.g., Brief for Defendants at 12, *Hinton v. Kentucky State Bd. of Educ.*, No. 88314, slip op. at 3 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

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state certification of teachers in private schools.⁶⁴

There appears to be no compelling interest that justifies a state requirement of teacher certification for private religious schools.⁶⁵ In the recent state decision of *Michigan v. Nobel*⁶⁶ the court found that there was no compelling state interest or even a rational basis for a requirement of teacher certification in a home religious school.⁶⁷ One court found that "there is not the slightest connection between teacher certification and enhanced educational quality in state schools, nor is there generally any such requirement in private schools."⁶⁸ And should the state establish a compelling interest sufficient to override a first amendment claim, it would then have to establish that the teacher certification was the least burdensome means of meeting that interest.⁶⁹

64. See, e.g., ALA. CODE tit. 16, §§ 16-23-1, 16-23-2 (1975) (instruction in private schools shall be by those holding certificates; requirements set by the state board of education in administrative regulations); MICH. STAT. ANN. § 15.1923 (1979) (same requirements as would qualify teachers to instruction in public schools); NEB. REV. STAT. § 79-1701 (1943) (certification of teachers in nonpublic schools is the same as for public schools); N.C. GEN. STAT. § 115-256 (1978) ("No person shall be employed to teach in a nonpublic school who has not obtained a teacher's certificate entitling such teacher to teach corresponding courses or classes in public schools."); S.D. COMP. LAWS ANN. § 13-4-2 (1975) ("[N]o person shall be permitted to teach in any non-public school any of the courses prescribed to be taught in the public schools unless such person shall hold a certificate entitling him to teach the same course in the public schools of this state."); cf. IND. STAT. § 20-1-19 (1971) (teacher certification required if a nonpublic school is to be accredited); ME. REV. STAT. tit. 20, § 1751 (Supp. 1979) (teacher certification required for nonpublic school teacher if school accepts public funds for tuition); MISS. CODE ANN. § 37-17-7 (1972) (nonpublic schools may request accreditation, and if so, standards for public schools govern); OR. REV. STAT. § 345.525 (1977) (private schools may register with the state and if so, they must demonstrate that teachers are qualified, "but such qualification shall not include the requirement that teachers be certified"); WIS. STAT. ANN. § 115.28(7)(b) (West 1973) (certification of nonpublic school teachers same as certification of public school teachers, except nonpublic school teachers may assert teaching experience in public or private schools if the private school offered an adequate educational program; private schools not obligated to employ only licensed or certified teachers).

65. The constitutional infirmity of teacher certification requirements . . . is not just that a religious school teacher without the requisite education courses or degree from an accredited university often is a better instructor than one without a natural talent for teaching, but also that a religious school has theological requirements for its teachers that may be contrary to the secularistic beliefs of most university education courses that may be met only by graduates of religious universities that do not seek accreditation.

Bird, *supra* note 35, at 193 n.311.

66. No. S-79-9114-A, slip op. at 1 (Mich. Dist. Ct. Dec. 12, 1979).

67. *Id.* at 10.

68. *Hinton v. Kentucky State Bd. of Educ.*, No. 88314, slip op. at 3 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudisill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

69. *Bird*, *supra* note 35, at 192; Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 539-40, 542 (1978); see *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974), *aff'd in relevant part and rev'd in part*, 421 U.S. 349 (1975); accord, *McCormick v. Hirsch*, 460 F. Supp. 1337, 1356 (M.D. Pa. 1978). "[T]he state may regulate private religious schools only insofar as the regulation either involves the incidents

c. *Textbook approval.* A state-imposed textbook approval requirement is unconstitutional if the content of approved texts burdens the free religious exercise of parents and students as well as freedom of conscience.⁷⁰ The state has no compelling interest in a textbook-approval requirement.⁷¹ As commentator Bird noted,

The constitutional problem with textbook regulation is not just that some of the content of approved texts is objectionable to religious schools, such as evolutionary instruction in science texts or relativistic ethics in social studies material, but that the underlying premise of those texts is not pervasively biblical or theological as the parents' and students' religious exercise requires.⁷²

The Kentucky Supreme Court in *Rudasill*, in overturning that state's textbook approval requirement, found no rational relationship, much less a compelling state interest, in requiring particular materials to be used in private religious schools.⁷³

d. *Compulsory attendance laws.* The early common law recognized the duty to educate children as one belonging to parents.⁷⁴ The states began usurping some of this parental responsibility by adopting "compulsory attendance laws."⁷⁵ The United States Supreme Court gave tacit approval to these statutes in dictum in the case of *Prince v. Massachusetts*.⁷⁶ This dictum has been used by state courts in upholding particular state laws.⁷⁷ The Court relied primarily on the belief-action distinction espoused in *Reynolds v. United States*,⁷⁸ which has since been

of *Pierce* rights [i.e., not the right itself to nonpublic education] or is justified by a compelling state interest." Arons, *The Separation of School and State: Pierce Reconsidered*, 46 *HARV. EDUC. REV.* 76, 78 (1976).

70. See *Hinton v. Kentucky State Bd. of Educ.*, No. 88314, slip op. at 1 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

71. *Id.*

72. Bird, *supra* note 35, at 193 n.311.

73. *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

74. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("[I]t is the natural duty of the parent to give his children education suitable to their station in life. . . .") See generally Note, *One State's Struggle with Wisconsin v. Yoder: The Kansas Compulsory School Attendance Statute and the Free Exercise of Religion*, 17 *WASHBURN L.J.* 574 (1978).

75. That state compulsory attendance laws are not compulsory "education" laws should be noted. The term "compulsory education law" is a misnomer, and the courts use the term loosely. No school is required to educate. Schools are required only to make an education in basic subjects available to all students.

76. 321 U.S. 158, 166 (1944).

77. See, e.g., *Commonwealth v. Bey*, 166 Pa. Super. Ct. 136, 141, 70 A.2d 693, 695 (1950).

78. 98 U.S. 145 (1878) (upholding federal conviction of Mormon for polygamy); see, e.g., *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967);

abandoned.⁷⁹

Yoder eradicated. The Court found that the practice of a legitimate religious belief determines if the state's interest in the first amendment is outweighed by the balancing of the first amendment. The state must show that the law causes a substantial detriment to some secular statute.⁸² For the first time, the Court held that deference to individual religious beliefs is required.

Surprisingly, the Court's decision is not compulsory attendance laws.

Commonwealth v. Bey, 166 Pa. Super. Ct. 136, 141, 70 A.2d 693, 695 (1950).

79. "The Supreme Court's general regulations of religious tenets or burdens in *Public Schools* were rejected where the compulsory and applied uniformity reversed its earlier decision which had sustained religious freedoms in the case of *Prince v. Massachusetts*." 406 U.S. at 406.

80. 406 U.S. at 406. See Note, *Freedom of Religion*, 539-42 (1978). This dictum has been used by state courts in upholding particular state laws.

Although courts have been conflicting in their interest in a reasonable relationship between the state and the individual, is it adequate governmental interest to outweigh the individual's interest to overrule the state's law?

Id. at 539.

81. "An individual has the right to speak, write, and publish his views on the scales and requirements of the First Amendment." Note, *Freedom of Religion*, 515, 539 n.115 (1978). See also *Communications of Ideas v. Board of Education*, 56 Cal. L.J. 115, 268 n.20 (1967) ("[I]t is important or more so than a way of expression 718 (1970). See also *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967);

82. See 406 U.S. at 406.

abandoned.⁷⁹

Yoder eradicated much of the prior decisional law in this area. The Court found that if a compulsory attendance law interferes with the practice of a legitimate religious belief, definitional balancing will be used to determine if the state interest is compelling, as is necessary to overcome the first amendment infringement.⁸⁰ The court may not simply use ad hoc balancing of the state's interest against the constitutionally guaranteed first amendment right.⁸¹ In establishing its compelling state interest, the state must show that harm to the physical or mental health of children or detriment to society would result if children are exempt under the particular statute.⁸² Although the Supreme Court tacitly recognized, for the first time, the validity of general compulsory school attendance statutes for the first eight grades, the Court's decision in *Yoder* also reflects a deep deference to individual religious exercise.

Surprisingly, little specific judicial treatment has been afforded to compulsory attendance laws. Statutes describing age requirements and

Commonwealth v. Renfrew, 332 Mass. 492, 494, 126 N.E.2d 109, 111 (1955); *State v. Superior Court*, 55 Wash. 2d 177, 185, 346 P.2d 999, 1004 (1959).

79. "The Supreme Court has abandoned the secular regulation rule that sustained general regulations dealing with non-religious matters regardless of their contrariness to religious tenets or burdens on religious exercise." Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 538 (1978) (citing sources). The rule effectively was rejected in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), where the compulsory flag pledge and salute, which appeared not to be a religious exercise and applied uniformly to all students, was found unconstitutional. In so ruling the Court reversed its earlier decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had sustained a similar requirement as a secular regulation. See also Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 231-55.

80. 406 U.S. at 214. For an excellent discussion of this compelling state interest test, see Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 539-42 (1978). This commentator writes:

Although courts have employed many approaches to accommodate these conflicting interests, it is not sufficient for the government merely to show a "reasonable relation" between the challenged program and a valid state concern. Nor is it adequate for a court simply to balance the free exercise right against the governmental interest. Free exercise cases generally require a compelling state interest to override an individual's First Amendment claim.

Id. at 539.

81. "An ad hoc balancing test reduces a constitutional guarantee to a mere weight on the scales and requires judicial assessment of legislative matters and individual imponderables." Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 539 n.115 (1978). Ad hoc balancing has been soundly criticized. E.g., DuVal, *Free Communications of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 172-78 (1972); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1441-45 (1962); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939-41 (1968). See also *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967) ("[It is] inappropriate for this Court to label one [interest] as being more important or more substantial than the other."); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 718 (1970) ("In the hands of most judges the balancing test comes to be nothing more than a way of rationalizing preformed conclusions.")

82. See 406 U.S. at 230.

what actually constitutes a "school" vary considerably from state to state.⁸³ A state's interest in the enforcement of a particular statute is not absolute, and a sincere claim of religious infringement must also be considered.⁸⁴

Yoder recognized some state interest, but not a compelling interest, in compulsory education; furthermore, it exempted a burdened religious group from many requirements. The state courts have viewed *Yoder* as most significant for its constitutional doctrine on parental rights and religious liberty. In *LaBarge*,⁸⁵ a unanimous Vermont Supreme Court held for the parents in a truancy action under the state compulsory attendance statute, stating: "As recently as *Wisconsin v. Yoder* . . . that court has also stated that compulsory school attendance, even in an equivalency basis, must yield to First Amendment concerns."⁸⁶ In a similar case, a unanimous Ohio Supreme Court in *State v. Whisner*⁸⁷ held that parents were not subject to truancy violations under the compulsory attendance statute where the private religious school did not meet "minimum standards" relative to the operation of all schools (including nonpublic schools).⁸⁸ The court stated: "[A]s required by *Wisconsin v. Yoder* . . . we must also determine whether '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement of government neutrality . . . [because] it unduly burdens the free exercise of religion.'"⁸⁹

Religious schools which do not object to compulsory attendance itself nonetheless might find themselves in violation of other state-mandated requirements, such as licensing and textbook approval, and thus fail to constitute a "school" as required by the compulsory attendance law.

e. Mandatory testing. Perhaps the newest area of concern about regulation of the private religious schools has been the mandatory testing of children. This testing has fallen under the general category of "standardized" testing. The state uses these tests in evaluating the quality of education in the schools and the abilities of individual students. Christian schools have generally been willing to submit their "product" voluntarily to reasonable evaluation by the state through such achievement testing.⁹⁰

Many religious schools in North Carolina and elsewhere, however, have grounds to object to much testing. The state may have a compelling interest in ensuring that reading, writing, and arithmetic are taught effec-

83. The courts should compare the different requirements of various state statutes to determine if the interest being advanced under the particular statute is compelling.

84. See note 46 *supra* and accompanying text.

85. 134 Vt. 276, 357 A.2d 121 (1976).

86. *Id.* at —, 357 A.2d at 124.

87. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

88. *Id.* at —, 351 N.E.2d at 754.

89. *Id.*

90. See *Hinton v. Kentucky State Bd. of Educ.*, No. 83314, slip op. at 2 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 577 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

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tively, but the state arguably has no compelling interest in testing beyond that basic level⁹¹ or in requiring use of any particular test. Just as tests can be used to inculcate religious views so that funding might violate the establishment clause, state tests might subvert religious views or penalize those holding beliefs which conflict with prevailing beliefs. Moreover, if two recognized tests satisfy any state interest and one is religiously objectionable, the least-burdensome-means requirement mandates that religious schools be allowed to choose the unobjectionable test rather than being arbitrarily required to use an objectionable test.

f. Fire, health, and safety regulations. The state has a compelling interest in ensuring the safety of church schools, like other buildings, from fire and epidemic disease. This interest justifies safety and immunization requirements comparable to those of other public buildings. On the other hand, it does not justify regulations more strict than those of businesses, amusement locations, and other public buildings.

The private religious schools generally have been willing to submit their schools to reasonable fire, health, and safety regulations.⁹² They feel these laws do not foster an ideological view.⁹³ The state has a compelling interest in these requirements⁹⁴ as long as the requirements are not unreasonably demanding but are the least burdensome means of ensuring safety. Unreasonable requirements that demand expensive alterations not essential to safety, however, burden free religious exercise through church-operated schools, just as they would if applied to other church ministries.

Health and safety laws generally have been understood to refer to sanitation and safety requirements, ensuring a healthy learning environment. There has been a tendency nationwide to include sex education, pregnancy avoidance, venereal disease protection, and other "personal" health aids under the general heading of "health law."⁹⁵

91. See note 46 *supra*.

92. The private Christian schools were willing to submit to regulation in *Hinton*, *Whisner*, and *LaBarge*. The schools in *Columbus Christian Academy* were not willing to submit to all "health" laws, contending that to do so would be writing the State a "blank check" for its future use in this area.

93. See, e.g., *Hinton v. Kentucky State Bd. of Educ.*, No. 88314, slip op. at 2 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

94. See *id.* slip op. at 2 ("overriding interest in maintaining reasonable health, fire and safety standards for all schools"). See also *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 & n.8 (E.D. Wis. 1974) (compelling state interest in requiring immunization in public schools).

95. See, e.g., N.C. GEN. STAT. § 143B-422 (Cum. Supp. 1979). The enabling legislation, entitled "A Child Health Plan for Raising a New Generation," states: "Family planning services, including pregnancy testing, sex education, and contraceptives, should be available to all sexually active persons regardless of age." This includes assistance with abortion. The Act has received widespread criticism from Christian school leaders and educators. See, e.g., *The National Educator*, Aug. 1979, at 13. See also *State v. Whisner*, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 763 (1976). Concerning the Ohio health provision, the court stated:

We share the concern of appellants that the philosophy espoused especially in

Many religious schools have refused to submit to these types of regulations, due to their ideological content.⁹⁶ The Supreme Court in *Wolman v. Walter*⁹⁷ gave limited approval to state funding of health services in the area of diagnostic speech, hearing, and psychological services,⁹⁸ where there is no risk of forcing objectionable ideological views on religious students,⁹⁹ but did not require that religious schools accept these services.

g. *Mandatory participation in community programs.* The Ohio Supreme Court has held that state regulation that requires a private religious school to cooperate with elements of the community infringes upon the free-exercise rights of parents, children, and church leaders of religious schools.¹⁰⁰ Christian educators have objected to this form of regulation in that it violates a basic tenet of their faith that Christians "be not conformed to this world."¹⁰¹ It is for this very purpose that many parents send their children to private church schools.¹⁰² The fact that some religious schools participate with the community programs on a limited voluntary basis is not a factor to be considered in deciding whether such a mandatory regulation burdens another religious group.

2. *The establishment clause of the first amendment*

Private religious schools are protected from intrusive or hostile state

EDb-401-03(B), relating to the teaching of . . . health, may be interpreted as promoting "secular humanism," and, as such, may unconstitutionally be applied to these appellants to "unduly burden the free exercise of religion," and that section of the publication be interpreted as part of the "minimum standards."

Id. at —, 351 N.E.2d at 767. Section EDb-401-03(B) reads:

The health of the child is perhaps the greatest single factor in the development of a well-rounded personality. No individual is adequately prepared for effective living unless he has a well-functioning body and can make reasonably successful adjustments to his many problems. Both are essential for facilitating learning, promoting personal efficiency, and developing successful social and family living. For these reasons health education is considered an integral part of the total education program. Its place in the curriculum becomes increasingly important as automation, population growth, changing moral standards and values, mounting pressures, and other changes in our society create new or intensify existing health problems.

Id. at —, 351 N.E.2d at 763.

96. See *State v. Whisner*, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 767 (1976). See also Brief for Defendant at 40, *State v. Columbus Christian Academy*, No. 78-CVS-1678 (Wake County, N.C., Super. Ct. Sept. 5, 1978), noted in 47 U.S.L.W. 2212 (Oct. 3, 1978).

97. 433 U.S. 229, 244 (1977).

98. The private church schools asserted that communication between the psychological diagnostician and the pupil will provide an impermissible opportunity for the intrusion of religious influence. 433 U.S. at 241-42. The Court disagreed. While addressing the issues of diagnostic speech and hearing services, the Court paid only lip-service to the administration of psychological services to private school students. *Id.* at 242-44. The risk of fostering ideological views would undoubtedly be greater under such services, and the Court's decision appears inconsistent with its rationale.

99. *Id.* at 244.

100. *State v. Whisner*, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 767 (1976).

101. See *id.*

102. T. SMITH, CHRISTIAN EDUCATION 33 (1977).

regulation under essential requirements toward religious government aid¹⁰³

103. For an example of private schools, see *Epperson*.

104. *Epperson*, 361 U.S. 618, 629 (1978) ("[T]he State is required. The State of the United States, 401 U.S. [is] ensuring government 306, 314 (1952) ("[T]he sects."); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947) (the state to be neutral. See, e.g., *W. Katz*, *R. the First Amendment but of government ne & State v. Blanton*, 4 Bird has stated:

The framers of the Constitution require an "absolute wall" between church and state. The framers of the eighteenth century and nineteenth century constitution were Jefferson and Madison who did not believe in the concept of that the establishment of church and state 'wall,' is a blurring of the establishment clause requires no

Bird, *supra* note 35, n.

105. *Abington School District v. Schempp*, 374 U.S. 375 (1963) (prohibiting school prayer or showing hostility to religion); *McDaniel v. Paty*, 402 U.S. 172 (1971) (manifests patent hostility to religion); *Widmar v. Vincent*, 454 U.S. 263 (1981) (inhibits religion" in violation of the First Amendment); *Illinois v. Board of Education*, 406 U.S. 213 (1972) ("[C]hildren have in no religion over 211-12 (1948) ("[G]overnment with . . . the free exercise of religion (government must not favor them); *United States v. Board of Education*, 421 F. Supp. 337 (D. Mass. 1976) (injunction of neutrality); *M. of silence for meditation for free religious exercise First Amendment does not prohibit religious groups." *Id.* at 443. If there is an official state church that clause must be read to apply to religion generally. *Bird*,*

106. *Lemon v. Kurtzman*, 403 U.S. 564 (1973) (provide no basis for pr

regulation under the establishment clause of the first amendment.¹⁰³ The essential requirement of the establishment clause is neutrality of government toward religion.¹⁰⁴ This clause prohibits government hostility¹⁰⁵ and government aid¹⁰⁶ to churches and religious schools. Entanglement of

103. For an excellent analysis of the establishment clause with respect to public and private schools, see Bird, *supra* note 35.

104. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord*, *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality opinion) (command of the establishment clause is "neutrality"); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) ("Neutrality is what is required. The State must . . . neither advance nor impede religious activity."); *Gillette v. United States*, 401 U.S. 437, 449 (1971) ("[T]he central purpose of the Establishment Clause [is] ensuring governmental neutrality in matters of religion."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[T]he government must be neutral when it comes to competition between sects."); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) ("[The] First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers.") See, e.g., W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9, 12 (1964) ("[T]he impact of the First Amendment on religion is best understood in terms of church-state separation but of government neutrality . . ."). See also *Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97, 100 (M.D. Tenn.) ("total separation between church and state is not necessary" and "neutrality is what is required"), *aff'd*, 434 U.S. 803 (1977). Bird has stated:

The framers of the Constitution did not intend the establishment clause to require an "absolute wall of separation between church and state." Indeed, the eighteenth century meaning of the phrase differed significantly from its twentieth century connotations, and the early proponents of an absolute wall of separation were Jefferson who was not at the Constitutional Convention and Madison who did not author the establishment clause and who did not mention the concept at the Convention. The Supreme Court has repeatedly recognized that the establishment clause and its decisions "do not call for total separation of church and state" and that the necessary partial separation "far from being a 'wall,' is a blurred, indistinct, and variable barrier. . . ." The establishment clause requires not absolute separation but neutrality.

BIRD, *supra* note 35, at 139-40.

105. *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("affirmatively opposing or showing hostility to [theistic] religion" would prefer nontheists over theists); *accord*, *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., concurring) ("[T]he exclusion manifests patent hostility toward . . . religion . . . and, in sum, has a primary effect which inhibits religion" in violation of the establishment clause.); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[C]allous indifference to religious groups [would be] preferring those who believe in no religion over those who do believe."); *McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948) ("[G]overnmental hostility to religion or religious teachings [would] be at war with . . . the free exercise of religion."); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (government must not be the "adversary" of religion or "handicap" religions any more than it favors them); *United States v. Branigan*, 299 F. Supp. 225, 231 (S.D.N.Y. 1969) ("The injunction of neutrality does not require hostility toward religion.") In *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), the court upheld a public school requirement for a minute of silence for meditation or prayer at the beginning of each school day, an accommodation for free religious exercise and free ethical belief. The court noted, "The requirements of the First Amendment do not implicate hostility to religion or indifference toward religious groups." *Id.* at 443. If the establishment clause is to be read to prohibit not just creation of an official state church but advancement of any particular religion or religion generally, then that clause must be read to prohibit opposition or hostility toward any particular religion or religion generally. Bird, *supra* note 35, at 185.

106. *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) ("The government cash grants . . . provide no basis for predicting that comprehensive measures of surveillance and controls

church and state can result from intrusive regulation of religious institutions just as it can result from intrusive aid.¹⁰⁷

The historical intent behind the establishment clause was to require governmental neutrality towards religion,¹⁰⁸ not absolute separation between church and state. The framers of the American Constitution wanted to prohibit the creation of a national church.¹⁰⁹ Ironically, in perceiving this clause as requiring an "absolute wall of separation," the courts have allowed government programs that are not neutral in effect and are therefore violative of the first amendment.¹¹⁰

The Supreme Court has applied several different tests in determining whether the establishment clause has been violated.¹¹¹ The traditional test used by the Court has been to determine if the state action has a primary effect of advancement or opposition to religion, a predominant secular purpose of aid or hostility to religion, or excessive state entanglement with religion.¹¹² A proper test for construction of the establishment clause, in light of its historical intent, would be the substantial-neutrality test.¹¹³

Intrusive regulation of religious schools constitutes state hostility toward religion. As commentator Bird has noted,

Intrusive state regulations of religious schools, through an accreditation requirement, textbook approval requirements, teacher certification requirements, minimum curriculum standards beyond very basic subjects, intrusive periodic reports beyond essential information, or minimum fa-

will not follow.")

107. See *id.* at 620; *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 79 (1st Cir. 1979) (government intrusion "upon decisions of religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the school" is a "relationship pregnant with dangers of excessive government direction of church schools and hence of churches.")

108. See note 103 *supra*.

109. Bird, *supra* note 35, at 127-28 (citing sources). "The prohibition against congressional 'establishment' of religion referred to creation of a national church or financial and legal preference for one ecclesiastical institution over other churches. Hence Madison's initial proposal in the House of Representatives provided 'nor shall any religion be established,' and the first provision adopted in the Senate prohibited any 'law establishing articles of faith or a mode of worship' . . ." *Id.* See also T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW* 224 (3d ed. 1898) (establishment of religion means the setting up or recognition of a state church or conferring upon one church special favors and advantages which are denied to others); Kruse, *The Historical Meaning and Judicial Construction of the Establishment Clause of the First Amendment*, 2 *WASHBURN L.J.* 65, 85-87 (1962); 1 *ANNALS OF CONGRESS* 730-31 (Gales & Seaton eds. 1789), quoted in E. CORWIN, *CONSTITUTIONAL LIMITATIONS* 101 (1898).

110. For a discussion of how the establishment clause has been abridged by unneutral governmental programs, see Bird, *supra* note 35, at 174-204.

111. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (benevolent neutrality); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (strict neutrality); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (accommodation); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) (absolute separation of church and state).

112. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

113. For an excellent discussion of the establishment clause and the substantial-neutrality test, see generally Bird, *supra* note 35.

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cility requirements beyond essential safety and health standards, produce hostility toward those religions relative to secular and nontheistic religions and create hostility toward those religious schools relative to secular private or public schools, just as similar intrusive regulation of church worship or of Sunday schools would produce hostility toward those religions and ministries. Such hostility is a form of unneutrality of the state toward religious schools or toward religions that abridges the establishment clause.¹¹⁴

Several court decisions overturning regulation of religious schools have rested on the establishment clause as well as the free-exercise clause. Such burdensome requirements as textbook approval, state accreditation and teacher certification imposed on religious schools were found to violate the establishment clause in *Hinton v. Kentucky State Board of Education*.¹¹⁵ In *Surinach v. Pesquera de Busquets*,¹¹⁶ the First Circuit Court of Appeals recently held that government demands for the financial data of private religious schools both burden the free-exercise clause and constitute an impermissible entanglement of the affairs of church and state.¹¹⁷ In holding the particular regulation offensive to the constitutional requirement of government neutrality, the court noted that the government's power to "regulate, fix, control, freeze and review the [church] schools' prices is a continuing surveillance leading to an impermissible degree of entanglement."¹¹⁸ The National Labor Relations Board's assertion of jurisdiction over religious schools was held by the Supreme Court to pose a high likelihood of violation of the establishment clause and the free exercise clause in *NLEB v. Catholic Bishop*.¹¹⁹ In addition, the Ohio Supreme Court in *State v. Whisner*¹²⁰ noted that the "philosophy espoused [in the state's minimum standards] relating to the teaching of . . . social studies and health, may be interpreted as promoting 'secular humanism'" and thereby establishing religion.¹²¹

114. Bird, *supra* note 35, at 196-97 (footnotes omitted).

[T]he education of children is the prerogative not of the state but of the parents or church members. . . . [A]llowing the state to dictate the standards and procedures of Christian education jeopardizes the ability of parents and of church members to carry out their responsibility to God for the education of their children. The subjection of the Christian school to the control of the state . . . is, in effect, the subjection of the Christian homes and churches to secular domination. . . . [S]ecular control (even that which may appear benign) is incompatible with the aims of a spiritual ministry.

Id.; see PHILOSOPHY COMMITTEE, BOB JONES UNIV., *THE CHRISTIAN PHILOSOPHY OF EDUCATION* 5 (1978).

115. No. 88314, slip op. at 3 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

116. 604 F.2d 73 (1st Cir. 1979).

117. *Id.* at 79.

118. *Id.* at 78.

119. 440 U.S. 490 (1979).

120. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

121. *Id.* at —, 351 N.E.2d at 767 (dictum). An expert witness, Dr. Donald A. Erickson, Professor of Education at the University of Chicago, testified that "the standards are not

In the area of mandatory testing, however, funding has been a legitimate concern to the courts.¹²² A statute may not authorize state reimbursement to a private religious school for the administration of such tests without ensuring that such funding goes only towards secular services.¹²³ Where tests are prepared by the religious school, funding for the tests is not allowed.¹²⁴ In *Committee for Public Education & Religious Liberty v. Regan*¹²⁵ the Supreme Court recently held that where the state can ensure that only actual costs incurred by the private religious school in complying with state-mandated testing and reporting requirements are being reimbursed, such payment does not contravene the establishment clause.¹²⁶ While the New York statutory scheme in *Regan* provided for direct cash payment, the tests were prepared by the state, and the school had no control over the contents of the test.¹²⁷

B. State Law

1. The freedom of conscience provision of the North Carolina Constitution

State regulation of private religious schools is unconstitutional under state law if it abridges the right of conscience of parents, students, or churches.¹²⁸ Article I, section 13 of the Constitution of North Carolina provides, "All persons have a natural and inalienable right to worship Almighty God according to the desires of their own consciences, and no human authority shall, in any case whatever control or interfere with the right of conscience."¹²⁹

The right-of-conscience protection of a state constitution may impose an even greater limitation on the state's authority to regulate private religious schools than does the first amendment to the federal Constitution. The court in *Kentucky State Board for Elementary & Secondary Education v. Rudasill*,¹³⁰ in striking down a comprehensive regulatory scheme

neutral in that a philosophy of 'secular humanism' is espoused therein." *Id.* at __, 351 N.E.2d at 757. See also A. GROVER, OHIO'S TROJAN HORSE 56-69 (1977) (the Ohio minimum standards reflected secular humanist belief).

122. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 240 (1977) (state funding of nonpublic sectarian schools for diagnostic, therapeutic, remedial, and guidance services is permissible, but funding for instructional material and equipment involves excessive entanglement); *Meek v. Pittenger*, 421 U.S. 349 (1972) (state statute providing "auxiliary services" and loans of textbooks to children enrolled in nonpublic schools violated establishment clause); *Committee for Pub. Educ. & Rel. Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978) (state plan to reimburse nonpublic schools for expenses in testing and examining students and maintaining certain records violated establishment clause).

123. *Levitt v. Comr. of Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

124. *Id.* at 460.

125. 100 S. Ct. 140 (1980).

126. *Id.* at 848.

127. *Id.* at 847.

128. See N.C. Const. art. 1, § 13.

129. *Id.*

130. 589 S.W.2d 877 (1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

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136. *Id.*

imposed on a Christian school, recognized that a similar freedom-of-conscience provision under that state's constitution was "more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution as it has been applied to the states."¹³¹ The Kentucky constitutional provision referred directly to "[sending a] child to any school to which [a parent] may be conscientiously opposed."¹³² While the North Carolina provision makes no direct reference to schools, this distinction may be of no consequence. Christian schools, for example, are so pervasively religious that no difference in application should be possible.¹³³ Furthermore, the North Carolina Constitution's clause protecting the right of conscience is expressly incorporated into the state's new statute dealing with the private religious schools.¹³⁴ The apparent legislative intent was to protect, among other things, the right of conscience of parents who send their children to church schools, of children who go to church schools, and of churches and religious schools.

Intrusive state regulations interfere with the right of conscience in several different ways. A state regulation that requires textual material that offends beliefs and attitudes of children and teachers interferes with constitutionally protected rights of conscience.¹³⁵ A textbook approval requirement that results in the teaching of material which is conscientiously objectionable interferes with the religious liberty of students, parents, and churches. In *Rudasill* the Kentucky Supreme Court struck down that state's textbook-approval requirement under the state constitution's freedom-of-conscience provision.¹³⁶ The court noted:

The textual materials used in the public schools are at the very heart of the conscientious opposition to those schools. To say that one may not be compelled to send a child to a public school but that the state may determine the basic texts to be used in the private or parochial schools is but to require that the same may be fed in the field as is fed in the

131. *Id.* at 879 n.3.

132. See KY. CONST. § 5.

Right of religious freedom.—No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister or religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Id. (emphasis added).

133. See notes 198-201 *infra* and accompanying text.

134. See note 14 *supra*.

135. Kentucky State Bd. for Elem. & Secondary Educ. v. *Rudasill*, 589 S.W.2d 877 (1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

136. *Id.*

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The States' power to require that a teacher in a private religious school obtain a state certificate is also limited under section 13 of article I in North Carolina's Constitution. A teacher instills values and character into the students he or she teaches. A state certificate may require the elimination of teachers who, according to the beliefs of the particular religious sect, have the primary qualification of theological orthodoxy and require instead instruction by teachers who do not possess the desired theological qualifications. Many parents who are conscientiously opposed to the teaching of secular humanistic doctrine and values in public schools send their children to private religious schools in the belief that their children will receive in private schools proper educational and religious training. Any direct interference with the substance of this training violates their right of conscience, as well as that of students and churches. The court in *Rudasill* found that the State had reached too far under the state constitution's freedom-of-conscience provision, holding that teacher certification interfered with the parents' right of conscience.¹³⁸

2. The "other means" provision of the North Carolina Constitution

The North Carolina Constitution expressly recognizes the right of parents to have their children educated in a nonpublic school when it states in article IX: "The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means."¹³⁹

Article IX calls for the creation of a uniform system of public schools¹⁴⁰ under the supervision and regulatory authority of the State Board of Education and the Superintendent of Public Instruction.¹⁴¹ This constitutional authority to make regulations is limited to the public schools.¹⁴² No mention is made of providing for a system of private

137. *Id.*

138. *Id.*

139. N.C. CONST. art. IX, § 3 (emphasis added).

140. *Id.* § 2.

141. *Id.* § 4.

142. *State v. Williams*, 253 N.C. 337, 340-41, 117 S.E.2d 444, 447 (1969). The *Williams* court stated:

The Constitution of North Carolina provides that "schools and means of education shall forever be encouraged." Art. IX, S.1. Further, the State Board of Education shall have the power and duty "generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto." Art. IX, S.9. The constitutional authority of the State Board of Education to make regulations for and supervise and administer schools is confined to public schools and activities substantially affecting public schools and the public school system. It may have and exert only such authority in the supervision and control of private schools and their agents and representatives as is conferred by the General Assembly in the proper exercise of the police power of the state.

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schools.¹⁴³ The state constitution does not declare any state interest in private schools, but leaves the right to establish or attend private schools as one of the "rights retained by the people."¹⁴⁴ The State is limited under its general police power to the imposition of reasonable regulations on private schools in areas of public health and safety.¹⁴⁵ The court in *State v. Williams* established the following rule:

[T]he state has a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals, or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable, and (3) adequate legislative standards are established.¹⁴⁶

The court must view every statute in light of constitutional intent.¹⁴⁷ The North Carolina Constitution contains numerous provisions relating to religious liberty and education, evincing a commitment to both freedom of conscience¹⁴⁸ and universal compulsory education.¹⁴⁹ The State is thus limited by state, as well as federal, constitutional safeguards when it seeks to impose a minimum-requirement scheme on private religious schools.

III. ANALYSIS

Article 32A of the North Carolina General Statutes, dealing with private religious schools, manifests a recognition of the federal and North Carolina constitutional provisions and of prior case law safeguarding reli-

143. Section 5 in article IX of the North Carolina Constitution does not mention regulation of private schools. Section 5 provides:

Powers and duties of Board. The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. CONST. art. IX, § 5 (emphasis added).

144. Article I, section 15 of the North Carolina Constitution provides: "Education. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. Section 13 of article I further provides: "Other rights of the people. The enumeration of rights in this article shall not be construed to impair or deny others retained by the people." *Id.* § 13.

145. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960) (legislature may regulate private schools under the police power, but the "regulation must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals"); cf. *Columbia Trust Co. v. Lincoln Trust*, 138 Ky. 804, —, 129 S.W. 113, 115 (1910) ("[U]nless it can be shown that the establishment of [a private industrial school] is in some way inimical to the public safety, the public health, or the public morals, the act which forbids its operation [must be declared invalid].")

146. 253 N.C. at 345, 117 S.E.2d at 450.

147. *State v. Emery*, 224 N.C. 581, 585, 31 S.E. 658, 861 (1944) ("Every statute is to be considered in the light of the Constitution and with a view to its intent.")

148. See note 128 *supra*.

149. See note 143 *supra*.

gious liberty while ensuring the State's limited interest in a basic education.¹⁵⁰ The policy of the new statute combines freedom of conscience with pursuit of knowledge as it seeks to encourage freedom of religion along with education.¹⁵¹

The major provisions of the statute deal with school attendance, health and safety regulations, and mandatory testing. The most obvious change from North Carolina's prior regulatory scheme for private religious schools is the absence of the State's assertion of overall "approval" or "licensing" power, with its concomitant requirements for teacher certification and textbook approval.¹⁵² The statute seeks to satisfy the State's interest in a basic education for children while reducing the chance for burdens on free religious exercise. The primary effect of North Carolina's new statute is the restoration of government neutrality towards private religious schools.¹⁵³

A. Minimum Requirements Under the North Carolina Statute

1. Compulsory attendance

Section 115-257.2 of the North Carolina General Statutes requires private religious schools to maintain annual attendance and immunization records for every pupil. But no detailed administrative reports are required to be submitted to the State, thereby reducing governmental supervision which leads to excessive entanglement.¹⁵⁴ Also, there is no intrusive periodic report required that demands disclosure of nonessential information or that consumes excessive amounts of administrative time. The statute provides that mere "attendance by a child at any school . . . which complies with this article shall satisfy the requirements of compulsory school attendance. . . ." ¹⁵⁵ On first reading one might interpret the State's compulsory attendance law, G.S. 115-166, to be incorporated into the statute. This is not the case. Section 115-257.13 states that the requirements of article 32A (private religious schools) are exclusive and that the private religious school which complies with its provisions "shall be subject to [no] other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization."¹⁵⁶ The fact that G.S. 115-166 remains intact is of no consequence because it applies only to public schools and their students. Moreover, although the courts do not look favorably on repeals by implication,¹⁵⁷ the statute that is later in time will generally take precedence over an earlier statute be-

150. See note 46 *supra* and accompanying text.

151. See note 14 *supra*.

152. See notes 9-11 *supra*.

153. See note 113 *supra* and accompanying text.

154. See, e.g., *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1979). See also notes 116-18 *supra* and accompanying text.

155. N.C. GEN. STAT. § 115-257.2 (Cum. Supp. 1979).

156. *Id.* § 115-257.3.

157. *Person v. Garrett*, 289 N.C. 163, 166, 184 S.E.2d 873, 874 (1971).

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Mere attendance by a child, however, is not enough for parents to be in compliance with the compulsory attendance laws of North Carolina. The school must operate on a "regular" schedule during at least nine calendar months of the year. "Regular schedule" is not defined. Thus the school is not required by statute to operate on a strict 180-day schedule. There is no minimum or maximum day or hour requirement. It appears that the intent of the draftsmen was that the schools operate on a regular twenty-day-a-month schedule like the public schools, for nine months. The statute offers limited flexibility, allowing religious schools to operate with greater security and freedom, while it adequately safeguards the State's interest in education through inspection and mandatory testing.

"School" is not defined in the statute. It is likely that the drafters were referring to school in its ordinary meaning,¹⁵⁹ that of an organized, systematic plan of study by a group of instructors and pupils.¹⁶⁰ The statute does not, however, exclude the possibility of home instruction,¹⁶¹ particularly if the instructor has training in the appropriate field and meets the regular hours requirement. Article IX, section 3 of the North Carolina Constitution provides "that every child . . . shall attend the public schools, unless educated by other means."¹⁶²

The alternative to attending the public schools need not be a school similar in form to that of the public schools, but only a "school" which satisfies the State's interest in basic education in order to exercise the franchise. Section 3 explicitly refers to the end result of becoming educated. Neither the constitution nor the statute prohibits a parent educating his or her children at home, provided the State's interest in basic education is satisfied.¹⁶³ Should three or four parents decide they want to

158. *Bland v. City of Wilmington*, 276 N.C. 657, 661, 180 S.E.2d 813, 816 (1971).

159. See *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 882 (Ky. 1979) ("In its ordinary meaning the word 'school' denotes a place for systematic instruction in any branch or branches of knowledge."), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980); *Kesselring v. Bonnycastle Club*, 299 Ky. 585, 186 S.W.2d 402 (1945); *City of Chicopee v. Jackubowski*, 348 Mass. 230, —, 202 N.E.2d 913, 915 (1964).

160. *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 883 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980). See also *Benvenue PTA v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 620, 167 S.E.2d 538, 540-41 ("A school the court holds to be an institution consisting of a teacher and pupils . . . gathered together for instruction in any branch of learning, the arts or the sciences.") (citing *Weisse v. City of New York*, 178 Misc. 119, 32 N.Y.S.2d 258 (1941)), *appeal dismissed*, 275 N.C. 675, 170 S.E.2d 573 (1979); *St. John's Military Academy v. Edwards*, 143 Wis. 551, —, 129 N.W. 113, 114-15 (1910) ("The word 'school,' except when applied to a building or place, implies plural and consociation.")

161. The court in *Rudasill* held, after looking at the Kentucky constitutional debates, that the framers of the state constitution had specifically chosen not to permit education in the home. *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 883 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

162. N.C. CONST. art. IX, § 3.

163. Cf. *Michigan v. Nobel*, No. S-791-9114-A, slip op. at 8 (Mich. Dist. Ct. Dec. 12, 1979) ("[T]he State must have a compelling State interest, and no narrower alternatives, in applying the teacher certification requirement for home education. . . . No evidence has

train and teach their children in one of their homes, with a regular and systematic course of instruction based on religious belief, then such an undertaking would appear to constitute a "school" within the meaning of the compulsory attendance law. It would then be subject to, and protected by, the provisions of article 32A. The new North Carolina law minimizes state interference with religious liberty and conscience.¹⁶⁴ The State's interest in basic education is ensured through a required regular course of systematic instruction over a nine-month period. Mandatory standardized testing results are available for government inspection to ensure that the child's interest in an adequate secular education is being met. The form of the particular school need not be similar to that of the public schools, as *Yoder* clearly spells out.¹⁶⁵ Thus the potential for burdens on the right of free religious exercise¹⁶⁶ of private church schools under *Yoder* is minimized under the new statute. No detailed reports are required to be submitted to the State; thus entanglement problems are unlikely.

2. Fire, health, and safety inspections

Each school is further subject to reasonable fire, health, and safety inspections by the state.¹⁶⁷ The wording of the statutory provision differs from similar related statutes in other states in that the word "inspection" is used instead of regulation or law. From the plain meaning of the statute, the obvious intent of the drafters was that each school, not its children, shall be subject to general sanitation and safety laws, and not the more "personal" health laws which private church schools might find objectionable. This interpretation is clearly buttressed by G.S. 115-257.8, which states:

No school . . . shall be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization.¹⁶⁸

The State has a compelling interest in ensuring the safety of religious schools, like other buildings, from fire and epidemic disease.¹⁶⁹ This interest justifies safety and immunization requirements comparable to those of other public buildings. It does not justify more strict regulation than of businesses, amusement locations, and other public buildings. The Christian schools have been willing to submit to these laws as long as their requirements are reasonable, there is no burden on free exercise, and the requirements are not overly demanding but are the least burdensome

been introduced in this case that would demonstrate that the State has a compelling interest in applying teacher certification laws.")

164. See notes 128-38 *supra* and accompanying text.

165. 406 U.S. 205 (1972); see note 47 *supra* and accompanying text.

166. See generally notes 41-102 *supra* and accompanying text.

167. N.C. GEN. STAT. § 115-257.8 (Cum. Supp. 1979).

168. *Id.*

169. See note 94 *supra* and accompanying text.

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means of accomplishing these interests.¹⁷⁰ Under this statute, children in private church schools would be specifically excluded from any "personal" health laws imposed on public school students.¹⁷¹

3. Mandatory testing

At present, North Carolina is one of only two states that require their private religious schools to conduct mandatory tests.¹⁷² Private religious schools are required under the North Carolina statute to administer both a standardized test and a high school competency test. In allowing the school's chief administrator to select the nationally standardized test or equivalent measurement that must be administered to the children, the school is given greater "control" over the content of the test.¹⁷³ Thus the possibility for free-exercise infringement¹⁷⁴ or interference with conscience is greatly reduced. Private Christian schools have objected to the imposition of "secular humanistic" values through state testing programs involving state-selected tests.¹⁷⁵

The statute, by implication, requires private religious schools to fund these testing measures. The State is not authorized to reimburse the school for the costs of the tests and their administration. However, for those schools which such cost might unreasonably burden financially, and thus burden their free exercise of religion, G.S. 115-257.5 expressly allows the schools the option to participate in the high school competency testing and statewide testing programs.¹⁷⁶ Because the State does not directly finance private religious schools, there is no need for state supervision to guarantee that tests or portions thereof are not utilized for religious purposes, and thus there are no entanglement problems comparable to those in *Levitt*.¹⁷⁷ The statutes contain no detailed reporting requirements that would foster an impermissible degree of entanglement between church schools and state administrators.¹⁷⁸

No court of last resort has ruled on the validity of mandatory high

170. *Id.*

171. See text accompanying note 30 *supra*.

172. New York is the other state requiring testing.

173. See *Wolman v. Walter*, 493 U.S. 229, 249 (1977). The nonpublic school does not, however, determine the content of any particular test, which serves to avoid a school's use of the test as part of religious teaching and thereby to avoid that kind of direct aid to religion found present in *Levitt*. See *id.*

174. See notes 90-91 *supra* and accompanying text.

175. See K. KELLY, A CRITIQUE OF PERSONAL CONVICTIONS VS. NORTH CAROLINA LAWS 2 (1979).

176. See notes 26-27 *supra* and accompanying text. Section 115-257.5 provides: "Voluntary participation in the State programs.—Any such school may, on a voluntary basis, participate in any state operated or sponsored program which would otherwise be available to such school, including but not limited to the high school competency testing and statewide testing programs." N.C. GEN. STAT. § 115-257.5 (Cum. Supp. 1979).

177. 413 U.S. 472 (1973); cf. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 100 S. CL. 848 (1980) (direct cash reimbursement to parochial school for state-mandated testing and reporting requirement not in contravention of establishment clause).

178. See notes 116-18 *supra* and accompanying text.

school competency testing. At least one state supreme court has held that use of standardized tests was a legitimate and not unduly burdensome means to satisfy the state's interest in basic education.¹⁷⁹ In finding that standardized testing is not an unduly burdensome means of satisfying the state's interest, a requirement of high school competency testing might be struck down as unconstitutional under *Sherbert*.¹⁸⁰ In order for a student to graduate from a private religious school, he must pass the competency test.¹⁸¹ The State does not require that students graduate from the public high schools. Thus there is no compelling state interest in mandating that the religious school student pass a competency test in order to graduate from high school. However, the effect of such a requirement is negated by the statute's grant of authority to the school's chief administrator to set the minimum score on the test.¹⁸² In light of the Supreme Court's decision in *Yoder*, there is no compelling state interest in requiring state standardized or competency testing beyond the first eight grades. But the State might require testing beyond that grade level if it can show there is no burden on religious exercise and the testing bears a rational relation to a reasonable state interest. The competency test is effectively a limited form of disclosure. The test serves no real value other than to measure verbal and quantitative competencies of eleventh graders in private religious schools. It thus gives the State another gauge on the secular educational product of the schools. The Christian schools have voluntarily given these tests to their students.¹⁸³

The statute gives no indication of what the State might do should the students perform poorly on the tests. If such results were to occur, it would be difficult for a court in good faith to require the school to close down.¹⁸⁴ The State would then have to require public schools that fared poorly to close down. At any rate, church school students consistently do well on such tests and often surpass the performance of public school students.¹⁸⁵

179. *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudisill*, 589 S.W.2d 877 (Ky. 1979), citing *Wolman v. Walter*, 433 U.S. 229, 238 (1977), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

180. See *Sherbert v. Verner*, 374 U.S. 398 (1963); text accompanying note 42 *supra*.

181. Students in private religious schools tend to score higher than those in the public schools. Should a student be able to pass all of his required courses in the private school, and yet do poorly on the state-mandated competency test, a private school would almost certainly allow graduation; the statute gives that element of discretion to the private school administrator.

182. N.C. GEN. STAT. § 115-257.4 (Cum. Supp. 1979).

183. See K. KELLY, *STATE OF NORTH CAROLINA VS. CHRISTIAN LIBERTY* 66 (1979).

184. *Contra*, *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudisill*, 589 S.W.2d 877 (Ky. 1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980). "If the results [of the test] show that one or more private or parochial schools have failed to reasonably accomplish the constitutional purpose, the Commonwealth may then withdraw approval and seek to close them for they no longer fulfill the purpose of 'schools.'" *Id.* at 884.

185. See *Hinton v. Kentucky State Bd. of Educ.*, No. 83314, slip op. at 3 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudisill*, 589 S.W.2d 877 (Ky. 1979) ("[T]he educational

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Under this law the State may insure that basic subjects are being taught by the results of tests made available for their inspection. What the State may not do is empower public authorities to determine the scope of education in religious schools.

The administration of a high school competency test enables the State to check to see that each high school graduate possesses the necessary basic education needed to function in society.¹⁸⁶ The school must maintain records of these tests for reasonable annual inspection by the State. There are no detailed reporting requirements, thus reducing the possibility of serious entanglement problems.¹⁸⁷ Again, the school is given the option to select the nationally standardized test or equivalent of its choice, thus greatly reducing the possibility of free-exercise infringement or interference with conscience.

B. No Justification for Burden: Exemptions Under the North Carolina Statute

The State does not have a compelling interest in most regulations of religious schools. There is much doubt whether it has a compelling interest in establishment and maintenance of public schools,¹⁸⁸ but it certainly does not have that strong interest in private religious schools. In the delicate area of first amendment individual liberties, the court should apply the strictest scrutiny to see if the State's interest is compelling so that it requires denial of constitutionally guaranteed religious rights.¹⁸⁹

Churches that offer religious-centered education as an element of their ministries are protected from burdensome requirements. Sponsoring Christian churches, for example, believe they have a biblical mandate, which is part of their free religious exercise, to establish and maintain Christian education.¹⁹⁰ Church-operated schools are generally integral

product [of private Christian schools] is at least equal to if not somewhat better [than] that of the public schools, in pure secular competence."), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980). One HEW study noted:

[T]he basic Anchor Test Study finding that, on the average, nonpublic school pupils obtain considerably higher reading achievement test scores than public school pupils is in accord with previous research findings. One possibility is that nonpublic schools are doing a better job of teaching basic reading skills than schools in the public sector.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ADULT FUNCTIONAL COMPETENCY: A SUMMARY — 1975, *quoted in* K. KELLY, *STATE OF NORTH CAROLINA VS. CHRISTIAN LIBERTY* 53 (1979).

186. See generally note 91 *supra* and accompanying text.

187. See notes 116-18 *supra*.

188. See note 46 *supra*.

189. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

190. T. SMITH, *CHRISTIAN EDUCATION* 32 (1977) ("[P]arents [are] given the responsibility under God to see that [their] children receive the proper education to prepare them for this life and the life to come.") In dealing with matters of religious conscience, the examples used in this section are drawn from the basic beliefs of some Christian groups in North Carolina, who were the principal lobbyists for passage of North Carolina's new statutes and

parts of their sponsoring churches.¹⁹¹ Their superintendents are generally pastors or assistant pastors of the sponsoring churches; their teachers are generally members; and their doctrinal stances are generally set by the sponsoring churches.

Parents of Christian school students also believe they have a biblical mandate¹⁹² and a duty in conscience, which are part of their free religious

with whose beliefs the author is most readily familiar. The author does not intend to impute any of the beliefs discussed to all Christians or, indeed, to imply that article 32A applies only to Christian schools.

191. See, e.g., *NLRB v. Catholic Bishop*, 99 S. Ct. 1313 (1979), (NLRB's assertion of jurisdiction over church-operated schools would significantly risk infringement of the free-exercise clause and also exceed the jurisdiction of the Board); *Surinac v. Pesquera de Busquets*, 604 F.2d 73, 77 (1st Cir. 1979) ("The [private Catholic schools] are an integral part of the Catholic Church and as such 'involve substantial religious activity and purpose.'"); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1350, 1357 (M.D. Pa. 1978); *Hinton v. Kentucky State Bd. of Educ.*, No. 8314, slip op. at 2 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978) ("The Plaintiff pastors, parents and churches have established private religious schools as part of their respective churches. . . . The schools are a ministry of the respective churches."), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

192. E.g., *PHILOSOPHY COMMITTEE, BOB JONES UNIV., THE CHRISTIAN PHILOSOPHY OF EDUCATION* 5 (1978) ("Christians have a biblical mandate to educate in their homes and in their churches. . . . Christian parents or church members . . . may elect to form a Christian school. In doing so they are acting from religious conviction. To deny them . . . Christian education is to deny them the exercise of their religious convictions." See also *NLRB v. Catholic Bishop*, 99 S. Ct. 1313, 1319-20 (1979) (Catholic parochial schools are founded for religious reasons and religious doctrine is pervasive). Hence many Christians believe that parents, not the state, have the primary responsibility to provide a Christian education for their sons and daughters. Children are to be "under tutors and governors until the time appointed of the father," not the state. *Galatians* 4:2. Fundamentalist Christian leaders and parents believe that the future of the United States is directly related to and dependent on the education of its young people.

Christian education is not a new idea.

[In 1620] schools taught the Bible and colleges like Harvard, Princeton, and Yale were founded to train young men to preach the Gospel. [In 1837] the first public school was established. Horace Mann, a Unitarian, worked for a state-controlled educational system. The Bible was still taught in the public schools. [In 1905] John Dewey, the father of progressive education, introduced socialistic, anti-Christian philosophy in the schools. The Bible was separated from academic studies. [In 1933] the *Humanist Manifesto* [was] written by John Dewey and 33 other signers [enunciating] the doctrines of secular Humanism. God and the supernatural [were] rejected and replaced with man's reason and science. [In 1963] Bible reading in public schools [was] declared unconstitutional. The vacuum [was] quickly filled with textbooks on immorality, rebellion to parents, the occult and other teachings contrary to the Bible. [Since 1965, with the rise of Christian education], there are now over 10,000 Christian schools to combat the destructive education of religious humanism. A new Christian school is started every seven hours.

B. GOTHARD, 6 *INSTITUTE IN BASIC YOUTH CONFLICTS* 15 (1979). Some contemporary Christian leaders believe that the problems facing the United States are in large measure due to the teaching of secular humanism in the public schools. As Gothard notes, "If you only teach children what their rights are, you will promote a rebellion; but if you teach them what their responsibilities are, you will promote a revival." *Id.* at 3.

exercise,¹⁹³ to those schools. In their religious Christian school homes.¹⁹⁴ The Christian education

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193. See *Ste* 49 Wis. 2d 430, 4; U.S. 205 (1972); *H* County, Ky., Cir. believe that they) up in a religious schools of Plaintiff *in part sub nom.* S.W.2d 877 (Ky. 19 belief also protect also *Bird, supra n*

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exercise,¹⁹³ to send their children to Christian schools and to support those schools.¹⁹⁴ Parents delegate part of their responsibility for inculcating their religious precepts to their churches, which in turn establish Christian schools. Parents then complete that religious education in the home.¹⁹⁵ The parents willingly make economic sacrifices to secure Christian education for their children.¹⁹⁶

The school children's conscientious duty and desire for a Christian education and their full involvement in the pervasively religious life of the school are part of the students' free exercise of religion. Christian students feel they have a biblical mandate to seek a Christian education and to "study to show thyself approved unto God."¹⁹⁷

The curriculum of private church schools is pervasively religious.¹⁹⁸ Although more is taught in the Bible about some topics than about

193. See *Stevens v. Berger*, 428 F. Supp. 896, 905-06 (E.D.N.Y. 1977); *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539, 542 (1971), *aff'd sub nom. Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Hinton v. Kentucky State Bd. of Educ.*, No. 88314, slip op. at 6 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978) ("Plaintiff parents on account of religious convictions believe that they have a duty and a responsibility to insure that their children are brought up in a religious environment. . . . Plaintiff parents have enrolled their children in the schools of Plaintiff churches on account of their religious convictions."), *aff'd in part, rev'd in part sub nom. Kentucky State Board for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980). Free speech and belief also protect that right. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965). See also *Bird*, *supra* note 35, at 187.

194. See, e.g., *State v. Whisner*, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 756 (1976).

195. *E.g.*, PHILOSOPHY COMMITTEE, BOB JONES UNIV., *THE CHRISTIAN PHILOSOPHY OF EDUCATION* 7 (1978).

196. "Since most non-public schools charge tuition, it may be assumed that parents who send their children to such a school believe it has something to offer that is not available at the local public school and are sufficiently interested in their children's education to pay for this 'something extra.'" NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPT OF HEALTH, EDUCATION & WELFARE, *ANCHOR TEST STUDY: SCHOOLS, CLASSROOM, AND PUPIL CORRELATES OF FIFTH GRADE READING ACHIEVEMENTS* — (1975), *quoted in K. KELLY, STATE OF NORTH CAROLINA VS. CHRISTIAN LIBERTY* 53 (1979).

197. 2 *Timothy* 2:15; see note 187 *infra*.

198. See *State v. Whisner*, 47 Ohio St. 2d 181, 200, 351 N.E.2d 750, 762 (1976) (the sponsoring church and religious school have "an abiding religious conviction that Biblical training is essential to the proper inculcation of spiritual and moral values into their youth" and a "total religious compulsion that their offspring be educated in the word of God according to their religious scruples"); PHILOSOPHY COMMITTEE, BOB JONES UNIV., *THE CHRISTIAN PHILOSOPHY OF EDUCATION* 6-7 (1978). The Philosophy Committee writes:

[T]he Bible is the center of the Christian-school curriculum. The Bible is not only the most important subject matter but also the source of the principles determining the other subject matters and the way in which they are taught.

The presentation of biblical truth is thus not confined to a single segment of the curriculum . . . but diffused throughout the teaching of all subjects.

Id. See also T. SMITH, *CHRISTIAN EDUCATION* 14-16 (1977) ("Christian education is that education which is Christ-centered, Holy Spirit controlled, pupil related, socially applied with a Bible-based foundation. . . . Christ is the center of life and the message of Christian education.") *Cf. Bob Jones Univ. v. United States*, 468 F. Supp. 890, 895 (D.S.C. 1978) (Plaintiff's Biblical beliefs permeate every facet of the institution.), *appeal docketed*, No. 79-1293 (4th Cir. May 17, 1979); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1352 (M.D. Pa. 1978) ("[T]he Catholic faith and morals permeate and pervade the whole school.")

others, all subjects are based upon the Bible and are tested by the Bible.¹⁹⁹ No distinction is possible between sacred topics, not subject to regulation, and secular topics eligible for regulation.²⁰⁰ In those cases where the state regulatory scheme has been found to violate the free-exercise or establishment clause, the courts have recognized explicitly or tacitly that the providing of a religious education is an integral part of the ministry of the sponsoring church.²⁰¹ Though the United States Supreme Court has recognized the state has a proper interest in the private school's performance of its basic educational functions, difficulty arises in attempting to separate the "secular" from the "sacred."²⁰² The Court in *Meek v. Pittenger*²⁰³ said, "It would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church related schools."²⁰⁴ Attempts to separate these functions have generally been unsuccessful.²⁰⁵ In seeking to ensure that only a purely secular function is being aided or regulated, the state may easily involve itself with excessive entanglement under an establishment-clause analysis.²⁰⁶

The North Carolina statute protects the religious liberty of its religious schools by specifically exempting them from a number of burdensome regulations. The schools are not subject to licensing, textbook-approval, or teacher-certification requirements. Licensing is objectionable in the Christian school context because it presupposes that the State may

199. T. SMITH, CHRISTIAN EDUCATION 19-20 (1977) ("[T]he basis for all Christian education is the Word of God. . . . All teaching is done with Biblical principles in mind. No method, subject, or activity is used unless it meets the standards of God's Word.")

200. E.g., *New York v. Cathedral Academy*, 434 U.S. 125, 129-30 (1977) (detailed inquiry by the state into the "subtle implications" of classroom materials of sectarian school constitutes significant encroachment on protections of first and fourteenth amendments).

201. See note 191 *supra*.

202. State support of certain aspects of maintaining a school which are recognized as secular has been approved by the Supreme Court. The Supreme Court, using the child-benefit theory, has sustained state reimbursement of parents for bus fares to send children to church schools. *Everson v. Board of Educ.*, 330 U.S. 1 (1946). And in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the use of tax funds to furnish secular textbooks for pupils in private schools was held constitutional.

203. 421 U.S. 349 (1975).

204. *Id.* at 365.

205. See *Hinton v. Kentucky State Bd. of Educ.*, No. 88314 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978), *aff'd in part, rev'd in part sub nom. Kentucky State Board for Elem. & Secondary Educ. v. Kudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); *Vermont v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976). The Kentucky court invalidated all regulation of teaching performed in private Christian schools. The court in *Whisner* did not go as far. See generally Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education*, 67 Ky. L.J. 415, 416 (1979); Note, *Public Regulation of Private Religious Schools*, 37 Ohio St. L.J. 899, 925 (1976).

206. E.g., *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("[R]eligion is so pervasive that a substantial portion of [religious school] functions are subsumed in the religious mission."); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("[T]he parochial schools constituted 'an integral part of the religious mission of the Catholic Church.' . . . In short, parochial schools involve substantial religious activity and purpose.")

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Bird, *supra* note 3 1933, at 1, 1-4, *rep* 61 (1979)). See *ger witz*, *The Making* FERDINE L. REV. 10 braced ethical re situational.'"); *Wl manism and its Fi* preme Court in *Te* grants the same p Court said in dict "religion" covered teach what would Taoism, Ethical C Board of Educ., 33 clause). The Court United States v. Si

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prohibit—as well as authorize—this form of religious exercise. Christian schools and supporting parents believe that God has already licensed Christian education.²⁰⁷

The statute does not require the religious school to comply with a textbook-approval requirement. Such a requirement is objectionable to the Christian schools, for example, because it ignores the fact that the Bible is the center and source of all that is taught in the private Christian school.²⁰⁸ For the state to require textbooks that are not biblically based burdens students' and parents' free religious exercise.²⁰⁹ Parents send their children to church schools to acquire an education based on a biblical foundation.

In addition, a burdensome teacher-certification requirement is not imposed on private religious schools. Christian schools, for example, view their teachers as church staff workers, and the primary qualification is the biblical soundness of the teacher's theology. State certification may exclude many or even a preponderance of potential instructors who have graduated from unaccredited colleges but have the requisite theological qualifications. A certificate is not related to that primary qualification and may even reflect the absence of theological acceptability because the teacher certificate generally reflects study of various secular education courses that are viewed as "humanistic"²¹⁰ and unscriptural. Many educa-

207. *Matthew 28:19-20* (Christ commanded: "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost: Teaching them to observe all things whatsoever I have commanded you: and, lo, I am with you always, even unto the end of the world.") Indeed, the Christian mission is education.

208. See note 199 *supra*.

209. See notes 70-73 *supra* and accompanying text.

210. "Religious humanism" or "secular humanism" has been defined

as believing the universe and man to be the result of an evolutionary process without creation; rejecting any "supernatural" basis for values and formulating values with the scientific method; seeing man's purpose as "the complete realization of human personality" and achievement for human satisfaction; and ushering in a "socialized and cooperative economic order" in place of a free enterprise economy.

Bird, *supra* note 35, at 182-83 (quoting *A Humanist Manifesto*, *NEW HUMANIST*, May-June, 1933, at 1, 1-4, *reprinted in HUMANIST*, July-Aug. 1962, at 130, and 4 *RELIGIOUS HUMANISM* 61 (1979)). See generally O. McGRAN, *SECULAR HUMANISM AND THE SCHOOLS* (1976); Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 *PEPPERDINE L. REV.* 105, 122 (1978) (in public schools, "modern values education has . . . emphasized ethical relativism and its holdings that values are 'relative, personal, [and] situational.'"); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 *TEX. TECH. L. REV.* 1 (1978). The Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961), held that the free-exercise clause grants the same protection and imposes the same limitations on nontheistic religions. The Court said in dictum that humanism, atheism, and ethical creeds are included within the "religion" covered by the religion clauses: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11. Cf. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (religion of "[n]onbelievers" protected by free-exercise clause). The Court has also defined religion as including humanistic and nontheistic faiths. *United States v. Seeger*, 380 U.S. 163, 166 (1965) (ethical creed with skepticism toward exist-

tional experts question whether a certificate based on an earned degree has any relation to pedagogical ability or subject-area knowledge, particularly because most state certificates enable the instructor to teach in any field.²¹¹ A high school teacher with a bachelor's degree in mathematics from an unaccredited college may be a far superior instructor to an individual with a doctorate in business administration or education who teaches mathematics. And a grammar school teacher without a college degree may be a far more effective reading and arithmetic instructor than a person with a bachelor's degree but no innate teaching ability.²¹²

Education of children at common law was the responsibility of parents and not of the state.²¹³ Education is important to the state only insofar as it is necessary to prevent economic dependence on society through inability to find gainful employment and perhaps, to ensure minimal knowledgeability in exercising the franchise.²¹⁴

The state has a legitimate, and perhaps compelling, interest in ensuring that basic education in reading, writing, arithmetic, and patriotism is offered in church schools.²¹⁵ The state does not have a compelling interest

tence of God comes within statutory religious exemption). Cf. *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'")

211. See Erickson, *Freedom's Two Educational Imperatives: A Proposal*, in *PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS* 159 (1969) ("The weight of evidence suggests, obviously, that most preparation programs for school administrators have very limited outcomes and may even create a trained incapacity for the job.") Erickson, who is a professor of education at the University of Chicago, writes of certification requirements:

The main reason for the demand for certification is, obviously, that educators, like virtually every other organized occupational group, want to control access to their profession. It may be true, in addition, that in public schools, where large numbers of personnel must be processed, some fairly arbitrary guidelines are unavoidable. But why impose these questionable practices on nonpublic schools as well? There ought to be a few small pedagogical islands where it is possible to prepare and utilize personnel in new and imaginative ways.

Id. at 168 (footnotes omitted). See also *Michigan v. Nobel*, No. S-791-0114-A (Mich. Dist. Ct. Dec. 12, 1979) (testimony of Professor Erickson that teaching certificate has no clear relation to teaching competence or quality).

212. See Bird, *supra* note 35, at 193 n.311.

213. See note 74 *supra*.

214. See *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d (Ky. 1979), cert. denied, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

215. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (recognizing "the power of a state . . . to impose reasonable regulations for the control and duration of basic education"). The Court on the prior page identified basic education with the "three R's" and with "elementary education." *Id.* at 212. In *Board of Education v. Allen* the Court said, "The State . . . has a proper interest in the manner in which [private] schools perform their secular educational functions." 392 U.S. 236, 247 (1968). See Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125, 194 (1979); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 60 CAL. L. REV. 871, 957 (1977). See generally T. SMITH, *CHRISTIAN EDUCATION* 34-36 (1977) ("[The Christian school] places a strong emphasis on reading, . . . math, . . . history and geography, . . . and English grammar. . . . In a day when the American Flag is scorned and draft cards are

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in further requirements for curriculum, textbooks, and teachers. Because licensing, subject, textbook, teacher-certification, and intrusive reporting requirements burden free exercise but lack any compelling state interest, such regulations are prohibited by the free-exercise clause.

CONCLUSION

The new North Carolina statute dealing with private church schools manifests a careful recognition of religious and parental rights under the North Carolina and federal Constitutions, with an eye on prior United States Supreme Court and state court decisional law. It recognizes both the State's limited duty to see that children are offered a basic education and the primary parental responsibility to provide a child with a proper education and religious training. The statute adequately assures that the State's interest in education is being met by the standardized testing program. The court may, however, strike down the competency testing provision, finding that standardized testing is the least burdensome means under *Sherbert*.

North Carolina, in the passage of its new law dealing with private religious schools, has sought to protect its interest in the "things that are Caesar's" by ensuring that each child receives a basic education to enable him to obtain gainful employment and to exercise the franchise. By recognizing that "Caesar" has no right to touch one's conscience, the statute "renders unto God the things that are God's" and protects constitutionally guaranteed religious liberty and freedom of conscience. North Carolina has set a bold precedent for other states, should they wish to formulate a deregulatory scheme to protect religious liberty and personal rights.

J. ERIC EVENSON II

COMMUNITY CARE FACILITY LICENSING

PURPOSE

Children by their very nature are dependent. Children and dependent adults survival and their physical, intellectual, and social development depend on the love, care, and protection of others. Alaska child care facilities are licensed to care for 9,641 children. In addition, adult facilities are licensed to care for 276 dependent adults.

The purpose for regulating day care and residential facilities providing care for children or dependent adults is to reduce predictable risk to their health and safety and to ensure adequate programs and opportunity for development. Licensing establishes a floor of quality which must be met for a program to be permitted to operate.

THE STATUTE

The licensing law, AS 47.35, contains the language prohibiting the operation of a child or dependent adult facility without a license. It specifies the types of facilities that are regulated by the State. These include, day care centers, family day care homes, residential child care facilities, child foster homes, adult residential care facilities, adult foster homes, and child placing agencies. The statute gives the authority to regulate to the Department of Health and Social Services where the direct responsibility has been delegated to the Division of Family and Youth Services in the Department. Regulations are authorized to implement the broad language of the statute by establishing statewide standards. Some standards are based on the knowledge that certain practices are necessary to promote health, safety, and well being, and other practices, if permitted, would be detrimental to those in care.

REGULATIONS

Most regulations were designed to reduce predictable risk to health and safety. These include fire, sanitation, and equipment safety; planning for evacuation, handling serious illness, or serious injury, and reporting child abuse; assuring sufficient numbers of careprovider adults and emergency back-up staff; ensuring that careprovider adults have adequate background or preparation for child or dependent care and tuberculin clearance; ensuring that dietary needs are met, immunizations are current, medical care is provided, when needed, and emergency reports are provided to persons responsible; ensuring that medicines, poisons, guns and other hazardous objects are in a place inaccessible to children and adults with impaired judgement; ensuring discipline and behavior management are acceptable and that persons in care are not humiliated, shamed, frightened, locked up, or force fed.

Some regulatory standards are designed to promote appropriate developmental opportunities. A toddler who is routinely left in a playpen for long periods of time without adult contact and without toys or other materials is safe, but is deprived of adequate developmental opportunities. Developmental standards are few, but are of significant importance. Each set of regulations requires a program that provides a balance of quiet and active, group and individual activity. Opportunities for intellectual and social development, correcting problem behaviors, and appropriate recreational, cultural, or religious activity are required. There is special emphasis on maintaining or enhancing parental or other relative contacts. Materials and equipment must be available in sufficient number and appropriate to the development needs of persons in care and the program. Indoor and outdoor footage must be adequate.

Parents of infants and children in day care facilities have quite a lot of opportunity to observe their children in care, so the need for regulation is not as extensive as in 24-hour care of children. In order for parents or other relatives of children or dependent adults to make an informed judgement about the appropriateness of a program for their child or relative, they need certain information. The most important consumer protection provision in each set of regulations is the requirement that policies and the specifics of a program be presented and explained to parents and agency personnel prior to the admission of a child or dependent adult. In residential facilities pre-admission planning and placement agreements are an essential consumer protection.

THE LICENSING PROCESS

Most licensing studies are performed by licensing specialists located in six regional locations. Some home-sized facility licensing is performed by Division field office staff. Approved public or private agency staff perform some child foster home studies. The number of facilities licensed in January of 1983 was 1,365.

For information and planning assistance, individuals contact a regional or field office of the Division. In many communities there are monthly or semi-monthly meetings to familiarize potential applicants with licensing requirements and procedures. In one community, pre-licensing foster care training is being conducted. For a residential facility or a day care center, one year of planning and organization prior to opening is realistic. Except in emergency circumstances, 60 days is appropriate for planning and licensing prior to the opening of a home-sized facility.

An applicant generally submits an application form that requires a number of supporting documents such as a report of tuberculosis clearance, an authorization to conduct a background check including references and a law enforcement clearance, background applicant information, plans for operation, facility forms, and an operational manual, if required. In home-sized facilities the applicant is visited by a licensing specialist who inspects the home and discusses the applicants background and plans to provide care and to otherwise meet the requirements. For the larger facilities the specialist also requests inspections by appropriate fire safety and environmental health authorities. The prelicensing and review process in larger facilities may entail several visits by a specialist and include file reviews, policy reviews, program observation, and interviews with parents, staff, and placing agencies. Generally, within 60 to 90 days of receipt of an application when there has been adequate planning and after the study and inspection to verify compliance with requirements, a license is issued. There are no fees for an Alaska Community Care Facility License.

Specialists also provide professional consultation to facilities and agencies to upgrade the quality of services. Because of their unique position of knowledge about community facilities, they also serve as referral resources to families, social service staff, and others in selecting an appropriate facility for an individual child or adult, and in stimulating related community support services for facilities and agencies.

FAIR TREATMENT

While licensing protects children, dependent adults, and their families, the Administrative Procedures Act, AS 44.62, has built-in procedures which ensure that laws, such as the Licensing Statute, will be administered fairly. The rights of those regulated include, the right to notice if the requirements, notice of non-compliance, and reasonable time limits for corrections, receiving information on how to achieve correction, equitable enforcement, and access to administrative hearings and court decisions. Consultation from the Division is offered to new programs and to programs that have experienced difficulty following licensure.

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 14, 1983

SUBJECT: Regulation of religious schools
(CSHB 357 (HESS))

TO: Representative Milo Fritz
Chairman, Health, Education, and
Social Services Committee

FROM: Keith E. Levy *KEL*
Legislative Counsel

Enclosed is a copy of CSHB 357 (HESS), relating to the regulation of religious schools. The bill raises a number of constitutional questions. Because these constitutional requirements must be balanced against one another, there is virtually no way to guarantee that the bill is valid. In my opinion, however, the bill does a good job of balancing the constitutional requirements and is probably not unconstitutional.

In regulating religious schools, the state must consider the "free exercise" and "establishment" clauses of the state and federal constitutions. These provisions essentially prohibit the state from unduly burdening the free exercise of religion and from becoming so involved in the regulation of religious schools as to encourage or inhibit religious activity. On the other hand, the "equal protection" clauses of the state and federal constitutions require the state to justify treating religious schools differently from other private schools. Moreover, while the state may not excessively regulate religious schools, it also has an obligation to provide a reasonable education to school age children. Reconciling these different interests with one another is no easy task and it is difficult to predict which of these will take precedence in the courts.

CSHB 357 (HESS) exempts certain religious schools from all state laws and regulations relating to education except laws concerned with health, fire safety, immunization, and physical examinations if the schools agree to comply

schools from all state laws and regulations relating to education except laws concerned with health, fire safety, immunization, and physical examinations if the schools agree to comply

with certain minimal statutory requirements. The schools affected by the bill are those that are operated by a church or other religious organization that is exempt from federal taxation and do not receive state or federal funding (AS 14.45.040). Children attending these schools are exempt from the state's compulsory attendance law (AS 14.30.010). The schools that opt to comply with the minimal statutory requirements must maintain attendance and enrollment records (AS 14.45.030(b)), notify the public school superintendent if a child is no longer enrolled or attending (AS 14.45.-030(b)), administer a nationally standardized test to be selected by the individual schools that measures English grammar, reading, spelling, and mathematics (AS 14.45.035), and operate on a regular nine month schedule (AS 14.45.-030(c)). Parents of children attending these schools must file enrollment and attendance records with the local public school superintendent (AS 14.45.030(b)). Religious schools that choose not to comply with these standards remain subject to the same regulations as all other private schools.

The First Amendment to the United States Constitution and Article I, section 4 of the Constitution of the State of Alaska provide

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

The free exercise clause has been interpreted to mean that the state may not unduly burden the right of a parent, child, or church to freely exercise a particular religion, unless the state can show a compelling state interest. Sherbert v. Verner, 374 U.S. 398 (1968). Even when the state can show a compelling interest in regulating religious schools, it must also show that the regulation is by the least burdensome means.

CSHB 357 (HESS) allows the state to regulate health and safety standards, to require certain standardized tests, and to assure regular attendance by the children. None of these requirements appears to be unduly burdensome on the free exercise of religion. The state clearly has a compelling interest in maintaining health and safety standards and these standards, if reasonable, generally have no connection to the exercise of religion. The interest justifying the standardized test requirement is the state's obligation to provide an education for children. The requirement is not unduly burdensome because the individual schools are

permitted to select the test of their choice provided that the test measures achievement in certain basic areas. Beyond that, the bill does not regulate curriculum in the religious schools. Finally, the bill requires certain attendance reports from the schools and the parents of children attending them. Again, the reporting requirements are minimal and are justified by the state's interest in assuring that the children are receiving an education. Accordingly, the bill probably does not infringe on the right to the free exercise of religion.

The analysis of the bill under the establishment clause is similar to that under the free exercise clause. Legislation must be substantially neutral toward religion. Epperson v. Arkansas, 393 U.S. 97 (1968). Excessive entanglement in the regulation of religious organizations is not permitted. Lemon v. Kurtzman, 403 U.S. 602 (1971).

The bill minimizes the state's involvement in regulating religious schools by exempting them from the state's general education regulations if the schools agree to comply with certain minimal standards. Of these standards, the only one that might present a problem by excessively involving the state in the regulation of religion is the attendance reporting requirement. In Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979), the court found state requirements that religious schools release extensive financial and other data unconstitutional. The statute challenged in that case can be distinguished from CSHB 357 (HESS), however, because the bill only requires attendance reports, the reports must be released by the parents, and they can be justified by the state's obligation to ensure that children receive an education. The attendance reports are probably not an excessive entanglement by the state in the regulation of religious schools.

The equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, section 1 of the Constitution of the State of Alaska require the state to justify the statutory creation of a class based on religion. The classification

. . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976).
CSHB 357 (HESS) creates a class of religious schools which are exempt from most state regulations that apply to other private schools. Since the exemptions are substantially tied to the free exercise of religion, however, they can be justified on the basis that there is a substantial relationship between the exemptions and the goal of the legislation. Only if the exemptions were not tied to the exercise of religion or some other valid governmental purpose would the bill violate the equal protection clause.

The bill's deregulation of religious schools may raise a problem with respect to the state's obligation to provide an education to all children in the state. It is not clear, however, that this obligation is mandated by the constitution. Article VII, section 1 of the Constitution of the State of Alaska provides, in part,

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions.

It is not clear whether this provision merely obliges the state to provide the opportunity for an education to all children of the state, or if it includes the obligation to ensure that they actually receive an education. If the latter is true, then the state would be restricted in the degree to which it may deregulate religious schools. Even if that is the case, however, CSHB 357 (HESS) probably does impose sufficient requirements on the religious schools to ensure a minimal level of quality of education. Thus, the bill probably does not violate any obligation the state has to provide an education to children in the state.

In conclusion, CSHB 357 (HESS) is probably constitutional although the necessary balancing of constitutional requirements makes it difficult to be certain of this. Ideally, legislation regulating religious schools will place minimal burdens on the schools and require minimal state involvement while requiring the schools to meet minimal educational requirements to ensure that the children are receiving an education. In my opinion, the bill successfully strikes this balance.

KBL:ljb
20/002



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

May 13, 1983

MEMORANDUM

TO: Representative Sam Pestinger

FROM: Leslie Longenbaugh *L*
Research Staff

RE: Other States' Regulation of Religious Schools
Research Request 83-159

Ed Essa of your staff asked that we provide information about states that regulate religious and other nonpublic schools differently. My preliminary work, provided to you on May 4, revealed five states that exempt religious schools from some state regulation to which other nonpublic schools are subject. Upon further investigation, I found significant differences in regulation in only three states: Maryland, North Carolina and Tennessee. Below is a brief description of the statutory distinctions made by each state; I have attached copies of the pertinent state statutes.

Maryland

Maryland requires that private "noncollegiate" schools obtain a state certificate of approval before they may operate in the state. The issuance of such a certificate of approval is contingent upon the state board of education's finding that the "facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate" for the type of school.¹

Specifically exempted from the requirement of a certificate of approval are all institutions "operated by a bona fide church organization..."² Schools that come under this exemption may not receive any state funds other than funds for the state food service program.

All private noncollegiate schools in Maryland, including the religious schools that are exempt from the certificate of approval, must make annual reports of their enrollment and courses of study.³ In addition,

¹ Annotated Code of Maryland, Education § 2-206 (e)(2).

² ACN § 2-206 (3)(4).

³ ACN § 2-205.

Representative Pestinger

May 13, 1983

Page 2

they must conform to a state law that requires private schools that are ending operation to furnish to the state the academic records of all past and present students.

North Carolina

North Carolina in 1979 enacted a statute which has served as a compromise between the competing interests of religious schools and states.⁴ For the purposes of state regulation, the law creates three types of legal nonpublic schools: 1) religious schools, defined as "private church schools or schools of religious charter"; 2) "qualified nonpublic schools" -- these institutions are either accredited by the state or an association or receive no state funds; and 3) "proprietary schools," or nonpublic schools that are operated for profit.

Schools in the first and second classifications above (religious institutions and other nonpublic schools) share the following requirements:

- a) notice to the state of the intent to begin or cease operation;
- b) maintenance of annual attendance and disease immunization records for all students (there is no requirement that these records be submitted to the state);
- c) operation on a regular schedule during at least nine months of the year;
- d) subjection to reasonable fire, health and safety inspections as required by law;
- e) administration of nationally standardized tests for all students in the first, second, third, sixth and ninth grades;
- f) administration of nationally standardized tests for all students in the eleventh grade and establishment of minimum standards for achievement on the test before graduation.

In addition, schools of these two types may choose to participate in any state-operated or -sponsored program which is available to other nonpublic schools. The statute adds that no other state laws, except health, fire and safety laws, are applicable to these schools.

Apparently, North Carolina is one of only three states that require standardized testing for students of religious schools (New York and

⁴ General Statutes of North Carolina, § 115C-547 through § 115C-554.

South Dakota are the other states). In North Carolina, the chief administrator of the religious school may choose the test, rather than having the state select the tests to be given. The tests need cover only the basic secular skills -- grammar, reading, spelling and mathematics. Records of the test scores must be available for state inspection for one year following the test.

Nonpublic schools that are operated for profit must obtain a license from the state annually. The state board of education is charged with promulgating and enforcing regulations and standards governing approval and licensure. By law, the reports solicited must include detailed information regarding curricula, costs, and instructional space. In addition, the schools must post a bond of \$1,000.⁵

Another difference in the requirements for licensed and exempt nonpublic schools in North Carolina is the certification of their staff. While North Carolina is one of the few states that require nonpublic-school teachers to be certified, teachers in religious schools are exempt from this provision.

Tennessee

The Tennessee Department of Education, by regulation, requires that all nonpublic schools report the name, age and address of all students to the local public school superintendent for the purposes of ensuring compliance with attendance laws.⁶ Otherwise, state law requires only that the department of education inspect, approve and classify those primary, secondary and pre-elementary nonpublic schools that request such services. The approval is to be according to the standards that are used for the state's public schools.⁷

In 1976, the Tennessee legislature enacted legislation which prohibits the state and local boards of education from regulating the selection of faculty, textbooks or curricula of "church-related schools." The law requires that these schools meet the standards of accreditation of at least one of four nonpublic school associations. The law does require that the terms of church-related schools be as long as the public schools'.⁸

⁵ GSNC §115C-570.

⁶ Donald Wood, Chief of Management Services, Tennessee Department of Education, Nashville; telephone: 615/741-2731.

⁷ Tennessee Code Annotated, 49-105 § 19.

⁸ TCA 49-5201.

Representative Pestinger

May 13, 1983

Page 4

The statute adds that children who attend church-related schools may transfer into the state's public school system; however, the public schools may test such students and place them at a grade level that is indicated by the results of the test.

Like other nonpublic schools in Tennessee, church-related schools may apply for state approval, and many do. Of approximately 440 nonpublic schools in the state, roughly 160, both religious and secular, have received state approval.⁹

Case Law

Mr. Essa mentioned an interest in the case law about the regulation of religious nonpublic schools. I have enclosed a copy of a law review article written about North Carolina's regulation of religious schools; this article contains a concise overview of the findings of the United States Supreme Court and state courts of last resort.

* * *

If you have any questions or further needs for research, please call on us.

LL

Attachments: Annotated Code of Maryland, Education, § 2-205, § 2-206,
§ 2-304
General Statutes of North Carolina, Articles 39 and 40
Tennessee Code Annotated, Chapter 52 and § 49-105
J. Eric Evenson II, "State Regulation of Private Religious Schools in North Carolina -- A Model Approach,"
Wake Forest Law Review, Vol. 16 1980, pages 405 to 437

⁹ Donald Wood, Tennessee Department of Education.

Alaska State Legislature



IN SESSION:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4949

BOX 142
EAGLE RIVER, ALASKA
99577

Representative Randy Phillips

HOUSE DISTRICT 15

MEMORANDUM

TO: Senator Joe Josephson
Chairman, Senate HESS Committee

FROM: Representative Randy Phillips

DATE: May 25, 1983

RE: CS HB 357 (RLS)

During the House floor debate on the captioned bill, Representative Koponen and I offered the attached amendments for consideration. These amendments failed the House.

The amendments were offered so that this bill would apply equally to all nonprofit private schools (to include religious schools). I have some real concern that the bill as is presently drafted could open the door to some lawsuits concerning the constitutionality of singling out religious schools for special treatment. It was my feeling that by extending the provisions to all nonprofit private schools, this problem could be avoided.

I would appreciate it if you and your committee would take the attached amendments into consideration when you review this legislation.

If you have any questions, please do not hesitate to contact me.

RECEIVED

MAY 25 1983

Josephson,

NEA - ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

Jean Krauss, President

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Don Cheng
Past President
Box 1064
Kenai, Alaska 99511

May 12, 1983

Gayle Pierce
President Elect
SR Box 51377
Fairbanks, Alaska 99701

TO: House HESS Committee

FROM: NEA-Alaska

Bill Potter
NEA State Director
177 Fenlands Avenue
Juneau, Alaska 99801

RE: HB 357

Bob McInerney
Region I Director
Box 1015
Sitka, Alaska 99585

NEA-Alaska members wanted to participate in this teleconference for HB 357; but, because of the timing of the teleconference to fall during the peak hours of the school day, in every region of Alaska, they find themselves unable to testify. Therefore, on behalf of over 6,000 teachers NEA-Alaska submits this written testimony in opposition to HB 357 "An Act relating to the regulation of religious schools".

Karen Cobble
Region II Director
SR Box 1000
Juneau, Alaska 99801

Our opposition is premised both on constitutional and educational grounds.

Griffin Wood
Region III Director
Box 1
Garden Valley, Alaska 99546

The State of Alaska is not and cannot be concerned with instruction in sectarian, religious matters; but in non-sectarian disciplines such as mathematics, science, English, history, civics, physical and vocational education, etc. the state is and must be concerned. The Alaska State Constitution in Article I, Section I, "Inherent Rights", states:

Frank Parker
Region III Director
Box 1000
Juneau, Alaska 99801

"SECTION 1. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

Jean Robb
Region IV Director
Box 100
Ketchikan, Alaska 99901

HB 357 removes all oversight and regulation by the State for those educational programs offered by religious institutions who do not receive federal or state funds. In doing so, HB 357 forces the State to abdicate its responsibility in the education, health and social services of youngsters enrolled in religious schools. The State of Alaska will not be able to ensure that religious school students are enjoying equal rights, opportunities and protections under the law:

Roy Wilson
Region IV Director
Rt. 1, Box 1000
Haines, Alaska 99827

Chick Smith
Region V Director
Box 100
Fairbanks, Alaska 99701

Pat Abney
Region VI Director
Box 481 SRA
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Section 14.45.030 as amended denies the State the power to receive and examine reports about the educational programs offered in religious schools;

Section 14.30.010 (b)(1)(D) and Section 14.45.030 as amended denies the State to compel attendance in an educational program offered in religious schools;

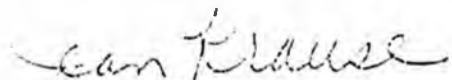
Section 14.30.010 (b)(1)(D) as amended denies the State the authority to ensure the presence of competent and capable staff who meet established criteria to teach in the State of Alaska.

These amendments serve to weaken substantially our educational system in Alaska. It appears to us that this bill sets the stage for anarchy: any religious order could establish and maintain any "educational" program it wanted to, even if that program did not include basic instruction in reading, math, science, etc., or require that pupils attend. It is conceivable and probable that this piece of legislation, if enacted, could create whole groups of citizens who have received no instruction in basic skills and/or in disciplines essential to one's ability to function in a democratic and technological society.

We cannot condone this abrogation of the State's authority to oversee and regulate the education of all its citizens. Whether or not a religious school receives federal or state funds is immaterial; the overriding consideration is the education of our youth. It seems most ironic that at the same time the National Commission on Excellence in Education and The Twentieth Century Fund both call for higher, more stringent standards this bill gives broad latitude to diminish educational standards in Alaska by removing accountability for certain schools.

NEA-Alaska urges you to strengthen, not weaken Alaska's system of education. We ask that you, too, oppose Hb 357.

Respectfully submitted:



Jean Krause
President

JK:jc

State Regulation of Private Education

by Patricia M. Lines

Violations of state compulsory school attendance laws appear to be rising dramatically, and the issue is unlikely to go away. Ms. Lines details the trends in state regulation, the current wave of judicial activity, and the implications for public policy.



Although a good education is generally considered crucial to a child's future economic success and personal happiness, a growing number of people believe that traditional schooling is neither indispensable to education nor "right" for every child. Thus some parents are enrolling their children in unaccredited private schools or teaching them at home, whether or not such choices are acceptable under compulsory school attendance laws.

Parents who violate such laws risk criminal charges, fines, jail sentences, and other forms of legal compulsion. Under most state laws, a child who is declared a truant may be institutionalized. Resisting school attendance requirements takes its toll in other ways as well; the judicial process is rarely easy on the participants.¹

PATRICIA M. LINES is director of the Law and Education Center, Education Commission of the States (ECS), Denver. Copies of the complete report from which this article comes ("Private Education Alternatives and State Regulation," Pub. No. LEC-82-3) are available at \$4.50 each from the Law and Education Center, ECS, 1860 Lincoln St., Denver, CO 80295. The research for this article was supported by ECS state fees and by grants from the Carnegie Corporation, the Spencer Foundation, and the Ford Foundation. The conclusions are the author's own and do not necessarily reflect the views or policies of these agencies.

But despite the serious personal consequences for parents and for children, violations of state compulsory school attendance laws appear to be rising dramatically, presenting policy makers with one of the most serious issues facing them today.

Nontraditional Schooling

Parents who place their children in unauthorized educational programs have a variety of reasons. Those who choose home schooling often see public schools or publicly approved private schools as too traditional or too conservative. By contrast, the growing number of parents who send their children to fundamentalist Christian schools tend to feel that the public schools are too liberal or devoid of the moral and religious instruction that they see as crucial to children's education. These disparate groups have two things in common: a rejection of the ideal of the U.S. public school as melting pot and a willingness to defy the law in the interests of their children.

The public education system is caught in the middle, unable to please everyone but responsible for enforcing compulsory attendance laws against those who disagree with the values that undergird the public school program.² Some state and local officials wonder whether compulsory attendance is important enough to be treated as a criminal offense, with stiff

penalties imposed on parents for seeking what they believe to be the best education for their children. Others worry that children in unaccredited programs may not be acquiring the essential skills for good citizenship and self-sufficiency; they are also concerned about the long-range implications of allowing large segments of the population to insulate themselves from the mainstream of society. Still others fear that private schools provide havens for those who seek to avoid racial integration.³ One state official expressed a private suspicion that hucksters, interested only in tuition payments, were running one particular fundamentalist Christian school. Meanwhile, a few state officials have recognized the financial implications for public schools of the trend toward nontraditional schooling, which is siphoning off students and thus enrollment-based state aid.

This issue is unlikely to go away. In fact, the number of families choosing nontraditional educational options seems to be increasing. The Census Bureau estimates that enrollments in non-Catholic private schools increased from 615,548 in 1965 to 1,433,000 in 1975.⁴ These figures probably cover only established, accredited schools, however.⁵ Families choosing unaccredited schools neither seek nor want state approval, and they probably do not want to be counted by the Census Bureau. Many of the unau-

Some states have consciously deregulated private schools. These states expressly limit state authority to promulgate regulations.

thorized schools are fundamentalist Christian schools, which reject state authority over their operations as a matter of faith. Some refuse even to provide information on themselves. Using techniques designed to locate all hard-to-find schools in a sample of 22 counties, Bruce Cooper and Donald McLaughlin estimate that there are 15,000 non-Catholic private schools in the U.S., serving two million children; they also estimate that enrollments in these schools are increasing at a rate of 100,000 per year.⁶ It seems likely that the largest growth in attendance has occurred among small, unaccredited schools.

Many other children in the underground education movement are taught at home. John Holt, an educator and author whose Boston-based organization, Holt Associates, provides support services for home instruction, estimates that there are more than 10,000 families educating their children at home in defiance of compulsory education laws. Others believe the number to be much higher.

If enrollment figures are hard to come by, data on the quality and goals of unaccredited education programs are even more elusive. Virginia Nordin and William Turner have attempted to locate and evaluate fundamentalist Christian schools in Wisconsin and Tennessee. From their own observations and the scant available data, they have concluded that supporters of these schools are motivated by strong religious beliefs, not by segregationist attitudes.⁷

The scant amount of available evidence from standardized tests suggests that these unaccredited alternatives are educationally adequate. Test scores introduced as evidence in a few lawsuits suggest that children's performances improve after they are enrolled in unauthorized educational programs.⁸ Test data from a home tutorial network in Los Angeles showed children in the tutorial program scoring higher than children in the public schools. However, the researchers did not control for parents' socioeconomic status, and pretest data were not available.⁹

Trends in State Regulation

Traditionally, compulsory school attendance laws have served as the mechanism for enforcement of minimum standards for private education. Punishment for breaking those laws has been directed at parents and children, not at those who offer private instruction. Typically, the basic requirement of these laws is school attendance, although some states require education of the child. These laws almost always mandate fines and jail sentences for parents who fail to comply; frequently they make children subject to truancy

charges and possible institutionalization. In nearly every state, the local superintendent or school board and the local prosecuting attorney are responsible for identifying truants, i.e., children who are not enrolled in an approved educational program. In most states, local officials also have primary responsibility for approving home instructional programs, if such programs are allowed by state law. Local boards may also have responsibility for approving private schools, but the state often assumes this task. The criminal sanctions in compulsory attendance laws appear to have been designed for parents who are guilty of neglecting their children's education.

Acceptable ways of complying with a compulsory education requirement vary widely among the states. Some states demand certification of teachers and schools, some require that only the schools be approved, and some merely require minimal evidence that schooling takes place. At one end of the spectrum, such states as Alabama, Iowa, Nebraska, North Dakota, West Virginia, and Wisconsin have obtained state court approval for at least some aspects of the regulation of private educational alternatives. Those states with more flexible requirements will probably experience less litigation, unless the state boards exercise their broad statutory authority to impose more stringent standards. Connecticut, for example, provides a broad exception to the school attendance requirement; parents who do not send their child to public school must educate the child themselves or "show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools."¹⁰ Other states that follow this model include Delaware, Idaho, New Jersey, South Dakota, and Vermont. The laws in these states typically do not specify who the teacher must be or where instruction is to take place.¹¹

Some states have consciously deregulated private schools. These states expressly limit state administrative authority to promulgate regulations. Tennessee, for example, prohibits the state board and local boards from regulating faculties, textbooks, or curricula in church-affiliated schools.¹² Prior to the passage of a new law in North Carolina, the state board had gradually expanded its regulations governing private schools to the point of requiring that teachers' qualifications, courses of study, and textbooks be substantially the same as those in the public schools. Now North Carolina requires only that private schools keep records on pupil attendance and disease immunization and that they select and administer a nationally standardized test to students each year. The schools keep the tests on

file and make them available to state inspectors. They must also meet fire, health, and safety standards established by other laws.¹³

State law in Washington prevents state agencies from expanding on statutory provisions, but these provisions set minimum standards as to length of a school year, length of day, subjects to be taught, and teacher qualifications. Teacher certification is required, except for courses in religion and other subjects not taught in the public schools.¹⁴ This requirement is a stumbling block for many private educational alternatives. However, state law in Washington allows persons of "unusual competence" to teach, if they are supervised by certified teachers. In practice, Washington may allow private educators more flexibility than the state law would suggest.

Laws in about half of the states permit instruction at home by a parent.¹⁵ Other states permit instruction at home by a certified teacher (who may also be the parent). Of course, home instruction is permissible in any state if it meets all the requirements of a private school.¹⁶ It would not be easy for most homes to meet these requirements.

State legislators and board members, torn between strong lobbies for both public and private education, are having a difficult time dealing with the issue of regulation of private education. In states that have little regulation, such as Oregon and Idaho, bills to establish even minimal reporting requirements are failing to pass. By contrast, efforts in the state of Washington to permit instruction by a parent are also foundering in the legislature. Large numbers of state legislatures are being asked — usually by fundamentalist Christian schools — to deregulate private schools, but to date only Alabama has responded to such requests. The topic appears to be so controversial that any kind of legislative change will be very difficult.

Legislative change is not impossible, however. Both Arizona and Vermont recently modified their laws to reduce the friction between public and private education sectors. Clearly, legislative change is more desirable than change through the courts. It is less polarizing, and it minimizes personal costs for the individuals involved.

Supreme Court Guidance

In the 1920s the U.S. Supreme Court outlined in part the limits to state regulation of private education. In *Pierce v. Society of Sisters* the Court struck down an Oregon law that required attendance at public schools only. The Court held that the law "unreasonably interferes with the

liberty of parents and guardians to direct the upbringing of children under their control."¹⁷ The Court recognized as legitimate the interests of the state in compelling some form of schooling, but in this case the state had gone too far.

The Supreme Court also dealt in the Twenties with laws in Nebraska and Hawaii that were less restrictive but that still unreasonably burdened the right of parents to rear their children as they deem fit. In *Meyer v. Nebraska*,¹⁸ the Court struck down a state law forbidding the teaching of foreign languages to younger children. The Court found that this law was not rationally related to the stated

Clearly, legislative change is more desirable than change through the courts.

goal in Nebraska of cultivating good citizenship. Meanwhile, in *Farrington v. Tokushige*, the Court struck down a law regulating foreign language schools in Hawaii. These schools, which were predominantly Japanese, were required to pay fees, to submit numerous reports, to establish their commitment to the "ideals of democracy," to adhere to strict rules regarding when and how long the schools could operate each day, and to follow detailed regulations on textbooks and other matters. The Court observed that enforcement of the act "would probably destroy most, if not all," of the affected schools.¹⁹

More recent Supreme Court decisions have provided some additional guidance on the extent of state authority to regulate private education. In 1979 the Court observed in *NLRB v. Catholic Bishop of Chicago* that enforcement of federal labor laws against religious schools touches on First Amendment rights. The Court decided the issue on statutory grounds, however, holding that the National Labor Relations Act does not apply to church schools.²⁰ In 1981 the Court ruled similarly in *St. Martin Evangelical Lutheran Church v. South Dakota*, a case involving federal and state unemployment taxes.²¹ Both cases follow a Supreme Court rule that requires lower courts to construe statutes in ways that enhance their constitutionality. The Supreme Court might have upheld the statutes involved in these two cases, had the statutes expressly included church schools. But the Court avoided a decision on the issue. These two cases suggest only that state regulation of private education may sometimes go too

far, but the Court's decisions provide no detailed guidance.

Finally, in a very different kind of case, the Court ruled in 1972, in *Wisconsin v. Yoder*, that Amish families with strong religious objections to public schooling are exempt from educational programs beyond the eighth grade.²² Although the plaintiffs objected to the absence of Amish values in the public school program, they accepted compulsory school attendance in the lower grades because they believed that their children should acquire basic skills. The Court held that, as applied to the Amish, the compulsory attendance law in Wisconsin is unconstitutional. This ruling does not affect state compulsory attendance laws in general, even in Wisconsin.²³ *Yoder* holds only that a state cannot compel a child to attend public school in the face of strong religious objections and when the state's interest in the education of the child is adequately served by an alternative program. The Court was careful to distinguish between philosophical and religious objections to formal schooling, and it took into consideration the long tradition of the Amish.

Despite the Court's limiting language, the *Yoder* decision can be extended at several points. First, it clearly applies to religions other than the Old Order Amish, if plaintiffs demonstrate a comparable sincerity of belief and if the record shows that the states' interests are being met by adequate alternatives. To restrict the exemption granted in *Yoder* to a single religion would be unconstitutional. The *Yoder* decision may also apply to nontheistic, nontraditional religious beliefs, if the standards in *Yoder* are otherwise met.²⁴ To date the Supreme Court has not had occasion to consider extensions of *Yoder*.

Current Judicial Activity

Lower courts have followed *Yoder* only when dealing with traditional, theistic beliefs.²⁵ In other cases, despite obviously sincere religious objections to approved school programs, the courts have refused to extend *Yoder*. Some of these cases have involved fundamentalist religious schools using the self-paced Accelerated Christian Education (ACE) curriculum.

In the celebrated case of *State v. Faith Baptist Church*,²⁶ a Nebraska court examined these curricular materials and found them generally adequate. Faith Baptist Church indicated that it would not request approval of the ACE program, even though church officials had been informed informally that the state board would grant such approval. The school run by Faith Baptist Church employed no

certified teachers, and school officials refused to furnish names and addresses of students to local and state education agencies, as required by state law. The defendants, citing *Yoder*, argued that the state has no authority whatsoever over the operation of a religious school. They offered evidence, including passages from the Bible, supporting their view that religion must be integrated into teaching and that the public schools are inadequate to this task. Finally, the defendants asserted that public schools have secular humanism as their basic philosophy.

The Nebraska High Court rejected these arguments and upheld the state regulations. The U.S. Supreme Court dismissed an appeal by the school for want of a substantial federal question.²⁷ To enforce court orders to close the school, a lower Nebraska court for a time had the church door padlocked during school hours. The children transferred to an unapproved fundamentalist religious school in Iowa. The case seems far from ended, however. The local prosecutor is now seeking enforcement of the Nebraska compulsory attendance law against the parents and school officials, and the minister who operated the school was jailed for contempt of court.

Nebraska officials are now proceeding against other fundamentalist schools. One, the Park West Christian School in Lincoln, is operated by the Rev. Carl Godwin, the pastor of Bible Baptist Church. Godwin, although clearly embarrassed by the publicity, is articulate and active. He has organized the Nebraskans for Religious Freedom and has retained the legal services of William Ball, the defense attorney in the *Yoder* case. Ball has a reputation for winning cases of this kind, and Godwin is willing to report enrollment data and similar matters. Thus Godwin's case may force the courts to focus more sharply on the constitutional issues. Godwin spoke before a conference of more than 100 leaders of public and private education, sponsored by the U.S. Education Department in early May, and he seems capable of winning support from the traditional private education sector. Such support could help to bring about legislative change before court action becomes necessary.

A flurry of judicial activity involving religious schools is now in progress, with mixed results.²⁸ Most court opinions are grounded in state constitutions or statutes. Although the case law can be transferred from state to state (as guidance, not as precedent), the disparity in state constitutions and statutes does not permit broad generalizations. Of course, general rules for federal cases may emerge, but this has not yet occurred.

Home instruction is in a somewhat dif-

ferent category than instruction in an unapproved school, although the line between them is unclear. Home instruction may be entitled to even more constitutional protection, because the child/parent relationship may be entitled to constitutional protection under a right to privacy. But this idea has not been tested, and judicial reactions to it have been mixed.²⁹

Of course, judicial opinions to date on home instruction represent only the tip of the iceberg. Additional cases have been or will soon be filed in Iowa, New Hampshire, Maine, Michigan, and many other states. Given the accelerating growth of the fundamentalist Christian schools, other nontraditional private schools, and home instruction, strict state requirements for compulsory attendance in approved schools will probably continue to be challenged. As I have already noted, litigation of this type carries with it high personal costs for the individuals involved. Such litigation also has the potential to polarize supporters of public and private education.

Implications for Public Policy

Thus legislative reform seems preferable to judicial reform. Unlike the courts, legislatures are not limited to accepting or rejecting existing statutes. Their wider range of options allows for greater flexibility.

States that wish to reform the regulation of private education through legislative action might consider a shift in focus from compulsory school attendance to compulsory education. The available evidence, though scant, suggests that periodic testing of children enrolled in nontraditional educational programs may be a viable alternative to compulsory school attendance. States that move in the direction of compulsory education should probably establish minimal requirements for nontraditional programs with regard to the subjects to be taught, the amount of time per day and year to be devoted to instruction, and the reporting of enrollment and attendance figures and similar data to state officials. If a child shows unsatisfactory academic progress on standardized achievement tests, state law might require remedial instruction in an accredited or approved school.

In the interest of consumer protection, a state may wish to establish regulations that guarantee honest and fair promotion of private schools, including full disclosure of the teachers' qualifications and of the schools' educational philosophies. However, existing laws may already protect consumers adequately.

States that are concerned about the operation of schools in private homes

could amend their statutes to permit home instruction only by a child's parent(s). Statutes in such states could define "school" as instruction of children from one or more families by an unrelated teacher. (Some states may wish to emulate California, which has established separate rules for instruction at home by a tutor.)

North Carolina, Washington, and Oregon have established flexible regulations for private education that could serve as models elsewhere. In Oregon and North Carolina, test scores help to provide assurance that children enrolled in nontraditional programs are being educated. Washington relies on teacher certification for such assurance, although this gives private educational alternatives less leeway in staffing and precludes instruction by a parent in most cases. Such legislation would not be necessary, if state law did not give the state board of education or other state administrative officials broad regulatory power over private education in the first place. But such legislation is called for when a state board has gradually increased the requirements for nontraditional educational programs and the state legislature wishes to make clear its intent that statutory minimum standards are to remain *minimum* standards, not subject to expansion by administrative action.

Administrative action is probably the most peaceful means for resolving issues related to the regulation of private education. And flexible state laws make such action possible. In New Hampshire, for example, state officials have reached a somewhat fragile agreement with the fundamentalists: The state will accept school records submitted on church stationery instead of on standard state forms. Thus the state receives the information it must have to approve fundamentalist educational programs, and the fundamentalists do not feel that they are submitting to the state regulatory system. In Iowa, the state has agreed to accept reports from parents rather than from fundamentalist schools. Iowa fundamentalists see parental reports on children's schooling as analogous to the annual reports these parents file with the Internal Revenue Service. But they deem it inappropriate for the state to request such information directly from the church.

Because they are staunch supporters of public education and because they may see nontraditional educational programs as a threat to their membership, teacher unions seem likely to oppose the relaxation of state laws requiring attendance at approved schools staffed by certified teachers. These unions may argue that testing instruments are not yet sufficiently sophisticated to assure the public that adequate education is taking place. This is

probably true, but it could be argued that teacher certification is no better. Teacher certification is usually dependent on completion of a degree, which in turn is dependent on passing final examinations in college courses. (In some states, certification is also dependent on passing a competency test.) Ultimately, state legislators must decide whether testing a child, testing his or her teacher, or testing both would best provide adequate assurance that education is taking place.

Local school officials are also likely to oppose the relaxation of existing state laws regulating private education. As supporters of public education, such officials will probably be wary of the academic and social implications of nontraditional alternatives. They may also be concerned about the loss of state aid to public schools (which is based on enrollments), should more flexible regulations encourage families to choose private alternatives.

States that are sensitive to these problems could publish test data from non-traditional programs, if these data are available. They could also stand ready to revise their policies, if children in non-traditional programs fail to perform as well as they should. States should also recognize and deal with the problems caused by the loss of per-pupil aid to local school districts. For example, states might explore constitutional ways of providing partial state aid to local districts that make their school libraries, physical education facilities, art facilities, testing and guidance services, and other resources available to pupils in alternative educational programs. Such cooperation requires new laws and regulations. It also demands new relationships between state and local education officials and between public and private educational systems.

1. As an example of the extreme emotionalism that surrounds these cases, John Singer was involved in a shoot-out with law enforcement officers and was killed outside his Utah home three years ago. The officers were investigating a charge that Singer had failed to abide by his obligations under the Utah compulsory school attendance law.

2. Educators generally agree that it is nearly impossible to provide education without also imparting values. See, for example, William J. Bennett and Edwin J. Delattre, "Moral Education in the Schools," *The Public Interest*, Winter 1972, pp. 81-98; and Andrew Oldenquist, "Moral Education Without Moral Education," *Harvard Educational Review*, May 1979, p. 247.

3. There is some support for this point of view. On the heels of the school desegregation order in Mississippi, for example, that state repealed its compulsory education law, apparently to avoid requiring parents to send their children to integrated schools. Following a desegregation order in Los Angeles, an organization of parents opposed to busing formed a home instruction network that served approximately 1,000 children (see Roy A. Weaver, Anton Negri, and Barbara Wallace, "Home Tutorials vs. the Public School in Los Angeles," *Phi Delta Kappan*, December 1980, pp. 251-55).

4. Department of Health, Education, and Welfare, *Statistics of Public Elementary and Secondary Day Schools* (Washington, D.C.: National Center for Education Statistics, 1976), p. 6.
5. Census Bureau officials are unable to estimate the number of children enrolled in unapproved educational alternatives, according to a 10 February 1982 memorandum to the director from Paul M. Siegel, chief of the Education and Social Stratification Branch (copy on file at the Education Commission of the States).
6. Bruce S. Cooper and Donald H. McLaughlin, "The Latest Word on Private School Growth," paper presented at the annual convention of the American Educational Research Association, New York, March 1982. By contrast, public school enrollments have declined from approximately 45.9 million in 1970 to 42.6 million in 1978, according to *Statistics of Public Schools, Fall 1970* (Washington, D.C.: National Center for Education Statistics, 1971); and *Statistics of Public Elementary and Secondary Day Schools, Fall 1978* (Washington, D.C.: NCES, 1979).
7. Virginia Davis Nordin and William Lloyd Turner, "More Than Segregation Academies: The Growing Protestant Fundamentalist Schools," *Phi Delta Kappan*, February 1980, pp. 391-94. See also William Hazard, *The Flight from the Public Schools: Myth or Reality?*, a paper prepared for the Education Commission of the States, presented at the Special Advanced Leadership Programs Services Seminar for Legislators, Atlanta, 31 July 1980.
8. See *In re Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979); and *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).
9. Weaver, Negri, and Wallace, pp. 253-54.
10. Connecticut General Statutes, Sec. 10-184 (1981).
11. See, for example, Delaware Code Annotated, Tit. 14, Sec. 2703 (1981); Idaho Code, Sec. 33-202 (1981); New Jersey Statutes Annotated, Secs. 18A:38-25 (N.J. 1968); and South Dakota Compiled Laws Annotated, Sec. 13-27-3 (Supp. 1981). See also Table B in Patricia Lines, "Private Education Alternatives and State Regulation," Education Commission of the States, Pub. No. LEC-82-3, March 1982.
12. Tennessee Statutes Annotated, Sec. 49, §201-§204 (1970).
13. North Carolina General Statutes, Sec. 155C-547 *et seq.* (Cum. Supp. 1981); Sec. 115C-555 *et seq.*

- (Cum. Supp. 1981); and Sec. 115C-378 (Cum. Supp. 1981).
14. Washington Revised Code, Secs. 28A.02.201 *et seq.* and 28A.27.010 (1981).
15. See Table B of Lines, "Private Education Alternatives. . . ."
16. See, for example, Michigan Attorney General, Opinion No. 5579, 27 September 1979.
17. 268 U.S. 510 (1925), 534-35.
18. 262 U.S. 390 (1923).
19. 273 U.S. 784 (1927), 298.
20. 99 S.Ct. 1313 (1979).
21. 101 S.Ct. 2142 (1981).
22. 406 U.S. 205 (1972).
23. See, for example, *Meyerkeh v. State*, 173 Neb. 889, 115 N.W.2d 585 (1962); *Parr v. State*, 117 Ohio St. 23, 157 N.E. 553 (1927); *Stephens v. Bongart*, 15 N.J. Misc. 89, 189 A. 131 (1937); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *State v. Williams*, 56 S.D. 370, 228 N.W. 470 (1929); *State v. Freudenberg*, 166 Wis. 35, 163 N.W. 184 (1917); and *State v. Bailey*, 61 N.E. 730 (Ind. 1901).
24. See, for example, *United States v. Seeger*, 380 U.S. 163 (1965), in which the Court adopted a broad interpretation of the selective service law to avoid favoritism to individuals with more traditional theistic beliefs — a favoritism that would clearly violate the establishment clause.
25. See, for example, *Nagle v. Olin*, 64 Ohio St.2d 3-1, 415 N.E.2d 279 (1980), which dealt with a non-Amish parent sending a child to an unapproved Amish school; and *State v. Nobel*, Nos. S 791-0114-A and S 791-0115-A (Mich. Dist. Ct., Allegan County, 9 January 1980), which dealt with a mother who was teaching a child at home but who refused for religious reasons to obtain a teacher's certificate, although she met the requirements.
26. 107 Neb. 807, 507 N.W.2d 571 (1981).
27. 102 S.Ct. 75 (1981). Members of the congregation of Faith Baptist Church subsequently brought suit in federal court, seeking an injunction against the state to permit continuation of the school. The court dismissed the suit, relying primarily on the Supreme Court's decision to dismiss the appeal in *Prettyman v. Nebraska*, Civ. No. 82-0-154, D. Neb., 16 April 1982.
28. For a discussion of applicable cases, see Lines, "Private Education Alternatives. . . ."
29. *Ibid.*



"Use my mind? At home?"

NOTES

Preliminary Findings

Religious and Secular Schools: Differences in State Control
Research Request 83-159
Leslie Longenbaugh, Research Staff
May 4, 1983

I. Which states allow religious schools to operate free of state control?

A. Primary and Secondary Schools

- 1) Five states exempt religious schools from some requirement(s) to which other private schools are subject.*
 - a. Maryland
 - b. Nevada
 - c. Pennsylvania
 - d. Tennessee
 - e. Washington

- 2) Eight states do not require accreditation, approval, or licensure of any nonpublic school.*
 - a. California
 - b. Delaware
 - c. Florida
 - d. Massachusetts
 - e. Minnesota
 - f. New Mexico
 - g. North Carolina
 - h. Wisconsin

- 3) One state, South Dakota, has removed all state standards from all nonpublic schools. Students in the nonpublic schools must take competency tests periodically to ensure that they are receiving adequate instruction.**

- 4) Twenty-one states have voluntary, rather than mandatory, reporting by all nonpublic schools.*

a. Alabama	l. Montana
b. Arizona	m. New Jersey
c. Colorado	n. North Carolina
d. Georgia	o. Oklahoma
e. Idaho	p. Oregon
f. Illinois	q. Tennessee
g. Indiana	r. Texas
h. Iowa	s. Utah
i. Kansas	t. Virginia
j. Louisiana	u. Wyoming
k. Mississippi	

5) At least two states other than Alaska have legislation pending that would affect state control of religious schools.***

a. Colorado

i. The bill would exempt both religious and secular private schools from state control.

b. Montana

ii. The bill would make mandatory some of the requirements that are now voluntary.

B. Pre-schools

1) Three states now have laws exempting religious pre-schools from all state certification and inspection except for conformity with health and fire codes.****

a. Arkansas; enacted 1981

i. A lawsuit has been filed challenging the constitutionality of the Arkansas law on the grounds that it denies the children who would attend such schools equal protection of the law.*****

a) A copy of the plaintiffs' brief in this lawsuit has been sent to us.

b. Illinois

c. Virginia

2) Legislatures in two states other than Alaska are now considering legislation that is similar to HR 357 in regard to pre-schools.****

a. Arizona

b. California

II. How do such states distinguish between religious and secular nonpublic schools for the purposes of the exemption?

A. Religious schools for the purposes of these exemptions usually are those that are sponsored and funded entirely by a church or religious organization rather than through the state or federal government.

B. The language used often includes a phrase such as "church-sponsored schools or schools with religious charters."

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CHRISTIAN SCHOOL COMMENT

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WHAT EVERY PARENT SHOULD KNOW ABOUT THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

by Dr. Paul A. Kienel, Executive Director
Association of Christian Schools International

The Association of Christian Schools International (ACSI) is a non-profit service organization serving Bible-centered Christian schools and colleges. It is the largest association of Christian schools in the world with a membership of 1,933 schools and a combined student enrollment of 337,554. Over the past five years, ACSI membership has nearly doubled in size. The annual cost of school membership is \$3.00 per student payable on October 1. Most schools include this small amount in their annual student registration fee. As a parent, you need to know about the wide variety of services offered by ACSI that directly benefit your Christian school and ultimately your child or children in the school.

LEGAL/LEGISLATIVE SERVICES

Over the past five years, ACSI has raised and spent more than \$400,000 to preserve your school's religious freedom. We have had major struggles with the U.S. Department of Labor and the IRS. There have been several important victories but the struggle continues. Last week, for example, I met with U.S. Department of Education leaders in Washington, D.C. to discuss guidelines on how state departments of education can work cooperatively with Christian schools instead of attempting to control them. Next week I fly to Washington, D.C. again to meet with U.S. Department of Labor officials. We will attempt to reverse a decision made by the previous U.S. Secretary of Labor under the Carter Administration that claimed Christian school teachers are secular employees subject to government agency control. In the past ACSI has organized parent and teacher letter-writing campaigns to the White House and members of Congress on various issues. The results have been important to your school and your children.

CONVENTIONS AND CONFERENCES

Another service of ACSI is to encourage the spiritual and professional growth of your school's staff through ACSI conventions and conferences. Your child's teacher comes away from these meetings with fresh insight and inspiration for his or her ministry in the classroom. The ACSI staff of 42 people work year-round preparing for these meetings. More than 20,000 teachers, administrators and board members will attend the seventeen ACSI conventions held in the United States and Canada this year. ACSI also conducts similar programs in other countries.

ACCREDITATION AND CERTIFICATION

Under the capable leadership of ACSI's president, Dr. Roy W. Lowrie, Jr., the association offers a quality program of school accreditation and teacher and administrator certification. These professional services are designed to raise the spiritual and academic levels of our schools and to provide testimony to all, including government agencies, that the Christian school community has its own forms of

professional recognition. Dr. Lowrie is also the editor of *Christian School*, a professional journal for Christian school teachers and administrators. It is provided free of charge to ACSI member schools.

STUDENT ACTIVITIES

Approximately 25,000 Christian school students participate annually in ACSI student activities. I am referring to speech meets, spelling bees, choir festivals, science fairs, art festivals, sporting events, piano festivals, academic meets, band festivals, cheerleader camps and student leadership conferences. Each of these events is designed to inspire leadership qualities and communication skills so that students will be effective in sharing Jesus Christ with others.

PROFESSIONAL COUNSEL

ACSI personnel are located in twelve offices throughout the country. They are available to offer counsel and information to Christian schools in the United States and Canada. The ACSI regional directors are competent leaders in the Christian school movement. Pray for them as they travel thousands of miles each year on behalf of ACSI member schools.

PROFESSIONAL BOOKS

ACSI publishes many books and manuals for parents, administrators, board members, teachers, school secretaries and students. The association also publishes a monthly teacher placement list, an annual directory of member schools and colleges, regional newsletters and our professional journal, *Christian School*. This flow of vital information is important to the quality of education in your child's Christian school. Without the strong flow of written communication provided by ACSI, the Christian school movement would soon lose its cohesive thrust.

REDUCED INSURANCE RATES

ACSI insurance programs return more than one million dollars a year to its member schools and colleges via savings in premiums and worker's compensation rebates. Many schools more than offset the annual cost of ACSI membership with savings from the group insurances offered through ACSI.

Finally, the most important thing parents should know about ACSI is that everyone who is a part of the association is vitally concerned about children and young people. The 42 staff members, the 26 people who serve on the ACSI Board and scores of others who assist with ACSI programs are all born-again believers in Jesus Christ. We are strongly committed to quality Christ-centered education. Along with the staff of your fine Christian school, we have devoted our lives to the task of inspiring the next generation to be followers of Jesus Christ. ☐

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12. Compulsory Schooling and Nontraditional Education

The Issue

Some parents today believe that traditional schooling (public or private) is not necessarily equivalent to "education" nor "right" for every child. They are placing their children in nontraditional schools (not necessarily accredited) or educating them at home. Their reasons vary. Some have overriding religious concerns; others are dissatisfied with or mistrust the public school system. Occasionally they seek only to escape the effects of public desegregation policies.

Some private options may violate state compulsory attendance laws. In some states, parents and individuals operating unaccredited private schools have received or are faced with jail sentences. One fundamentalist Christian clergyman in Nebraska has refused to comply with court orders directing him to either obtain state approval for his school or cease operating, and he has been jailed twice. A church has been padlocked to enforce laws requiring private schools to obtain state approval and comply with state rules for operating a school.

The Choice Before State Education Policy Makers

In states that require compulsory school attendance (rather than compulsory education) and require certified teachers in private schools, policy makers are being asked to change the laws. Private school people seek fewer requirements for private schools, exemption of church schools, provision for home instructions, removal of teacher certification requirements or other policies that would make it easier for individuals to choose nontraditional education options free of state accreditation or approval.

How Many Children are in Unapproved Education Options?

While most children in nonpublic schools are enrolled in Roman Catholic institutions, the U.S. Bureau of Census estimated that (as of 1975) there were close to 1.4 million children in non-Catholic, private schools. Most likely the census bureau counted only traditional and accredited schools. A more careful study for the National Center for Statistics suggests there are about 15,000 non-Catholic private schools serving approximately 2 million students, and that this population is increasing by 100,000 students per year. One might speculate that the difference of some 500,000 to 600,000 children between the official census and this study represents the number of children in unapproved schools.

By contrast, public school enrollments declined from approximately 45.9 million in 1970 to 42.6 million in 1978.

Estimates of the numbers of children being taught at home vary from 10,000 to 50,000.

Education In An Unapproved Setting

When available, testing data shows that children in these schools are performing above national standards. The data do not show whether this is due to socioeconomic status, other individual characteristics, or the education program. With this caveat, the data show children in a Los Angeles home tutorial program (approved by the state) scored higher than children in public schools on nationally standardized tests.. Experimental work done about ten years ago showed no significant difference in students' test scores whether they were taught by an experienced teacher or by a lay person knowledgeable in the subject taught. Finally, in three court cases, attorneys introduced evidence of test scores showing

improvement as children moved from a public school to a private, unapproved education option.

State Education Requirements

Traditionally, states enforce minimum standards for private education through compulsory school attendance laws, which provide for punitive action for noncomplying parents and children, but not for those who offer private instruction. Although these laws vary, they contain the following features:

- o All states have some kind of compulsory law requiring school attendance or education of children.
- o States that require education of the child rather than attendance include Connecticut, Delaware, Idaho, New Jersey, South Dakota and Vermont. Most states require school attendance, although many of these provide exceptions for home instruction.
- o Almost every state provides for jail sentences and fines for parents who fail to comply with the state's compulsory attendance law.
- o Without exception, compulsory requirements can be fulfilled by attendance at a nonpublic school that is properly approved or accredited. A number of states require the teachers to be certified, or require approval of the curriculum and similar matters.
- o Some states have recently "deregulated" private schools, and have restricted the authority of the state board of education to regulate them. These include Alabama, Arizona, Louisiana, North Carolina, and Tennessee. Washington restricts state board authority but contains a number of important statutory requirements, such as a teacher certification requirement.
- o Laws in about half the states permit home instruction by a parent whether the parent has a teaching certificate or not.
- o In some states, courts or attorneys general have ruled that if the home meets the standards for private school (generally, where a parent is a certified teacher), home instruction is allowed even if state law does not expressly so provide.

Court Challenges

The United States Supreme Court has indicated that regulation of nonpublic education can go too far. In a landmark case, Yoder v. Wisconsin, the high court narrowly ruled that Wisconsin's compulsory attendance law could not be enforced against the Amish (a religious community). The Court held that the state cannot compel attendance of children in the face of strong religious objections, so long as the children are adequately educated in an alternative setting. Lower courts have extended Yoder only when traditional religious beliefs are involved. Decisions outside of this narrow realm have been mixed, with most cases turning on state constitutional or statutory grounds.

Litigation over the status of private education has culminated in court rulings in a number of states, among them Florida, Hawaii, Iowa, Kentucky, Michigan, Nebraska, North Dakota, Ohio, Washington, and West Virginia. Generally, states undergoing litigation require school attendance and certification of private school teachers. In a few states the central issue is approval of curriculum or facilities, or zoning rules. Additional cases have been or will soon be filed in many states, including Iowa, Maine, Michigan, New Hampshire, North Dakota, and Virginia. Given the growth of fundamentalist Christian schools, other nontraditional private schools and home instruction, states that require compulsory school attendance and set standards for the school, will probably be challenged in the near future.

The litigation receiving the most attention from the media appears to be State v. Faith Baptist Church, dealing with the refusal of Reverend Everett Silevan to obtain approval from Nebraska for any aspect of his church-run school. The school uses a series of booklets called the Packet of Accelerated Christian Education (PACE), including instructional information and self administered tests. The school does not use state-certified teachers, a requirement under Nebraska's compulsory school attendance law. The Nebraska high court found the materials adequate, but upheld the state's requirement for certified teachers. On appeal to the United States Supreme Court, the case was summarily dismissed because, based on the papers filed before it, the high court could not identify an important constitutional issue.

Somewhat similar opinions (not going to the U.S. Supreme Court) have been handed down by state courts in Florida, North Dakota, and Wisconsin. In some of these cases, parents refused to provide any evidence about the child's schooling.

In other cases, state courts have ruled in favor of parents. In Ohio, in State v. Whisner, the state supreme court struck down a system of state regulation that, by its literal terms, left no time for religious instruction in a private school. A Michigan court was reluctant to find a mother teaching a child at home guilty under the state's compulsory attendance law, as she met the requirements for teacher certification but refused to obtain a certificate for religious reasons. (Michigan allows home instruction only by certified teachers.) In a Kentucky case, the state court applied a state constitutional provision (found only in a handful of state constitutions) that prohibits requiring a child to attend a school which parents find objectionable for conscientious reasons.

Policy Alternatives

Where statutory requirements are flexible, imaginative administrative solutions to the issue become possible. In New Hampshire, for example, state officials reached a somewhat fragile agreement with fundamentalists that required information to be submitted on church stationery rather than on official state forms. This fulfills the state's need for certain information, but recognizes the fundamentalists' tenet that they should not submit to state regulatory systems. In Iowa, the state accepts reports from parents instead of the fundamentalist school. The fundamentalists involved felt individual reporting was no different than filing an income tax form, while a church report was tantamount to church submission to state regulation.

A state considering a change in its policy can look to sister states for models. In the past five years several states have deregulated private education.

- o Tennessee, for example, prohibits the state board and local boards from regulating faculties, textbooks, or curricula in church affiliated schools.
- o North Carolina requires only that private schools keep records on pupil attendance and disease immunization and that they select and administer a nationally standardized test to students each year. The schools keep the tests on file and make them available to state inspectors. They must also meet fire, health, and safety standards established by other laws.
- o Washington prevents state agencies from expanding on statutory provisions, but these provisions set minimum

standards as to length of school year, length of day, subjects to be taught, and teacher qualifications. Teacher certification is required, except for courses in religion and other subjects not taught in the public schools. State law in Washington allows persons of "unusual competence" to teach, if they are supervised by certified teachers.

- o The Vermont legislature, following efforts by its state board to require teachers certification, made it clear it could not do so, and also strengthened its child abuse laws in order to narrowly focus on actual problems, rather than to sweepingly subject all private educators to regulation.
- o In mid-1982 the Arizona legislature determined to permit home instruction, so long as the child shows academic progress, as indicated by test scores or an impartial professional evaluation.
- o Louisiana exempted schools which receive no local, state or federal funds from most reporting requirements.
- o Arizona, Oregon, and North Carolina require testing of the children, to help provide assurance that they are being educated.
- o Teacher certification is the mechanism used in Washington, although it reduces flexibility for private education alternatives and precludes instruction by a parent in most cases.

Policy Questions

Policy makers contemplating a change in state compulsory education laws need to ask the following questions before deciding on a course of action.

- o Should compulsory attendance laws carry criminal sanctions against parents honestly acting in the best interests of their children?
- o Are the children educated in unapproved settings acquiring what they need for good citizenship and self-sufficiency?
- o What are the long-range implications of large segments of the population insulating themselves from the mainstream of society -- in this case, by avoiding state-approved education for their children?

- o Are private schools havens for those wishing to avoid integration?
- o Do existing consumer protection laws assure that parents are evaluating small nontraditional schools on the basis of adequate and correct information?
- o What are the political implications of the growing exodus from public schools, when local school districts depend on state aid based on enrollment or attendance?

Policy Implications

Organizations and individuals urging more flexible compulsory education laws argue that this is required to preserve the free exercise of religion. These groups argue that parents know what is best for the child. They include those participating in nontraditional options, fundamentalist Christians, more traditional private schools and, to some extent, organizations and individuals concerned with civil liberties. The national ACLU, for example, in its Policy #71A, states: "We believe that, in the interest of parental right to choose an alternative to public education, [home instruction with safeguards, such as approval of curriculum or testing of the child] . . . should be extended to all jurisdictions because the state's interest in assuring minimum levels of education does not extend to control of the means by which that interest is realized."

Organizations and individuals urging retention or adoption of stricter requirements for private education generally argue that these regulations are needed to assure the best interests of the child, and to prevent balkanization of society. These groups include teachers' organizations and public school administrators.

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COMMENTS ON
HOUSE BILL #357
and
SENATE BILL #307

The subject at hand has to do with House Bill #357, currently before the Legislature, and a Senate Bill with identical language for which I have no number at the present time.

This is an act relating to the regulation of religious schools.

The First Amendment to the U.S. Constitution says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" With these words, the First Amendment guarantees a separate church and state. Historically, this has meant that the church was not subject to the state, nor was the state subject to the church.

The First Amendment also guarantees "free exercise of religion." Our nation has repeatedly recognized the value of this most important clause and has resisted infringement of First Amendment rights of the citizenry.

It is also true that the language of the Constitution of the State of Alaska provides similar liberties to those spoken to in the Constitution of the United States.

At the outset of these remarks, it should be noted that it is the responsibility of the church to provide buildings and equipment that meet reasonable regulations for fire, life safety, health, and sanitation when they are equally and fairly applied to all.

One of the reasons for the presentation of the proposed legislation has to do with some language found in the Constitution of the State of Alaska. That language reads as follows:

ARTICLE VII. HEALTH, EDUCATION, AND WELFARE.

Section 1. The Legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

We have no quarrel with the language set forth in the paragraph above excerpted from the Constitution of the State of Alaska. However, since the provision is made that the public school system of the State of Alaska shall be free from sectarian control, we believe it follows reason and logic that the church-operated schools of the State of Alaska should be free from state control.

For this reason, we have addressed the importance of certain changes that need to be made in the present structure of the Alaska Statutes that would bring present law into line with the provision of the Federal and State Constitutions.

Our special concern has to do with the impact of present law and the resultant regulations that could be written under the umbrella of the existing language.

While we have stated above that we have no quarrel with the right of the State to require reasonable fire, life safety, health, and sanitation standards, we would never submit to the inspection of personnel, programs, finances, records, curricula, etc., since this is clearly a violation of the First Amendment, and cannot be permitted by the local church.

For these and other reasons, we have proposed an Amendment to Section 1. A.S. 14.07.020(8).

In this Amendment, we have addressed the fact that it is our sincere conviction that neither the Department of Education nor the Department of Health and Social Services has the constitutional right to general supervision over our pre-elementary schools, nor over the educational component of our nurseries.

We have also offered an Amendment to Section 2. A.S. 14.30.010(b)(1).

One of the reasons why we have suggested the addition of paragraph (D) has to do with the requirements set forth in paragraph (C). You see, it is our policy to regularly measure the progress of our students in our church-operated schools through the use of national achievement tests, and we would have no problem with making that information available to anybody on a request basis. However, since the Constitution says that no law shall be made concerning the establishment of religion, we simply believe that the State has no right to REQUIRE that information. So, we have proposed paragraph (D) as an amendment to that section.

One of the questions that has been raised with regard to paragraph (D) is as follows: "If paragraph (D) should become law, what assurance do we have that some 'fly-by-night' type church such as the Jim Jones syndrome or the Moonies won't pop up and start what they would call a church-operated school?"

Quite honestly, we don't have any assurance that that wouldn't happen. However, there are some reasons why I believe it would not happen. One of the reasons why I would question that a "Jim Jones" church or a "Moonies" church would start a school is simply that it is not as lucrative an operation as that which generally interests them. They are usually looking for ways to get their hands on large amounts of money as quickly as they can with a minimum of work involved.

The operation of a school involves a great deal of hard work, dedication, consecration, and plain, old-fashioned elbow grease!

Church-operated schools must function in a free-market society, and they simply must produce what they claim to produce, or the parents will take their children elsewhere.

My second response to the original question would be as follows: It is our understanding that laws should be made for the benefit of and the protection of the majority of the people. While it is true that there is the possibility that some church like the Jim Jones, Moonies, or Universal Life Church people might start a school under the provision of paragraph (D), why would the Legislature of the State of Alaska wish to continue to impose an unconstitutional burden on the many churches in the State of Alaska who are doing a great job in the field of private education because it was afraid a possible small minority might start an educational program that would be undesirable?

Why would the Legislature want to take away the liberties of the many because it feared the abuses of a few?

Section 3 has been amended by the Department of Law as a housekeeping measure to bring it into line with the rest of the proposed legislation in this bill.

The next item under consideration is Section 14.45.030. Once again, this is a matter where we believe constitutional liberties are being abrogated. While it is a fact that we would have no problem providing this information on a request basis in cooperation with the State Department of Education, we are convinced that it should not be required by law in order to maintain the true separation of church and state.

The last amendment proposed in this bill is found in A.S. 44.27.020(1).

This amendment is proposed in order to maintain the separation of church and state. Present law says that the Department of Education shall administer the State's program of education at the elementary, secondary, and adult levels. What we are

saying in our proposed amendment is simply that the State Department of Education does not have the right to administer the church's programs of education, since the State neither founded nor funded our church educational programs.

Respectfully submitted,

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4/18/83
PEG:hm

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SB 261 AND HB 357

Summary of the Legislation

SB 261 and HB 357 deal exclusively with private church schools and schools operated by religious organizations and, as amended, are modeled after the legislation adopted by North Carolina in 1979 and by West Virginia in 1982 to remedy church-state constitutional conflicts. These laws, if enacted by the Legislature, would establish requirements that must be met by private religious schools in order for parents whose children attend them to satisfy the compulsory education law. They would also exempt pre-elementary and nursery programs operated by religious organizations from the supervision of the Departments of Education and of Health and Social Services. The purpose of these bills is to remedy existing church-state constitutional conflicts by protecting the guaranteed religious freedom of church schools in Alaska and, at the same time, to balance the state's interest in assuring that each child receives a good education.

This legislation only covers schools, pre-elementary programs or nursery programs operated by a church or other nonprofit religious organization exempt from federal taxation and not receiving state or federal funding. These are constitutionally protected groups and activities.

More specifically, church schools (or denominational schools as defined in the proposed legislation) would be required to maintain attendance and immunization records. Since current compulsory education laws make parents liable for their children's failure to attend school, these bills, as amended, would require the parents to file statements with the public school authorities to establish their children's attendance at a church sponsored private school. By placing the requirement on the parent, the bills avoid the constitutional problems created by the state's excessive entanglement in religious activities. The school would also be required to operate on a regular schedule, at least nine calendar months per year, and to be subject to reasonable fire, health, and safety regulations.

To ensure that children attain certain minimum educational standards, each religious school would be required to administer a nationally standardized test to students in the first, third, sixth and ninth grades and to make the school results available for the Department of Education. This would satisfy the state's interest in compulsory education and still avoid the constitutional problem of excessive state entanglement in religion.

Any church school that satisfied all the requirements of AS 14.45 would be exempt from any additional provision of law

relating to education except those requirements of law relating to fire, health, and safety.

Constitutional Requirements

The changes set out in SB 261 and HB 357, as amended, are required to correct existing Alaskan laws which run afoul of the constitutional mandate requiring the states to avoid excessive entanglement in religious activities. The state's right to impose minimum requirements on private religious schools is very limited, because these religious activities are protected by the First Amendment of the United States Constitution and its identical counterpart in the Alaska Constitution, Art. I, sec. 4.¹

Schools operated by churches or by nonprofit religious organizations are quite different from other private schools. They enjoy a constitutionally protected status.

"Church operated schools are generally integral parts of their sponsoring churches. Their superintendents are generally pastors or assistant pastors of the sponsoring churches; their teachers are generally members; and their doctrinal stances are generally set by the sponsoring churches."²

Federal and state courts recognize that operating a church school is an integral part of the free exercise of religion.³ For many churches, it is in fact the ministry of the church. Because

¹ E.g., Kentucky State Bd. for Elem. & Secondary Education v. Rudasill, 589 S.W.2d 877 (Ky. 1979), cert. den., 446 U.S. 938 (1980); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1970); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

² "State Regulation of Private Religious Schools in North Carolina -- A Model Approach," 16 Wake Forest Law Review 405, 431-32 (1980).

³ See, e.g., NLRB v. Catholic Bishop, 99 S. Ct. 1313 (1979) (Catholic parochial schools are founded for religious reasons and religious doctrine is pervasive); Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979) (private Catholic schools are an integral part of the Catholic Church and as such "involve substantial religious activity and purpose"); Hunt v. McNair, 413 U.S. 734, 743 (1973) ("[R]eligion is so pervasive that a substantial portion of [religious school] functions are subsumed in the religious mission."); Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) ("[T]he parochial schools constituted 'an integral part of the religious mission of the Catholic Church'. . . In short, parochial schools involve substantial religious activity and purpose.").

church operated schools clearly come within the First Amendment free-exercise clause, their activities are constitutionally protected as fundamental rights.⁴

In the area of First Amendment individual liberties, any state legislation that burdens parents', childrens', or a church's free exercise of religious beliefs is unconstitutional unless, the state can demonstrate "a compelling state interest in the regulation of a subject within the state's constitutional power to regulate." Sherbert v. Verner, 374 U.S. 398, 403 (1963).

To establish the existence of a compelling state interest, it is not enough for the state to merely show that a rational relationship exists between a colorable state interest and the proposed regulation. According to Sherbert, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

More importantly, the state must demonstrate that it is using the least burdensome method for addressing the compelling state interest. The current law violates this mandate, because the legislative goals can be achieved with less burdensome methods. SB 261 and HB 357, as amended, use North Carolina and West Virginia laws as models and are less burdensome while still accomplishing legislative goals.

Eventhough SB 261 and HB 357, as amended, would create two classes of private schools and treat them differently, these bills would not violate the Equal Protection clause of the Fourteenth Amendment. According to established legal principles⁵, the equal protection guarantee of the Fourteenth Amendment does not take from the state legislatures all power to classify persons or objects. The state may classify persons for the purpose of legislation. Classification is an inherent right and power of the legislature.

The important issue for these proposed bills is whether the distinction between private schools operated for profit and private schools operated by churches is based on a real and substantial difference between the two classes. Clearly, there is a substantial difference. The decision of the legislature to recognize its limited ability to regulate church schools is based on a constitutional distinction between the two classes. Church schools are in a protected class, enjoying the protection of the First Amendment. Private schools are not.⁶

⁴ Ibid.

⁵ 16A Am Jur 2d, Constitutional Law, §746, et. seq.

⁶ In addition, it must noted that the motivations for operating

In the area of religious freedom and expression, the Constitution demands neutrality. The government cannot demonstrate a hostility toward religion or religious activity. The mere fact that the government specifically exempts religious groups from complying with certain laws does not violate the Constitution. For example, federal law clearly creates two classes when it exempts the property and income of religious organizations from federal taxation. These two classes parallel the two classes which would be created by SB 261 and HB 357, as amended. The Supreme Court held this was proper legislation in Walz v. Tax Commission, 397 U.S. 664,669 (1970). The Supreme Court found that neither the purpose nor the effect of such exemption was to advance or inhibit religion. It was "benevolently neutral."

The distinction between private schools operated for profit and those operated by churches is real and parallels distinctions created by the federal tax laws. Therefore, there is no violation of equal protection guarantees.

In summary, the present law violates both the United States Constitution and the Alaska Constitution. SB 261 and HB 357, as amended, balance the state's interest in ensuring that each child receives a good education with the fundamental right to religious freedom and should be adopted.

a private school for profit and a school operated by a church are entirely different.

* Section 1. 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) excluding pre-elementary schools and nurseries operated by a church or other nonprofit religious organization that is exempt from federal taxation provided the program does not receive state or federal funding; pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

* Section 2. 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 certificated according to AS 14.20.020;

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

(C) except as provided in (D) of this paragraph, 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;
or

(D) attendance in an educational program operated by a church or other nonprofit religious organization that is exempt from federal taxation provided the program does not receive state or federal funding and provided that the church or other nonprofit religious organization elects to comply with the provisions of AS 14.45;

* Section 3. AS 14.45.015 is added to read:

Sec. 14.45.015. POLICY. In conformity with the fundamental right to freedom of religion guaranteed by the constitutions of the United States and of Alaska, it is the public policy of the State in the matters of education by religious organizations that the state shall not control or interfere with the rights of conscience or with religious liberty. The State further finds that there is no compelling reason to interfere with this fundamental right.

* Section 4. AS 14.45.020 is repealed.

* Section 5. AS 14.45.025 is added to read:

AS 14.45.025. STANDARDIZED TESTING REQUIREMENTS. Each school operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive state or federal funding and that has elected to comply with this chapter shall administer, at least once in each school year, a nationally standardized test or other nationally standardized equivalent measurement selected by the chief administrative officer of such school, to all students enrolled or regularly attending grades one, three, six and nine. The nationally standardized test or other equivalent measurement selected must measure achievement in the areas of English grammar, reading, spelling and mathematics. Each school shall make and maintain records of the results achieved by its students. For one year after testing, all records shall be made available to the parents at the principal's office, and the school composite test results shall be made available at all reasonable times for annual inspection by a duly authorized representative of the State of Alaska.

* Section 6. 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 [OR DENOMINATIONAL] schools not operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive state or federal funding and that has elected to comply with AS 14.45 shall make regular monthly attendance reports and annual reports to the commissioner in the same manner as teachers and superintendents in the public schools.

(b) The enrollment and attendance of a child in a school operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive state or federal funding shall be filed with the local public school superintendent by the parent, guardian or other person in charge or control of the child on a form provided by the superintendent which shall be countersigned by the administrator of the church school and returned to the public school superintendent by the parent. Should said child cease attendance at a church school, the parent, guardian, or other person in charge or control of the child shall by prior consent at the time of enrollment direct the church school to notify the local public school superintendent that said child no longer is in attendance at a church school.

(c) Each school operated by a church or other nonprofit religious organization exempt from federal taxation and which does not receive state or federal funding shall make and maintain monthly attendance records for each student enrolled and regularly attending classes. Such school shall operate on a regular schedule, excluding reasonable holidays and vacations, during at least nine calendar months of the year.

* Section 7. AS 14.45.035 is added to read:

AS 14.45.035. REQUIREMENTS EXCLUSIVE. No school operated by any church or other nonprofit religious organization exempt from federal taxation which does not receive state or federal funding and which has complied with this chapter shall be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation, *physical* and immunization. *examinations*

* Section 8. AS 44.27.020(1) is amended to read:

(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 by a church or other nonprofit religious organization that is exempt from federal taxation if the program does not receive state or federal funding and if that school has elected to comply with the requirements of AS 14.45;

CHAPTER 60.
PRE-ELEMENTARY (EARLY
CHILDHOOD) SCHOOL

Section

- 10. Requirements
- 20. Exemption
- 30. Application for a certificate of approval
- 40. Denial of approval; hearing
- 50. Duration of approval
- 60. Display of certificate
- 70. Certificate of approval
- 80. Insurance
- 90. Records
- 100. Physical examination for children
- 110. (Repealed)
- 115. Staff
- 120. Recognition of special needs
- 130. Disaster plan
- 140. Facility inspections
- 150. Changes in major written policies, plans, programs
- 160. Nondiscrimination
- 170. Programmatic requirements of the pre-elementary schools
- 175. Transportation
- 180. Definitions

4 AAC 60.010. REQUIREMENTS. (a) Every person, institution or agency operating a school for children ages three through five years, when the school's primary function is educational, shall apply to the department for a certificate of approval.

(b) The educational component of all pre-elementary programs is under the general supervision of the department in cooperation with the Department of Health and Social Services. Those programs not approved by the Department of Education are supervised by the Department of Health and Social Services.

(c) Before admitting a child whose school expenses could be the responsibility of departments of state government, authorization of eligibility should be requested from the appropriate department by the school. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060
AS 14.35.080(4)

4 AAC 60.020. EXEMPTIONS. The following are exempt from 4 AAC 60.010:

(1) schools maintained by the United States or funded entirely with federal funds;

(2) courses of instruction on religious subjects given under the auspices of a religious organization, such as church schools, vacation Bible schools, or similar denominational programs;

(3) schools that enroll six children or less. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.030. APPLICATION FOR A CERTIFICATE OF APPROVAL. (a) Application for a certificate of approval must be submitted on a form prescribed by the department.

(b) No pre-elementary school may represent that its program has a sponsorship, approval, characteristics, affiliation, or accreditation which it does not have, nor may any school cause a likelihood of confusion or misunderstanding as to any of these matters.

(c) Before issuing a certificate of approval, the department shall conduct an investigation of the applicant, including the proposed plan for the education and supervision of children and the mode of operation of the pre-elementary school. If the results of the investigation reveal that the primary purpose of the school is educational and that applicable regulations adopted by the department are satisfied, a regular certificate of approval shall be issued.

(d) The department may grant a conditional certificate of approval for programs with minor deficiencies correctable within a time specified on the permit, but not exceeding six months. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.040. DENIAL OF APPROVAL: HEARING. (a) A school or program denied a certificate of approval by the department is entitled to a hearing before the state Board of Education at a regular meeting of the board if a

written appeal is received by the commissioner within 15 days of the date of denial of certification.

(b) The decision of the board on the appeal is final. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.050. DURATION OF APPROVAL.

(a) A certificate of approval remains in effect for a period of no more than five years from date of issuance.

(b) A certificate may be revoked or suspended for failure to comply with the requirements of this chapter or other statutes and regulations governing the health, safety and welfare of students and employees.

(c) If the department has reasonable cause to believe that the holder of a certificate has failed to comply with this chapter or other applicable statutes and regulations, it may notify the holder of the basis for its belief and schedule a hearing on the matter to determine whether the certificate should be revoked or suspended. The commissioner shall appoint a hearing officer to preside over the hearing and to control its proceedings. The hearing shall be public, and all interested persons who have information relevant to the inquiry shall be permitted to be heard or to submit written statements and arguments, or both. A record shall be kept of the hearing.

(d) Following the hearing, the hearing officer shall prepare his findings and conclusions and recommend appropriate action to the commissioner. The commissioner shall review the hearing officer's recommendations and decide what, if any, action should be taken.

(e) A certificate holder whose certificate has been revoked or suspended by the commissioner may request, in writing and within 15 days of receiving notification of the commissioner's decision, that the board review that decision. A review will be made by the board or a committee of the board in the same manner as that provided in 4 AAC 60.040. The decision of the board is final. (Eff. 4/20/73,

Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.060. DISPLAY OF CERTIFICATE.

The certificate of approval must be displayed in a prominent place in the pre-elementary school. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.070. CERTIFICATE OF APPROVAL. The certificate of approval must include

- (1) name of pre-elementary school;
- (2) address of pre-elementary school;
- (3) maximum allowable number of children;
- (4) effective dates of certificate;
- (5) ages of children to be enrolled;

(6) minimum number of staff members required to be in attendance while children are present. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.080. INSURANCE. (a) Each nonpublic, pre-elementary school must have bodily injury liability insurance in an amount not less than \$100,000 per child, \$300,000 per accident, with a company authorized to do business in the State of Alaska. Policies must contain the following endorsement:

"In the event of cancellation of this policy, the company agrees to give 30 days' advance notice to the Department of Education, Pouch F, Juneau, Alaska 99811."

(b) If the insurance required under (a) of this section is allowed to lapse more than once in a 12-month period, the second policy lapse is grounds for termination of approval. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.090. RECORDS. The

pre-elementary school shall maintain an individual record for each pupil enrolled which must contain not less than the following:

(1) child's full name, birth date, and current address;

(2) name and address of parents or legal guardians;

(3) telephone numbers and instructions how the parents may be reached during school hours;

(4) names and addresses of persons authorized to take the child from school;

(5) a record indicating the immunization status of the child;

(6) a Cumulative Health Record Form. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.100. PHYSICAL EXAMINATION

FOR CHILDREN. (a) Not more than three months before first entering school, each child must have a tuberculosis skin test which meets the requirements of 7 AAC 27.213.

(b) Before first entering school, each child must have received the immunizations required by 4 AAC 06.055. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62; am 8/17/78, Reg. 67; am 9/24/82, Reg. 83)

Authority: AS 14.07.020(7) and (8)
AS 14.07.060
AS 14.30.070

4 AAC 60.110. PHYSICAL EXAMINATIONS FOR EMPLOYEES AND VOLUNTEERS. Repealed 5/20/77.

4 AAC 60.115. STAFF. (a) All staff members must have a physical examination annually and not more than three months before initial employment in the pre-elementary school. This

physical examination must include proof of negative Tine test. It is the responsibility of the operator to maintain a personnel file for each employee in which the results of the current physical examination are kept. This file is subject to inspection by the department.

(b) All volunteers who work in the classroom or who provide direct services to children must present to the operator proof of a negative Tine test taken not more than three months before initial service. This test must be repeated annually.

(c) Schools subject to the provisions of this chapter shall comply with all applicable statutes and regulations concerning labor and employment practices. (Eff. 5/20/77, Reg. 62)

Authority: AS 14.07.020(7) and (8)
AS 14.07.060

4 AAC 60.117. RECOGNITION OF SPECIAL NEEDS. At the age of three years, an exceptional child may receive special assistance as a part of the local school district's annual plan of services for special education. Any pre-elementary school which provides services for an exceptional child and receives state funds for providing those services must adhere to state guidelines for special education programs. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060
AS 14.30.180

4 AAC 60.130. DISASTER PLAN. Each pre-elementary school shall develop a disaster plan which must include provisions for accountability for each child in the school until he is released to an appropriate authority. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(7) and (8)
AS 14.07.060

4 AAC 60.140. FACILITY INSPECTIONS. (a) Each pre-elementary school shall request an inspection by public safety and health agencies and shall conform to standards established by those agencies.

(b) Copies of documents indicating satisfactory compliance with health and safety standards must be filed with the department before the issuance of a certificate of approval.

(Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(7) and (8)
AS 14.07.060

4 AAC 60.150. CHANGES IN MAJOR WRITTEN POLICIES, PLANS, PROGRAMS. Major changes in written policies, plans, programs and other information included in the initial application must be transmitted to the department within 30 days following implementation of the change. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.160. NONDISCRIMINATION. No pre-elementary school will be approved unless it adopts a policy of nondiscrimination in respect to race, sex, creed, color or religion with the following exceptions:

(1) a pre-elementary school established for an identified group (e.g., physical-mental handicaps) may serve that group only but otherwise may not discriminate;

(2) a religious group may elect to serve children that adhere to its religious beliefs but otherwise may not discriminate. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.170. PROGRAMMATIC REQUIREMENTS OF THE PRE-ELEMENTARY SCHOOLS. (a) The pre-elementary school shall provide the following information, in writing, to the department: the philosophy of education; the goals and objectives of the school; the program model and teaching techniques used in achieving the stated goals and objectives; daily educational activities schedule including provisions for individual activities, small group activities and large group activities; the number and ages of the children to be served along with the number of staff members working with the children; provisions for parental involvement; a copy of all public advertisements regarding the school; a copy of the personnel and administrative rules of the school; and a copy of all administrative forms used by the school.

(b) A pre-elementary school must have

sufficient staff to provide for each child's physical care and to offer individual attention to children as it may be needed as well as time to interact with children for the benefit of their conceptual and language growth. The number of staff and their utilization should reflect programmatic requirements, differences in the needs of the children served and should permit flexible groupings.

(c) There must be at least two staff members, one of whom may be a teacher-aide, present in each building. They must be stationed in sufficient proximity to be of aid in emergency situations.

(d) The operator shall provide a written training plan for each staff member who serves in the capacity of teacher, teacher-aide or assistant teacher. This plan must include provisions for preservice and inservice training and must indicate frequency as well as content. All such training is subject to the approval of the department.

(e) The department shall investigate to determine whether the programmatic objectives of the school are being met. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.175. TRANSPORTATION. An adult must be designated to accompany the driver and provide for pupil safety when more than six pupils are transported in a vehicle. (Eff. 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

4 AAC 60.180. DEFINITIONS. Unless the context indicates otherwise, in this chapter

(1) "department" means the Department of Education;

(2) "board" means the state Board of Education;

(3) "commissioner" means the Commissioner of Education;

(4) "pre-elementary school" means a school for children ages three through five years whose primary function is educational;

(5) "certificate of approval" means a regular certificate issued to an operator of a pre-elementary school who has met the minimum requirements of this chapter;

(6) "operator" means the person legally responsible for the pre-elementary school;

(7) repealed (Eff. 5/20/77, Reg. 62);

(8) "staff member" means anyone who provides direct services to children in the classroom and may be any of the following:

(A) a person 19 years or over who is salaried;

(B) classroom volunteers who are at least 19 years of age;

(C) student aides who are enrolled in a training program who are at least 16 years of age;

(9) repealed (Eff. 5/20/77, Reg. 62). (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)
AS 14.07.060

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Court Challenges

The United States Supreme Court has indicated that regulation of nonpublic education can go too far. In a landmark case, Yoder v. Wisconsin, the high court narrowly ruled that Wisconsin's compulsory attendance law could not be enforced against the Amish (a religious community). The Court held that the state cannot compel attendance of children in the face of strong religious objections, so long as the children are adequately educated in an alternative setting. Lower courts have extended Yoder only when traditional religious beliefs are involved. Decisions outside of this narrow realm have been mixed, with most cases turning on state constitutional or statutory grounds.

Litigation over the status of private education has culminated in court rulings in a number of states, among them Florida, Hawaii, Iowa, Kentucky, Michigan, Nebraska, North Dakota, Ohio, Washington, and West Virginia. Generally, states undergoing litigation require school attendance and certification of private school teachers. In a few states the central issue is approval of curriculum or facilities, or zoning rules. Additional cases have been or will soon be filed in many states, including Iowa, Maine, Michigan, New Hampshire, North Dakota, and Virginia. Given the growth of fundamentalist Christian schools, other nontraditional private schools and home instruction, states that require compulsory school attendance and set standards for the school will probably be challenged in the near future.

The litigation receiving the most attention from the media appears to be State v. Faith Baptist Church, dealing with the refusal of Reverend Everett Silevan to obtain approval from Nebraska for any aspect of his church-run school. The school uses a series of booklets called the Packet of Accelerated Christian Education (PACE), including instructional information and self administered tests. The school does not use state-certified teachers, a requirement under Nebraska's compulsory school attendance law. The Nebraska high court found the materials adequate, but upheld the state's requirement for certified teachers. On appeal to the United States Supreme Court, the case was summarily dismissed because, based on the papers filed before it, the high court could not identify an important constitutional issue.

Somewhat similar opinions (not going to the U.S. Supreme Court) have been handed down by state courts in Florida, North Dakota, and Wisconsin. In some of these cases, parents refused to provide any evidence about the child's schooling.

In other cases, state courts have ruled in favor of parents. In Ohio, in State v. Whisner, the state supreme court struck down a system of state regulation that, by its literal terms, left no time for religious instruction in a private school. A Michigan court was reluctant to find a mother teaching a child at home guilty under the state's compulsory attendance law, as she met the requirements for teacher certification but refused to obtain a certificate for religious reasons. (Michigan allows home instruction only by certified teachers.) In a Kentucky case, the state court applied a state constitutional provision (found only in a handful of state constitutions) that prohibits requiring a child to attend a school which parents find objectionable for conscientious reasons.

Policy Alternatives

Where statutory requirements are flexible, imaginative administrative solutions to the issue become possible. In New Hampshire, for example, state officials reached a somewhat fragile agreement with fundamentalists that required information to be submitted on church stationery rather than on official state forms. This fulfills the state's need for certain information, but recognizes the fundamentalists' tenet that they should not submit to state regulatory systems. In Iowa, the state accepts reports from parents instead of the fundamentalist school. The fundamentalists involved felt individual reporting was no different than filing an income tax form, while a church report was tantamount to church submission to state regulation.

A state considering a change in its policy can look to sister states for models. In the past five years several states have deregulated private education.

- o Tennessee, for example, prohibits the state board and local boards from regulating faculties, textbooks, or curricula in church affiliated schools.
- o North Carolina requires only that private schools keep records on pupil attendance and disease immunization and that they select and administer a nationally standardized test to students each year. The schools keep the tests on file and make them available to state inspectors. They must also meet fire, health, and safety standards established by other laws.
- o Washington prevents state agencies from expanding on statutory provisions, but these provisions set minimum

standards as to length of school year, length of day, subjects to be taught, and teacher qualifications. Teacher certification is required, except for courses in religion and other subjects not taught in the public schools. State law in Washington allows persons of "unusual competence" to teach, if they are supervised by certified teachers.

- o The Vermont legislature, following efforts by its state board to require teachers certification, made it clear it could not do so, and also strengthened its child abuse laws in order to narrowly focus on actual problems, rather than to sweepingly subject all private educators to regulation.
- o In mid-1982 the Arizona legislature determined to permit home instruction, so long as the child shows academic progress, as indicated by test scores or an impartial professional evaluation.
- o Louisiana exempted schools which receive no local, state or federal funds from most reporting requirements.
- o Arizona, Oregon, and North Carolina require testing of the children, to help provide assurance that they are being educated.
- o Teacher certification is the mechanism used in Washington, although it reduces flexibility for private education alternatives and precludes instruction by a parent in most cases.

Policy Questions

Policy makers contemplating a change in state compulsory education laws need to ask the following questions before deciding on a course of action.

- o Should compulsory attendance laws carry criminal sanctions against parents honestly acting in the best interests of their children?
- o Are the children educated in unapproved settings acquiring what they need for good citizenship and self-sufficiency?
- o What are the long-range implications of large segments of the population insulating themselves from the mainstream of society -- in this case, by avoiding state-approved education for their children?

- o Are private schools havens for those wishing to avoid integration?
- o Do existing consumer protection laws assure that parents are evaluating small nontraditional schools on the basis of adequate and correct information?
- o What are the political implications of the growing exodus from public schools, when local school districts depend on state aid based on enrollment or attendance?

Policy Implications

Organizations and individuals urging more flexible compulsory education laws argue that this is required to preserve the free exercise of religion. These groups argue that parents know what is best for the child. They include those participating in nontraditional options, fundamentalist Christians, more traditional private schools and, to some extent, organizations and individuals concerned with civil liberties. The national ACLU, for example, in its Policy #71A, states: "We believe that, in the interest of parental right to choose an alternative to public education, [home instruction with safeguards, such as approval of curriculum or testing of the child] . . . should be extended to all jurisdictions because the state's interest in assuring minimum levels of education does not extend to control of the means by which that interest is realized."

Organizations and individuals urging retention or adoption of stricter requirements for private education generally argue that these regulations are needed to assure the best interests of the child, and to prevent balkanization of society. These groups include teachers' organizations and public school administrators.

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The Challenge of Exemptions in Safeguarding Child Care:
With Special Reference to Religious Organizations*

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- * This collectivity of short position papers was presented at the Virginia Commonwealth University Annual Institute on Human Services Regulatory Administration, Williamsburg, Virginia, September, 1982. These papers and responses by public lawyers will appear in Proceedings of the Institute

1 I. Introductory statement

2 Exemptions constitute a serious threat to the continued positive develop-
3 ment of the child care licensing movement. Insidiously the pay off of
4 exemptions is two-fold. One, a significant number of children in out-of-home
5 care are deprived of a proper minimal safeguarding. Two, due to the resultant
6 unequal treatment and ensuing community divisiveness it tends to weaken and
7 undermine the safeguarding program for those not exempt. Lincoln remarked a
8 house divided against itself cannot stand.

9 Although there are others, historically there have been three major
10 categories of legislative exemption: 1) There is exemption from regulation
11 by the child care licensing agency because the out-of-home care is under
12 public auspice. 2) The out-of-home care service is philanthropic (non-profit)
13 in nature (church organizations as well as benevolent and fraternal organiza-
14 tions are included but the intent of the exemption seems to focus on "non-
15 profit" rather than religious.) 3) The out-of-home care (service is church
16 related.

17 The times are changing. Up to a fairly recent date, the large majority
18 of out-of-home children in public care agencies were not covered by child
19 care licensing laws. Today, while probably most public out-of-home care
20 facilities are not formally licensed, an ever-increasing number of state
21 child care licensing statutes contain a provision to the effect that state
22 and/or local public care facilities must meet the same standards as are
23 required of similar private agencies. The child care licensing authority is
24 given the right of entry to inspect and to report on the nature of compliance
25 with prevailing licensing standards (requirements). The report may be made
26 to the director of the facility and/or to the governor, fiscal allotment
27 officer, the legislators, and sometimes to designated public offices, such as
28 juvenile court judges. Granting the trend toward legal regulation, if not
29 formal licensure, of public child care operations, the exemption problem in
30 this particular area would seem to be one of marked attenuation, not growing
31 concern.

32 Statutory exemption of philanthropic organizations was provided for in
33 some of the early (prior to 1920) child care licensing laws. However, later
34 enacted licensing laws (and some early laws when later revised) have tended
35 not to contain this category of exemption. The number of state child care
36 licensing laws granting exemptions to facilities under philanthropic auspices
37 (apart from religious organizations) is very limited and in most of these
38 states the possibly exempt facilities may seek licensure which they do with
39 much frequency for prestigious reasons and/or because public agencies
40 purchasing their service generally require licensure. Observation would lead
41 to the conclusion that non church philanthropic facilities are not in the
42 vanguard of the agencies seeking exemption.

43 Recently, within the last ten to fifteen year period, it has been the
44 church related child care organization, especially day care centers, that
45 have seemingly been the most active in resisting licensure or license
46 renewal. In a number of instances these centers have been licensed pre-
47 viously. They now claim exemption from the licensing statute by reason of
48 the First Amendment of the United States Constitution. From the viewpoint of
49 public policy planning it is important to note these two things in respect to
50 the exemption of church related child care organizations.

51 One) The advocacy for exemption would seem to come with much frequency
52 from a narrow band of what might be termed Protestant Fundamentalist Churches.

1 With some or great frequency their endeavor to secure exemption has not had
2 the support of the other Christian churches (both Protestant and Catholic)
3 nor the support of Jewish religious organizations. In fact, in many instances
4 the opposition leadership against granting exemption has come from these
5 churches.

6 Two) The attempts to secure exemption have been both judicial and legis-
7 lative. In a number of states there has been or there is pending court cases
8 based on the claim the child care licensing statute violates the First Amend-
9 ment of the U.S. Constitution. Some of these have gone to state or federal
10 courts for review. Generally speaking the claim of constitutional violation
11 has not prevailed. However, the lack of success in past fully decided cases
12 does not seem to have made for a discontinuance of initiating new cases.
13 Such litigation costs money but as of this date there would seem to be funds
14 to start such cases.

15 The legislative route to exemption has had a modest degree of achievement
16 in escaping child care licensure but not necessarily all types of public
17 regulation. From a recent (1981-82) limited enquiry to all fifty states
18 which one of the writers conducted, it would seem that not more than ten to
19 twelve states (twenty percent or less) have statutory provisions exempting
20 church related child care facilities from the child care licensing statute.
21 Moreover, while there is exemption from the formal child care licensing law
22 there are requirements for inspection and approval by other public regulatory
23 agencies. Also, and perhaps most important of all is to note that in
24 practically all states (except Missouri) providing exemption to some type of
25 child care there is a statutory stipulation for the exempted organizations
26 to seek licensure.

27 Now the point of what has just been said is not that the child care
28 licensing movement is necessarily in great immediate peril but the all out
29 effort by certain religious organizations seeking exemption does constitute a
30 most serious policy challenge to continued positive development. Those who
31 have a commitment to sound child care regulatory programs have a responsi-
32 bility of identifying the basic policy questions and to begin to formulate
33 position-taking answers to the questions. To this end we present three
34 short position taking papers in respect to three questions:

35 1. Is there really a compelling state interest to regulate day care
36 centers?

37 2. Is child care licensure constitutionally valid in light of the
38 First Amendment - when it is claimed that the day care program is one of
39 "religious instruction" - part of a religious ministry?

40 3. Is willingness upon the part of church-related organizations to
41 accept a very limited amount of public regulation, such as approval by fire
42 marshal and health officer a satisfactory alternative to formal child care
43 licensure?

1 II. Some compelling reasons for the regulation of child care centers, with
2 special reference to day care centers

3
4 Prefatorily this should be said: The principle of the right of the state
5 to safeguard out-of-home care of children goes back into the 19th Century.. It
6 is noted that Massachusetts, in 1863, concerned with the care of children in
7 institutions passed its famous State Board of Charities Law. This law,
8 although not a formal licensing program provided for right of entry and public
9 inspection and report on operations and care given in certain child care
10 facilities. In 1885 Pennsylvania enacted what amounts to a formal child care
11 licensing law. Since 1885, in every state, territory, or district (District
12 of Columbia) the legislative body has enacted and implemented some form of a
13 care facility licensing law. In the overwhelming number of instances of
14 these laws, there has been no exemption of religious, philanthropic, or non
15 profit organizations. It might be noted that in many instances, the legisla-
16 ture was apparently quite conscious of the religious exemption issue by
17 virtue of the fact that short-term and/or incidental child care, such as care
18 of children during the church services, vacation Bible school, or camp, or
19 care in respect to healing by prayer were specifically exempt. The long
20 history of child care facility licensure with no serious constitutional
21 invalidation, plus the universalization of enactment would seem to constitute,
22 per se, an acculturated validation of a communityheld belief, that there is
23 a need for state programs to safeguard out-of-home care of children generally.

24
25
26 When child day care centers are examined in particular these five
27 aspects of center care intensify the conclusion that there are compelling
28 reasons for safeguarding. The five aspects are:

- 29 1. age of the children
- 30 2. range of ages and physical size of the children
- 31 3. size of the groups
- 32 4. staff instability and shifting group composition
- 33 5. absence of agency placement services.

34 Comment will be made on each of these five aspects.

35 1. The age of the children. The majority of children in child care
36 centers are of pre-school age, under six years of age, with a probable modal
37 age of three to four. The state's concern with the safeguarding of very
38 young children is of long-standing. In fact, the first child care licensing
39 statute (Pennsylvania's) enacted focused on "infants." Of course the long
40 history of state regulation of facilities caring for young children is not
41 hard to understand: At this age the child is generally not able to discern
42 properly his needs, rights, and self-interests. Even if he is able to make
43 the proper perception, he/she would be generally incapable of "vocalizing"
44 them. (The Latin base of the word infant translates freely into: a person
45 without voice). Consideration of this age must be coupled with what might
46 be termed the "limited social visibility" of children in center care. By
47 limited social visibility is meant that the children are generally not in the
48 "public eye." Thus in a sense the children may easily become a "captive
49 group" of the operator. Licensing, with its right of entry, inquiry and
inspection must be seen as a compensatory operation against this possibility.

1 2. The range of ages and physical size of the children. Pre-school
2 children from an adult point of view may be generally classified as "small."
3 In reality, in a pre-school group, say, ranging from two to six years, there
4 may be marked difference in the size of the children. A five year old may
5 be literally almost twice the physical size of a two year old. Likewise
6 psychological observations have established that there may be marked differ-
7 ences in the aggressiveness in a pre-school group. When there is a com-
8 bining of marked aggression and largeness of size in a number of children
9 then the other, smaller and less aggressive children are at greater risk.
10 That is, they are at greater risk unless there is sufficient supervising
11 adult personnel skilled in dealing positively with such situations.

12 The need for a proper adult staff-child ratio requirement is further
13 increased due to what is sometimes referred to as the young child's asocial
14 behavior. The common law doctrine of the changing age of social responsi-
15 bility of children attests to the universality of societies' awareness of
16 this possibility in young children. While the doctrine may relieve the
17 young child of "criminal culpability" it in no way relieves adult child
18 caretakers knowing about the possibility of this type of behavior and of
19 responsibility for safeguarding the group, in advance, against the possi-
20 bility of it being expressed.

21 3. The size of the group especially in relation to number of children
22 to the number of teachers and/or care-givers. There would seem to be wide-
23 spread agreement among parents, teachers and experts in child development
24 that the years two through five in the life of a child are highly impres-
25 sionable. In fact, some observers hold that this two through five period is
26 of the most critical importance in the development of the human personality.
27 Lack of sufficient staff to properly individualize each child's needs and
28 lack of qualified staff to properly meet the needs may likely contribute to
29 faulty development and failure to realize a child's innate potential. To
30 try to correct faulty development later may be costly and time consuming.
31 In fact, with much frequency, the results of faulty development, which
32 might have been avoided at an early age, become irreversible at a later age.

33 4. Staff instability and constant change in the composition of the
34 group. Although it may not be true in all child care centers, there is a
35 widespread impression among persons who are able to get the "larger picture"
36 that there is a high level of staff turnover in child care centers. Staff
37 instability does not contribute to the development of a sense of security
38 in children in care. Yet there is a general holding that a sense of
39 security is of marked importance in positive personality formation. While
40 state licensing may not completely compensate for such a state of affairs
41 it may help to attenuate some of the negative aspects. Licensing standards
42 can be conducive to facilities having a minimal in-service program especially
43 for new workers. Licensing staff, as they make their supervisory visits;
44 can share their knowledge of sound personnel practice (derived in part from
45 their contacts elsewhere) with the facility at hand.

46 Likewise, observation indicates that there is a tendency for the
47 composition of children making up the group to change with considerable
48 rapidity. Like staff turnover, changing group composition does not contrib-
49 ute to the development of a sense of security. It is generally accepted
50 that stable personalities develop out of stable social relationships.

51 5. The absence of non-agency connection in placing. In twenty four
52 hour child care, the placement is, often, made through services of a child
53 placing agency, staffed with professional "case work" personnel. The

1 function of the case work personnel is to individualize the needs of the
2 child and to select out from the child placement agency repertoire of facili-
3 ties the most appropriate one for this specific child. After placement, the
4 caseworker continues in a counselling role to all the parties of the place-
5 ment: 1) child, 2) parents, 3) care provider, and 4) if necessary, community
6 interested parties, such as school, clinic or court. Now this is generally
7 not the situation in respect to child care centers. The overwhelming number,
8 perhaps over ninety percent of children receiving care have been placed there
9 "independently" - meaning without benefit of a community child serving
10 agency. In effect, the parents do it "alone" without benefit of (or with
11 very limited) organized knowledge as to what to look for in respect to out-
12 of-home safeguards pertaining to environmental safety, physical and psycho-
13 logical development, and general well being including basic rights and
14 entitlement of children. Moreover, this should be noted also that the over-
15 whelming majority of parents utilizing center care are working parents with
16 limited time and energy to make such safeguarding investigation. Thus, in a
17 certain sense, it may be said that licensing constitutes a preliminary case-
18 finding service for parents seeking a facility where minimal safeguarding
19 will be present.

1 III. De facto day care: with special reference to licensure exemption of
2 religious organizations.

3
4 A new type of upbringing of young children emerged in this country since
5 World War II--the 1940's. As acculturated, this new type of child upbringing
6 has been labeled "day care." In keeping with the history of safeguarding the
7 child who is cared for away from parents and/or relatives through child care
8 licensing, child day care regulation is now included in every one of the
9 fifty state child care licensure programs.

10 Of late, however, there would seem to be an effort upon the part of
11 certain religious organizations to escape the requirement of child care
12 licensure. ~~There is an insistence by these religious organizations that~~
13 ~~operations in their facilities do not constitute day care. Rather, they hold~~
14 ~~that it is a religious instructional program and a part of their religious~~
15 ~~ministry. (This insistence is maintained that the operation is wholly and~~
16 ~~completely instructional although the child may be in the facility from seven~~
17 ~~thirty in the morning until after five in the evening. This strikes one as a~~
18 ~~very extensive instructional program for preschoolers.) There is an insis-~~
19 ~~tence that this activity is a manifestation of the free exercise of religion~~
20 ~~and should not be subject to licensure by reason of the First Amendment of~~
21 ~~the United States Constitution.~~

22 Now, this matter of exemption of church affiliated child care facilities
23 has been before several state appellate and/or supreme courts on a number of
24 occasions in recent years, and it would seem that none of the review courts
25 have held that child care licensing statutes per se violate the First Amend-
26 ment of the Constitution. Yet, the negation by the courts of the contention
27 that the First Amendment does provide a basis of exemption for church
28 affiliated facilities has not had the effect of attenuating new attacks on
29 the constitutionality of child care licensure of church affiliated facilities
30 by reason of "The First."

31 In light of these continual attempts to secure exemptions from the child
32 care licensing law judicially, it was assumed that there would be value in an
33 enumeration of basic features of day care as a social institution of child
34 upbringing which has emerged in this last half of Twentieth Century America.
35 Thus, when these features are present in an operation, it prompts a conclu-
36 sion of ~~de facto day care~~ regardless of what it may be labeled by the opera-
37 ~~tors of the service.~~

38 Operational analyses of the typical day care center, regardless of
39 geographical location or organizational (public or private) auspices, reveal
40 that the overwhelming majority of the children cared for are of preschool age
41 (under six years) whose mothers work away from the home, i.e. the mothers
42 are gainfully employed or are in training for employment. Thus, day care may
43 be defined as a ~~supplementary parenting service~~ which has historically
44 emerged as a result of women (mothers) working away from home. Moreover
45 present statistical trends indicate this use of day care will not abate in
46 the immediate foreseeable future. Rather it is speculated that by 1990 an
47 overwhelming majority of preschool children will during their first five
48 years of life experience a substantial amount of day care in their upbringing.
49 In other words, regardless of how one may feel as to the desirability of this
50 type of child r ing, it will be the statistical norm. Public policy
51 relative to the protection of children should be based upon the social

1 reality of the situation, not a given group's dream of what it should be.
2 " ~~Given this primary feature, employed parent or parents, and the need~~
3 ~~for a supplementary parenting service, these five features tend to charac-~~
4 ~~terize center day care, all of which have safeguarding import for very~~
5 ~~young children.~~

6 ~~1.~~ The care is not in the child's own home or in a relative's home.

7 ~~2.~~ The type of care would be described as group care with the possi-
8 bility of great variation in the size of groups and the ages of
9 the children composing a given group.

10 ~~3.~~ The number of children in centers vary greatly, generally always
11 over ten and may extend upwards to over a hundred children.

12 ~~4.~~ The duration of the care is for a substantial period of time,
13 probably averages over eight hours per day and is for each working
14 day of the week and for each week of the working year.

15 ~~5.~~ The staff personnel providing the care are not related to the
16 children and (at least at the start of care for a given child) do
17 not know the child generally and especially in terms of the child's
18 physical, mental, and social needs.

19 In addition to these basic operational features of day care, it should
20 be further noted that the concept of day care has been acculturatively
21 clarified and crystalized to the point that in public policy formulation it
22 can be designated (1) as a tax deduction item, (2) as a possible appropria-
23 tion item in public funding, and (3) as an activity with a public interest
24 subject to public regulation.

25

2

26 The primary purpose of day care centers' licensing standards (require-
27 ments) is to reduce tangible and objective risks in the group care of many
28 young children of working mothers. For purposes of simple administration
29 analysis the care risks in a day care center can be summarized into eleven
30 propositional statements:

- 31 1. There are risks relating to fire, improper sanitation and faulty
32 building construction.
- 33 2. There are risks deriving from the location of the facility includ-
34 ing environmental hazards such as traffic and pollution.
- 35 3. There are risks associated with plant operations including
36 lighting, heating, and ventilation.
- 37 4. There are risks arising from insufficient staff, including the
38 physical protection of younger and smaller children from older ones
39 and coping with emergency-crisis situations.
- 40 5. There are risks relating to character defect of staff and to the
41 lack of qualifications of staff to carry out role assignments
42 properly and/or responsibly.
- 43 6. There are risks in relation to improper nutritious care of the
44 child while at the center.
- 45 7. There are risks relating to the health of staff, children under
46 care, and whether a given child's condition is suitable for the
47 program as it operates.
- 48 8. There are risks accruing from the lack of proper planning especially
49 in relation to active and passive play and the imbalance of activity
50 and rest.
- 51 9. There are risks of child abuse including excessively severe
52 disciplinary practices.

- 1 10. There are risks stemming from insufficient and improper equipments
2 and toys including those which are hazardous and inappropriate to
3 the ages of the children.
4 11. There are special operational risks including the reception of sick
5 children, improper release of children and transportation of
6 children.

7 ~~The achievement of risk reduction is by means of the formulation, imple-~~
8 ~~mentation and enforcement of child day care center standards in the form of~~
9 ~~structural-operational requirements.~~ To be initially approved a center must
10 demonstrate compliance with the risk reducing standards. To continue to
11 operate after being licensed the facility must stand ready to demonstrate
12 continued compliance to standards. Operationally conceived, standards might
13 be described as legitimated community expectations of performance by those
14 who take on the responsibility of caring for other people's children.

15 As already indicated the power of the state to provide such minimal
16 safeguarding of out-of-home care to children has been manifest legislatively
17 for approximately a century. Of the state as parens patriae acts to reduce
18 the tangible risks in day care centers by means of child care licensing pro-
19 grams, then the exemption of a church operation which in effect is a de facto
20 day care center regardless of what it may be called, would seem to constitute
21 unequal protection of the most defenseless and vulnerable category of persons
22 in the American society.

23 3

24 ~~The feasibility of any specific licensing standard impinging greatly~~
25 ~~upon free exercise of religion is minimal in light of the licensing agency's~~
26 ~~capability for positive accommodations by means of making exceptions and/or~~
27 ~~granting waivers and variances.~~ The exception is granted on a basis of
28 individualized review by the licensing agency with possible community partici-
29 pation being present. When the possibility of immediate danger to the child
30 does not exist and where the requirement is deemed to be particularly burden-
31 some on the free exercise of religious posture, accommodation may be possible.
32 However, these administrative features are present: (1) The religious
33 organization should request the exception in writing, and indicate how the
34 goal of the standard will be achieved by alternate operations. (2) The
35 granting of exceptions should be "open" operations with the fact of a modified
36 requirement for a given facility being in the public domain. (Justice Holmes
37 statement is recalled: "Silence breeds conspiracy.") This possibility of
38 positive accommodation by the licensing agency in respect to a given standard
39 in a given facility is most essential in a politically democratic society
40 characterized by a higher level of cultural pluralism. More important, this
41 approach of positive accommodation eliminates the need for total exemption
42 because of a conflict with perhaps a single specific requirement.

1 IV. Unacceptability of "token" regulation as an escape from licensure.

2 The challenge of exemption from the licensing of child care by religious
3 organizations has taken a number of forms. One such approach is "token" regu-
4 lation, which requires approval from a local fire marshal and health depart-
5 ment with respect to certain minimal physical plant requirements. For example,
6 relatively recent laws enacted in Indiana and several other states including
7 Virginia and South Carolina, in which church affiliated day care centers would
8 be exempt from the child care licensing statute provided there is compliance
9 with certain statutory stipulations. These stipulations may also include
10 registration of the fact of operating a day care center, seeking certain types
11 of approval from the fire marshal's office and the health department, and per-
12 haps notifying the parent consumer that the facility doesn't have a general
13 child care license.

14 We would express opposition to these exemption statutes for three reasons:

- 15 1. At best they are tokenism of child care safeguarding and beg the issue
16 of what constitutes proper and adequate protection of all young
17 children in out-of-home care situations.
- 18 2. This arrangement gives an economic advantage to the exempt facilities
19 and is unfair to nonchurch affiliated facilities, especially in light
20 of the fact that the church affiliated centers already may have a com-
21 petitive advantage by reason of the church's tax exemption status.
- 22 3. The granting of exemptions generally, and especially when it provides
23 an economic or administrative advantage, is conducive to community
24 divisiveness, or at least confusion to the consumer, and may well
25 contribute to undermining or actually destroying most of the state's
26 safeguarding effort.

27 1. Tokenism safeguarding

28 Fire safety and sanitation are important concerns in safeguarding
29 young children in out-of-home care. They constitute, however, only a small
30 proportion of the total risks in center care. In terms of actual experience
31 serious negative, detrimental care may result: To take just three examples
32 from: 1) insufficient staff to properly supervise the daily activity of the
33 children so that they do not hurt themselves or the older, larger children do
34 not hurt the smaller, younger children; 2) child abuse often stemming from
35 excessively severe punishment; and 3) insufficient equipment (resulting in
36 "glued to the tube" for five or six hours a day) or just plain hazardous toys.
37 In addition to these frequently recurring risks there are others that are per-
38 haps not as commonplace but they need to be guarded against. When they do
39 eventuate it may take on group catastrophic proportions. They include (but
40 are not limited to these two instances) 1) improper handling of the "child who
41 comes sick" and may infect a whole center, and 2) irresponsible transporta-
42 tions of young children. Now neither of these risks and many more are not
43 dealt with in this so-called less intrusive regulatory approach. It is
44 wholly inadequate in the safeguarding of very young children and needs to be
45 seen ironically (in as much as this is a First Amendment controversy) as a
46 "politics of religion" situation!

47 In fact this type of proposal - or enactment - is even unsatisfactory
48 from the viewpoint of fire safety and sanitation, per se. In a formal
49 licensing operation the licensing staff is generally sensitized to non-
50 compliance in these areas of fire safety and health. Thus in supervisory
51 visits to the facility the child care licenser may become aware of possible
52 deficiencies in these areas and call attention to operator. If it seems
53 very serious they can communicate their concern directly to these regulatory
54 authorities. In a sense child care licensing is a complementary safeguarding
55 operation in the area of fire safety and certain public health matters.

1 In 1981 the Illinois legislature passed an exemption measure similar to
2 what is under discussion here. Governor James R. Thompson vetoed the law. In
3 his August 21, 1981 veto message he wrote in part: —

4 "... The exemption proposed in Senate Bill 524 serves to eliminate the
5 very intent and purpose of the Child Care Act -- that is to provide for the
6 protection of children in care away from their own parents. Child welfare
7 licensing is preventive in nature and is designed to reduce risks to children.
8 The regulation of day care centers extends this protection to our most
9 vulnerable population -- infants and young children -- a group for which the
10 known risks of group care situations are well documented.

11 "This proposal to exempt day care centers from licensing, based upon
12 sponsorship by a church or religious organization constitutes unequal protec-
13 tion to children in group care; unfairly discriminates against those facili-
14 ties subject to state licensure; and greatly inhibits the effective enforce-
15 ment of the entire statute...

16 "... Moreover, the State should not place itself in the position of
17 distinguishing what constitutes a recognized church or religious organization.

18 *One argument which has been voiced in favor of Senate Bill 524 is the*
19 *assertion that health and fire safety standards, since they are referenced in*
20 *the Bill, will be met by the exempt facilities. Since it is licensure itself*
21 *which authorizes health and fire safety inspections, this is a specious*
22 *argument. Indeed, it is the day care center licensing standards which ensure*
23 *that health and fire safety codes are met. Exempt facilities cannot be*
24 *(routinely) inspected. (Italics added)*

25 2. Economics advantage to church affiliated centers.

26 There is no doubt that certain types of standards (requirements)
27 increase costs of operation. This is a "law of situation" that applies in
28 most safeguarding operations: whether it is safer automobiles, hospitals,
29 pharmaceutical products or day care centers. For the state, however, to
30 relieve church affiliated centers from having to meet these requirements
31 cost and to continue to demand that they be met by non church affiliated
32 centers is to give a competitive economic advantage to the church related
33 operations.

34 It should be further noted that this economic advantage is compounded
35 by the fact that church property may benefit from tax exemption laws. The
36 creation of such economic advantage to church day care centers would seem to
37 move the state from a position of "neutrality" to one favoring (aiding)
38 church operated facilities at the expense of the non church centers.

39 3. The aftermath of exemption is community divisiveness.

40 A general finding from the field of regulatory administration is
41 that exemption provisions are conducive to community divisiveness: "why me
42 but not him?" This divisiveness is present even when the economic advantage
43 is not in the forefront. For example, in the early days of child care
44 licensing only private facilities were included in the statute. There may
45 have been good political theory - the separation of powers doctrine - for
46 not including public child care facilities. Regardless of the reasons there
47 was ever increasing resentment among the licensed private facilities.

1. Although not economically disadvantaged it was a deep-seated feeling of
2 unfairness - a cardinal evil in a politically democratic society. Thus
3 resentment continued to the point that new legislation has tended to make
4 public child care facilities subject to the same standards (requirements)
5 and to systematic compliance inspections although negative sanctions may be
6 applied in a different way.

7 Where the exemptions give an economic advantage to one group of private
8 organizations over another there is bound to be even greater resentment.
9 The divisiveness may even manifest itself in community-wide meeting of day
10 care personnel. With much frequency, attempts to raise standards are reflex-
11 ibly resisted by non exempted organizations on a basis that it increases the
12 economic advantages of the exempt facilities. Exemption may also contribute
13 to marked divisiveness within the overall religious community of the states.
14 In a number of recent instances a proposal for exemption did not have the
15 support of the majority of church organizations and many church leaders were
16 in the forefront of opposition.

17 It is to be further noted that in all or almost all of the laws granting
18 exemption to religious organizations there is provision for the exempted
19 facility to elect to seek licensure. In every state with such a permission
20 to seek licensure provision, exempted religious organizations do as a matter
21 of fact seek licensure in substantial numbers. In one state the licensing
22 administrator estimated the number would be eighty percent of the total
23 exempted group. When operators of exempted facilities are asked why they
24 seek licensure a frequent answer is to the effect: "I believe in licensing
25 as a safeguard for children." One added, "The church has an added responsi-
26 bility to see that children get this protection."

27 As a postscriptive statement this might be added: The "offer" by
28 religious organizations to be subject to regulatory inspection by the fire
29 marshal and by the health department (but not by another state established
30 regulatory agency, namely the child care office) raises this practical
31 question in public policy formulation, implementation and enforcement: Are
32 church affiliated day care centers, because of the First Amendment, to be
33 authorized to pick and choose which state safety policies relating to young
34 children are to be applied to its facility?

35 In the conscientious objector cases (Gillette v. United States,
36 *Negre v. Larsens* 401 U.S. 437; 1971) dealing with situations when the
37 person's objection was not against all wars but only particular wars the
38 Court referred to the danger perceived by some that exempting persons who
39 dissent from a particular war, albeit on grounds of conscience and religion
40 in part would (and we quote from the case) "open the doors to a general
41 theory of selective disobedience to law"...

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

MAR 4 1993

CARL R. BRENTS, CLERK

By: _____
DEP. CLERK

ARKANSAS DAY CARE ASSOCIATION, INC.,
DR. BETTY CALDWELL; TIFFANY WELCH, by
her parents and next friends Mike and
Karen Welch; KATI MARTIN AND SHAWN
MARTIN, by their parents and next friends
Timothy and Vicki Martin

PLAINTIFFS

VS.

CIVIL ACTION

NO. LR-P-83-192

BILL CLINTON, Governor, State of Arkansas;
ARKANSAS CHILD CARE FACILITY REVIEW BOARD;
LOYD SCHUH; LEROY ACREE; JOHN LUSK; DR. SUSAN
KEATHLEY; RAY ALLEN; LARRY ROBERTSON; DR. P. B.
GREENHOUSE, all individually and in their official
capacities as members of the Arkansas Child Care
Facilities Review Board

DEFENDANTS

COMPLAINT

I. Jurisdiction

1. The court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343 (3) and (4) for causes of action arising under the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.

II. Nature of the Action

2. This is an action for declaratory and injunctive relief declaring Act 245 of 1983 and Act 518 of

1981, and Act 123 of 1973, Acts of Arkansas, which exempts "religious" child care facilities from regulation by the Child Care Facilities Review Board (hereafter "Act 245" and "Act 518" and Act 123), in violation of the First and Fourteenth Amendments to the Constitution of the United States, and of 42 U.S.C. §1983, and enjoining its implementation and/or enforcement.

3.- Acts 245, 518, and 123 (a) constitute an establishment of religion, (b) are impermissably vague, and (c) deny to plaintiffs equal protection of the law, all in violation of the Constitution and laws of the United States.

4. Plaintiffs request injunctive relief prohibiting defendants from in any way implementing and/or enforcing the provisions of Acts 245, 518, and 123 including the promulgation of any rules or regulations incident to issuance of any certificate of exemption or exempting any facility from inspection or regulation.

III. Plaintiffs

5. Plaintiffs are:

A. Arkansas Day Care Association Inc. is an Arkansas non-profit corporation made up of proprietary day care providers.

B. Betty Caldwell is a resident of Pulaski County, Arkansas. She is National President of the National Association for the Education of Young Children. She has devoted her professional career to the advancement of health, education and welfare of minor children.

C. Tiffany Welch is a resident of Pulaski County, Arkansas who attended an unlicensed day care center in Little Rock until she suffered physical abuse there. She is four years old and now attends a licensed religious day care center in Little Rock.

D. Kati Martin and Shawn Martin are residents of Pulaski County who also attended an unlicensed day care center facility in Little Rock until they suffered physical abuse there. They are two years old and one year old respectively, and are now attending a licensed religious day care center in Little Rock.

IV. Defendants

6. Defendants are:

(A) Defendant Bill Clinton is the Governor of the State of Arkansas. He signed Act 245 which was enacted by the legislature of the State of Arkansas.

(B) Defendant State of Arkansas Child Care Facility Review Board (hereafter, the "Board") is established and functions pursuant to the laws of Arkansas.

(C) Defendants Kenny Whitlock, Chairman, and Arkansas Child Care Facility Review Board, Loyd Schuh, Leroy Acree, Dr. Susan Keathley, Ray Allen, Larry Robertson, and Dr. P. B. Greenhouse, all individually and in their official capacities as members of the Arkansas Child Care Facility Review Board.

FACTS

7. A. The State of Arkansas has regulated child care facilities since at least 1969. In 1969 the legislature enacted Act 434 of 1969 being Ark. Stats. Ann., §§83-901 through §83-919. Pursuant to these statutes the Board has inspected and licensed all child care facilities.

B. The Board has promulgated various minimum standards for various types of child care facilities covering all aspects of the operation of these facilities. These standards are designed to insure the health, safety and welfare of all children under the care of these facilities.

C. In 1973 the legislature enacted Act 123 of 1973 which provided that religious child care facilities organized and operating as of July 1, 1969, were required to be inspected but could apply for an exemption from licensing.

8. A. In 1981 the legislature enacted Act 518 of 1981 which provided that any religious child care facility organized and operating as of July 1, 1969 was entitled to

apply for exemption from inspection and licensing. The request for exemption is sufficient to entitle any such facility to exemption.

B. Only religious facilities were exempted by Act 518 and no legitimate or compelling interest was brought before the legislature to justify such exemption from traditional regulation.

9. A. On or about January 24, 1983, a subcommittee of the, Committee on State Agencies and Governmental Affairs Committee Arkansas House of Representatives considered a bill known then as House Bill (HB) 223. HB 223 bill proposed that child care facilities operated by church groups be exempted from regulation by the defendant Board. The sole purpose of the bill was to exempt these facilities from state regulation.

B. At the time of the initial deliberations the Attorney General of the State of Arkansas, the Honorable Steve Clark, had already issued a formal Attorney General's Opinion dated January 24, 1983 and numbered 83-15. In this opinion, attached hereto as Exhibit A and made a part hereof, Clark set forth several constitutional difficulties with the bill and concluded (p.5) "...it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned."

/ 10. The subcommittee deliberated concerning the bill approximately two hours without being able to reach

consensus on the merits of the bill. The subcommittee then created a special ad hoc committee to which HB 223 was to be referred. This ad hoc committee was made up of five representatives of church groups favoring exemption from licensing, five persons opposing exemption from licensing and at least three members of the Board. Each of the five persons selected for those favoring legislation were clergy.

11. The ad hoc committee met on at least four separate occasions to consider "compromise legislation". The first meeting was for approximately six hours on January 26, 1983. The proposals made were referred to the Attorney General. The Attorney General issued a memorandum opinion attached hereto as Exhibit B and made a part hereof. This opinion, dated January 28, expressed the view that the proposed legislation continued to remain "constitutionally suspect and unlikely to be upheld as constitutional if challenged."

12. On January 28, after receipt of Exhibit B, the ad hoc committee met again for approximately three hours. The draft reached as a result of this meeting was dated January 29 and, again, was submitted to the Attorney General for his opinion. The Attorney General again reviewed the legislation. A copy of the Attorney General's opinion dated January 31 is attached hereto as Exhibit C and made a part of. The opinion again expressed the view that the proposed legislation possessed significant constitutional infirmities.

The Attorney General concluded his opinion "...it is my opinion that this draft is unlikely to be upheld as constitutional if challenged."

B. On January 31, the ad hoc committee met again for four hours. As a result of this meeting the proposed changes were submitted to Representative Lloyd George, the Chairman of the subcommittee. The submission was in the form of a letter from Ray Scott, Director of the Arkansas Department of Human Services, to Representative George. A copy of the letter from Scott forwarding the amendments is attached as Exhibit D and made a part hereof. Attached to this letter by Scott are the amendments as well as the names and affiliations of the members of the ad hoc Committee.

13. A. The members of the ad hoc committee in favor of exemption for religious facilities and their affiliations were:

<u>Name</u>	<u>Affiliation</u>
1. Dr. W. A. Dillard	President, American Baptist Association
2. Rev. Jerry Millikin	Faith Christian Home for Children, Forrest City, AR
3. Dr. Glenn Riggs	President, Arkansas Christian Schools Association
4. Rev. Bill Thomas	United Pentecostal Church
5. Rev. David Wiggins	Supervisor, Assemblies of God of Arkansas

B. At the time of the meetings of the ad hoc committee the Faith Christian Home for Children was a

defendant in an action brought by the State of Arkansas, concerning child abuse allegations in the operation of that facility covered by the State's licensing provisions.

C. At the time of the enactment of Act 518 of 1981 a facility under the supervision of W. A. Dillard was a defendant in an action brought by the State of Arkansas concerning aspects of the operation of that facility covered by the State's licensing provisions.

14. A. The Attorney General in a formal opinion dated February 2 and numbered 83-32 expressed the opinion that the amendments attached to the Scott letter dated February 1, 1983 were also unconstitutional. A copy of that opinion is attached hereto as Exhibit E and made a part hereof.

B. The Attorney General's opinion concluded, "...it is my belief that these proposed amendments are constitutionally suspect and would not withstand a legal challenge in state or federal court.

15. A. The ad hoc committee met for the final time on February 7, 1983 to consider their prior suggested amendments. They developed their final version of the proposed legislation, which was again forwarded to Representative George by Ray Scott in a letter dated February 9, 1983, a copy of which is attached hereto as Exhibit F and made a part hereof. Attached to the Scott letter was the proposed amended legislation. The proposed amendments were

identical in all material respects to the legislative enactment which became Act 245 of 1983.

B. The last version was not submitted to the Attorney General for his opinion.

C. The last version was not submitted to the Attorney General because his opinion would remain the same regarding constitutionality.

D. The last version was not materially different from prior versions in those matters found constitutionally suspect by the Attorney General.

16. A copy of Act 245 is attached hereto as Exhibit G and made a part hereof. The title as well as the actual provisions of Act 245 explicitly provide only for the exemption of religious child care facilities and no others.

17. The preamble to Act 245 notes that "many religious child care facilities have been organized since July 1, 1969" and that "many religious child care facilities are now included within the definition of child care facilities."

18. A. Act 245 provides that "Any church or group of churches, exempt from the State income tax levied by Act 118 of 1929, as amended, [Ark. Stat. Ann. §84-2006(3)] operating a child care facility, shall be exempt from obtaining a license..."

B. There is no definition of church contained in Ark. Stat. Ann. §84-2006(3). The only reference contained in

that statute which could possibly be applicable to Act 245 is "...corporations organized for religious, charitable, scientific or educational purposes."

19. A. Act 245 requires of church run facilities that they be in "substantial compliance" with published standards in order to maintain their exempt status.

B. Act 245 contains no definition of substantial compliance.

C. The existing regulations contain no definition of substantial compliance.

D. There nowhere exists a definition of substantial compliance as it is used in Act 245.

20. A. Act 245 establishes the concept of exemption only for church operated facilities.

B. Act 245 establishes a concept of being in substantial compliance only for church operated facilities.

C. Act 245 establishes a process of judicial review outside of and in conflict with the Arkansas Administrative Procedures Act only for church operated facilities.

D. Act 245 represents an unlawful delegation of legislative authority.

21. Act 245 establishes a scheme of self-regulation only for church operated facilities.

22. A. No secular or neutral legislative purpose was advanced by the ad hoc committee, the subcommittee of the

legislature, or the Governor to justify the exemption of church operated facilities from licensing.

B. Act 245 denies equal protection of the law to the children of the State of Arkansas who are in uninspected and unlicensed facilities as contrasted with those in licensed facilities.

23. A. Acts 245, 518 and 123 are the latest attempts in a longstanding pattern and practice of the State of Arkansas to promote religion and to assist in the establishment of religion.

B. Many religious leaders in Arkansas, as well as groups and associations, oppose the exemption from licensing for religious institutions and position statements are attached hereto as Exhibit H and made a part hereof.

24. A. The cost of being in "substantial compliance" for the exempt centers will be significantly less than the cost of complying with the requirements imposed on nonexempt centers by the licensing standards set forth in the Arkansas minimum standards. Exempt centers may also reduce their fixed costs per child, as compared with nonexempt centers, by increasing their enrollments beyond the levels imposed on nonexempt centers by the licensing standards.

B. A copy of minimum standards for one type of child care facility, the Day Care Center is attached hereto as Exhibit H and made a part hereof.

25. The opening of exempt centers will increase the supply of child care spaces in particular neighborhoods. Most children attend centers within a few miles of their home or within a few miles of their parents' workplaces. As a result of the increase in supply in particular neighborhoods caused by the opening of new exempt centers, the number of available spaces exceeds and will exceed the number of children in such neighborhoods who would attend day care centers, which in turn will lead to further unfair and unlawful competitive pressures on plaintiffs' costs and revenues.

26. Plaintiffs will suffer, if relief is not granted, substantial injury because they will lose customers to newly opened exempt centers.

27. This injury is continuing and irreparable and will persist until and unless defendants require religiously affiliated centers to comply with the minimum standards for day care licensing set forth in Exhibit I. Defendants will not be able to require compliance, because of Acts 245, 518, and 123 unless the relief prayed for herein is granted. Plaintiffs have no adequate remedy at law nor adequate administrative remedy to secure the relief requested herein.

28. The classifications established by Acts 245 and 518 constitute an invidious discrimination against plaintiff. Such classification furthers no valid or legitimate governmental purpose. The differences and

distinction between the established classification and the plaintiff classification of non-exempt facilities deprives plaintiffs of the equal protection of the law.

29. Acts 245, 518 and 123 constitute the establishment of religion by the State of Arkansas.

30. Plaintiffs have no plain or adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that this court:

1. Declare and adjudge Acts 245, 518 and 123 to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and therefore null and void and of no legal effect;

2. Issue a preliminary and permanent injunction (a) requiring the licensing of all child care facilities without regard to their religious affiliation; (b) enjoining defendant Board from exempting any child care facility from inspection and licensing by the State of Arkansas;

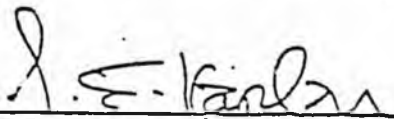
3. Award plaintiffs a reasonable attorney's fee and their costs;

4. Grant such other relief it may deem just and proper.

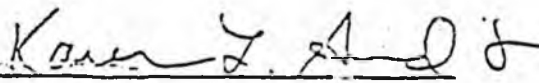
Respectfully submitted,

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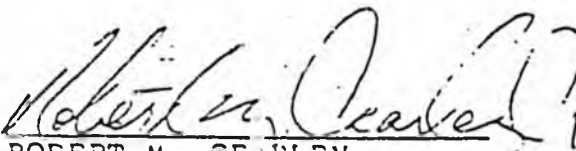

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DAY CARE CENTERS

- 185. Code requirements, modifications, and waivers
- 190. (Repealed)
- 195. Administration requirements
- 197. Ensuring care in emergencies
- 200. (Repealed)
- 205. Personnel qualifications
- 210. Number of staff required
- 220. (Repealed)
- 230. (Repealed)
- 240. General program
- 242. Environment requirements
- 245. Fire safety
- 247. Environmental health
- 250. Health program
- 255. Immunizations required
- 260. Nutrition
- 270. (Repealed)
- 275. Definitions

7 AAC 50.120. LICENSING STANDARDS. Repealed 2/3/77.

7 AAC 50.125. LICENSING AUTHORITY. The authority of the department under AS 47.35.010 - 47.35.080 has been delegated by the commissioner of health and social services to the division of social services within the department. This authority includes, but is not limited to

- (1) licensing determinations;
- (2) investigation and supervision of day care facilities;
- (3) proposing standards and enforcing those contained in regulations adopted by the commissioner;
- (4) acting as the single departmental agency on all matters pertaining to licensing. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.010
AS 47.35.030

ARTICLE 2.
DAY CARE

- Section
- 120. (Repealed)
 - 125. Licensing authority
 - 130. (Repealed)
 - 140. (Repealed)
 - 145. Voluntary licensure
 - 150. (Repealed)
 - 155. Licensing application procedures
 - 160. (Repealed)
 - 165. Annual licensing renewal procedure
 - 170. (Repealed)
 - 175. Special provisions regarding licensure
 - 180. (Repealed)

7 AAC 50.130. LICENSING REGULATIONS FOR NURSERIES. Repealed 2/3/77.

7 AAC 50.140. DEFINITIONS. Repealed 2/3/77.

7 AAC 50.145. VOLUNTARY LICENSURE. A facility for which a license is not required by

AS 47.35.020 is entitled to a day care license upon application and satisfactory findings. These include

(1) an occupied residence in which day care is regularly provided only to a child or children related to the resident caregiver;

(2) an occupied residence in which day care is regularly provided for four or fewer children unrelated to the caregiver; and

(3) an establishment whose primary purpose is educational and which is certified by the Department of Education. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.020
AS 47.35.030

7 AAC 50.150. ADMINISTRATIVE RESPONSIBILITY. Repealed 2/3/77.

7 AAC 50.155. LICENSING APPLICATION PROCEDURES. (a) An application for a license must be made on a form prescribed by the division, which can be obtained from its office in Nome, Fairbanks, Bethel, Anchorage, Juneau, or Ketchikan. There is no charge for licensing. The application must be returned to the division office nearest to the location of the facility sought to be licensed.

(b) Upon receipt of a completed application, a division representative will within 60 days

(1) review the application, confer with the applicant, inspect the facility for which application is made; and

(2) if the application is for operation of a day care center, request appropriate authorities to verify compliance with applicable fire safety standards, environmental protection standards, building codes, zoning ordinances, or other state and local law; and

(3) if the application is for operation of a family day care home, request an advisory environmental protection or fire safety inspection from appropriate authorities, whenever such an inspection is considered necessary.

(c) When the results of the study and inspections verify that the provisions of 7 AAC 50.125 -

7 AAC 50.275 have been met, a license will be issued. (Eff. 2/3/77, Reg. 61; am 11/21/80, Reg. 76)

Authority: AS 47.35.030
AS 47.35.040

7 AAC 50.160. STATEMENT OF PURPOSE. Repealed 2/3/77.

7 AAC 50.165. ANNUAL LICENSING RENEWAL PROCEDURE. (a) A license will be renewed

(1) upon application 30 days before the expiration date of the annual license for a family day care home and 60 days before the expiration date of the annual license for a day care center; and

(2) upon satisfactory completion of a study and inspection by the licensing representative and approval by the division.

(b) No later than 10 days before the expiration of a license, a written report of the study and inspection will be given to the day care operator. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.170. RECORDS AND REPORTS. Repealed 2/3/77.

7 AAC 50.175. SPECIAL PROVISIONS REGARDING LICENSURE. (a) A facility which has made application to the Department of Education for a preelementary school certificate that has been denied is subject to the licensure provisions of 7 AAC 50.125 - 7 AAC 50.275

(1) fifteen days following notification of denial; or

(2) upon a final finding on appeal affirming the denial of the application.

(b) Persons caring for children at the time that an application for license is made may, on

approval of the division, continue care of the children while the application is being studied and evaluated.

(c) Although under AS 47.35.050 a license remains in effect for a period of one year, unless revoked for cause, the division will in its discretion issue a provisional license for a period not to exceed six months to allow time for a day care facility to comply with applicable requirements. An exception to the six-month limitation for provisional licenses may be approved where considerations such as weather or shipping would prevent compliance within six months.

(d) Licensees and applicants shall permit licensing representatives to visit their day care facilities at any time during the facility's hours of operation. In carrying out these visits, licensing representatives are authorized to call upon governmental agencies for appropriate assistance. Licensees or applicants shall cooperate in these visits by providing access to their facilities, records, and staff.

(e) Changes that may substantially alter the extent or quality of services offered, including, but not limited to, expansion or reduction of services; construction or elimination of walls, stairs, exits; changes in the staff-to-child ratio; and change in location must be reported to the division at least 30 days before the expected change to facilitate review and decision by the division.

(f) A day care license must be displayed in a prominent place on the facility premises.

(g) An applicant who has been denied a license or an operator who has been denied a renewal of a license or whose license has been conditioned or revoked may request a hearing of the director or his authorized designee within 15 days after receipt of the accusation or statement of issues authorized by AS 44.62.360 and 44.62.370 of the Administrative Procedure Act. (Eff. 2/3/77, Reg. 61)

Authority: AS 14.07.020(8)
AS 47.35.030

7 AAC 50.180. LIABILITY INSURANCE.
Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.185. CODE REQUIREMENTS, MODIFICATIONS, AND WAIVERS. (a) Each day care facility shall meet required local and state fire safety, health, sanitation, and licensing requirements. However, the director or his designee may modify or waive a provision of secs. 125 - 275 of this chapter when an acceptable alternative method for meeting the safeguarding intent of that provision is established and the health and well-being of children is assured. Requests for modifications or waivers of fire safety, health, or sanitation requirements must be reviewed and approved by the appropriate agencies before any determination by the director or his designee on the request.

(b) Applications for modifications or waivers must be made in writing to the division and must include

(1) a statement of the provision for which modification or waiver is requested;

(2) an explanation of why the provision cannot be met; and

(3) a description of the alternative method proposed for meeting the safeguarding intent of the provision to be waived or modified.

(c) All requests will be answered in writing and a record of them maintained. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.190. FINANCIAL STATUS.
Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.195. ADMINISTRATION REQUIREMENTS. (a) The name, address, and telephone number of the person(s) with the legal responsibility and the administrative authority for operating the day care facility must be provided to the division.

(b) The operator of a day care facility

(1) is responsible for providing a child care program and facility which meets the requirements of secs. 125 - 275 of this chapter;

(2) shall comply with AS 18.80.230 to ensure that enrollment policies, access to

services, and services and activities of the facility are nondiscriminatory with regard to the religion, sex, color, race, and national origin of children in care and their parents;

(3) shall ensure confidentiality of records and information pertaining to an individual child or his parents, except as required by facility staff in working with the child and his family, by the licensing representative in carrying out the license study and monitoring activities, or when a release of information form is signed by the parents;

(4) shall maintain current individual child emergency information records in family day care homes and, in day care centers, maintain current individual records including, but not limited to

(A) caregiver employment and health records;

(B) child emergency information records; and

(C) caregiver and child attendance records;

(5) shall maintain records on forms prescribed by the division, unless prior division approval has been granted to use alternate forms;

(6) is responsible for the screening, scheduling, supervision, and conduct of all staff, volunteers, or others who provide services in the facility, and for designating an adult caregiver to be in charge of the facility in the operator's absence;

(7) shall, in day care centers, maintain bodily injury liability insurance (including transporting coverage, if applicable) in an amount not less than \$100,000 per child, \$300,000 per accident, with a company authorized to write insurance policies in the State of Alaska; these insurance policies must contain the following endorsement:

"in the event of cancellation or nonrenewal of this policy, the company agrees to give 30 days prior notice to the Division of Social Services, Pouch H-05, Juneau, Alaska 99811";

(8) shall, in day care centers, have written policies covering, but not limited to, nondiscrimination, the type of service to be offered to children served, provisions which can be made for special needs of individual children, enrollment requirements and procedures, fees and payment arrangement plans, insurance coverage, rules concerning personal belongings brought to the facility, transportation arrangements, parental permission for trips and related activities outside the day care center, ill children, and disclosure of information; these policies must be presented and explained to parents at the time of enrollments and a copy filed with the division;

(9) shall, in family day care homes, give evidence, through the application for a license, of established policies as specified in paragraph (8) of this subsection; these policies must be discussed with parents at the time of enrollment of a child; and

(10) must be at least 19 years of age. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030
AS 47.35.060

7 AAC 50.197. ENSURING CARE IN EMERGENCIES. (a) Each day care facility must have a plan for evacuation of children in case of fire or other disaster. The plan must include provisions for accountability for each child, until released to an appropriate authority. In day care centers, the plan must be written and posted. Caregivers must be aware of the plan and must hold evacuation drills at least once every two months.

(b) Provision must be made in all day care facilities for emergency electrical lighting by generator or battery power for use in case of power failure.

(c) Day care facilities must have a telephone or radiophone, if that service is locally available. Emergency telephone numbers must be conspicuously posted on or adjacent to the phone.

(d) In all day care facilities, first aid supplies appropriate to the size of the facility must be maintained and readily available at all times.

(e) In family day care homes, a second adult must be readily available to be summoned to assist in any emergency.

(f) Every caregiver or operator who, in the performance of his or her duties, has cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department. If the caregiver or operator cannot reasonably contact the nearest office of the department, and immediate action is necessary for the well-being of the child, the caregiver or operator shall make the report to a peace officer.

(g) Whenever a child is left in day care by his parents for a period exceeding the preplanned arrangement or more than 14 hours without contacting the operator, the operator shall immediately report that situation to the nearest office of the division. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.031

7 AAC 50.200. PERSONAL QUALIFICATIONS. Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.205. PERSONNEL QUALIFICATIONS. (a) Each caregiver and adult member of a family day care home must have an annual negative tuberculin skin test or a negative report of a chest X-ray before contact with day care children. For caregivers whose skin test is positive, the X-ray is required in accordance with the Alaska TB Control Program schedule or the recommended schedule of the caregiver's physician, rather than annually.

(b) Each caregiver, excluding operators, volunteers, substitutes, and day care center students, must furnish the names, addresses, and telephone numbers of three unrelated references to the operator. Reference letters must be kept on file at the day care facility. The day care operator shall furnish the names, addresses, and telephone numbers of three unrelated references to the division with their initial license application; reference letters shall attest to the good character and reputation of the operator and to the qualities which enable the operator to work successfully with children.

(c) Each caregiver, excluding operators, must have reached the age of 18 to be counted toward

meeting the staff-to-child ratio requirements. However, persons aged 14 through 17 may be employed as caregivers and counted toward staff-to-child ratio requirements if

(1) they have completed a child care training course or have demonstrated to the operator competency in child care;

(2) they work under the close supervision of an adult caregiver;

(3) they constitute no more than one-third of the total caregiving staff; and

(4) they are never placed in sole charge of a group of children in a center.

(d) Each caregiver must be able to

(1) encourage children and provide them with a variety of learning and social experiences appropriate to the age of the children served;

(2) work with children without recourse to physical or psychological abuse;

(3) recognize and act against hazards to health and physical safety. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.210. NUMBER OF STAFF REQUIRED. (a) Each facility must have sufficient personnel to ensure that the children are never left without supervision by a responsible caregiver.

(b) In a family day care home, if there are children under age two in care, there may not be

(1) more than two children under age two;

(2) more than five children unrelated to the caregiver; or

(3) more than eight children under age 12, including children related to the caregiver.

(c) In a family day care home, if there are no children under age two in care, there may not be

(1) more than six children unrelated to the caregiver; or

(2) more than a total of 10 children under age 12, including children related to the caregiver.

(d) In a day care center, the ratios of caregivers to children must be maintained at all times as follows:

(1) no newborn children may receive care in a day care center;

(2) there must be one caregiver for every five children between the ages of six weeks and 24 months;

(3) there must be one caregiver for every 10 children between their second and sixth birthdays;

(4) for school children aged six to 10 years, there must be one caregiver for every 15 children;

(5) for school children aged 10 - 14 years, there must be one caregiver for every 20 children.

(e) In a day care center where there are more than 10 children present, there must be a minimum of two caregivers on the premises.

(f) In a day care center, only caregivers who spend at least 75 percent of their working time providing direct care for children will be counted in meeting staff-to-child ratios. (Eff. 4/4/62, Reg. 5; am 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.220. PHYSICAL PLANT. Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.230. EQUIPMENT. Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.240. GENERAL PROGRAM. (a) The program conducted in a day care facility must provide planned experiences which promote the individual child's physical, emotional, social, and intellectual growth and a positive identity. Satisfactory compliance with this subsection requires that

(1) caregivers generally follow a written schedule of daily activities which provide a

balance of quiet and active, group and individual activities and include adequate time for meals, snacks, sleep, and toileting according to individual needs, and indoor/outdoor play; however, the schedule in family day care facilities need not be written;

(2) opportunities be provided for individual self-expression in conversation, imaginative play, and creative expression;

(3) opportunities be provided for vigorous physical activities such as running and climbing, and for daily supervised activity outdoors, taking into consideration climatic conditions;

(4) opportunities be provided for each child to participate in activities such as taking out or putting away materials, and caring for his own clothing and bedding;

(5) opportunities be provided for intellectual and social development through use of a variety of games, toys, books, crafts, puzzles, sand, crayons, infant toys, and other activities and materials;

(6) opportunities be provided for such activities as walking excursions and field trips, weather permitting, to increase each child's awareness beyond his immediate environment;

(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;

(8) the amount and variety of materials and equipment available, and its arrangement and use are appropriate to the developmental needs of the children in care so that

(A) the quantity of materials and equipment is sufficient to avoid excessive competition and long waits by children and to meet criteria contained in paragraphs (1), (2), (3), and (5) of this subsection;

(B) individual storage areas are accessible to each child for storage of his or her own belongings;

(C) furniture and equipment is durable and safe and that in day care centers it is of child size or appropriately adapted for children's use.

(b) Where newborns, infants, and toddlers are in care, compliance with the criteria in subsection (a) must be appropriate to their developmental stage. In addition

(1) separate sleeping space must be provided for infants and toddlers in day care centers; a play or crawl area exclusive of crib space must be provided for their use; and provisions must be made to ensure that they are not endangered by the active play of older children;

(2) these children may not be routinely left in a crib without direct adult contact for long periods of time while awake (e.g., typically not more than 45 minutes);

(3) infants and toddlers must be allowed, under supervision, some opportunities during the day when they can explore and learn on their own;

(4) there must be toys and materials available for their use which provide opportunities for the child to learn through seeing, feeling, hearing, smelling, and tasting;

(5) there must be frequent verbal communication between caregivers and these children; and

(6) there must be physical stimulation through being held and rocked and played with as well as through being dressed, bathed, and carried. (Eff. 4/4/62, Reg. 5; am 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.242. ENVIRONMENT REQUIREMENTS. (a) Each day care center must have sufficient indoor and outdoor space in relation to the number and ages of children in care to accommodate the physical and other developmental needs of children served. Satisfactory compliance with this subsection requires that

(1) there be at least 35 square feet of indoor space per child capacity used for the care of

children, exclusive of hallways, bathrooms, lockers, closets, laundry and furnace rooms, and the kitchen;

(2) there be at least 75 square feet per child of outdoor play space for the maximum number of children on the playground at any one time; where outdoor play space is not available at the facility, parks or other outdoor facilities that are easily accessible may be used.

(b) Each day care center must have appropriate storage and work space areas convenient to the area of use. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.245. FIRE SAFETY. (a) The building housing a day care center must meet the standards for buildings and life safety contained in 13 AAC 50.010 – 13 AAC 50.030 and 13 AAC 55.010 – 13 AAC 55.150.

(b) When the division receives a license application from a day care center and when new construction or remodeling is completed, a fire inspection of the premises must be made by the fire marshal or his local designee to determine conformity with existing safety standards. Subsequent annual fire inspections might be required.

(c) Family day care homes must be free of fire hazards. They must have

(1) at least one five-pound ABC dry-chemical fire extinguisher or an AC primary power or monitored battery powered smoke-detection device;

(2) two exits remote from each other that are usable year round, one of which may be a window which can be opened;

(3) at least one usable exit directly to the outside at street level where a basement is utilized;

(4) a restriction limiting occupancy to the main floor, daylight basement, or second floor of the building, when more than two children under age five are in care;

(5) at least one exit leading directly to the

outside in any room used for sleeping purposes from midnight to 6:00 a.m.:

(6) a safe and effective heating system;

(7) adequate screening of radiators, hot water pipes, open fires, oil or wood-burning stoves, and similar hazards to prevent burns;

(8) storage of flammable or liquid combustible materials safely away from heat sources and children; and

(9) no more than one electrical extension cord on the same outlet and no combination of extension cords. (Eff. 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.247. ENVIRONMENTAL HEALTH.

(a) A day care center must meet the standards for sanitation and environmental protection contained in 18 AAC 30.800 - 18 AAC 30.880.

(b) A family day care home must have an ample supply of potable water.

(c) A family day care home must have an acceptable sewage disposal and refuse control system.

(d) A family day care home must have the facilities necessary for the proper care, storage, refrigeration, and preparation of food.

(e) A family day care home must be reasonably free of hazards which can cause injury or health risk.

(f) Medicines, cleansers, harmful chemicals, and dangerous tools in a family day care home must be stored so as to be inaccessible to young children.

(g) Firearms in a family day care home must be unloaded and stored in a place reasonably inaccessible to young children. Ammunition must be stored separately from the firearms in a place reasonably inaccessible to young children. (Eff. 2/3/77, Reg. 61; am 2/24/78, Reg. 65; am 11/21/80, Reg. 76; am 3/31/82, Reg. 81)

Authority: AS 47.35.030

7 AAC 50.250. HEALTH PROGRAM. (a) Medicines or drugs may not be administered to any child except with written permission of the child's parent or physician or other medical authority. However, in the case of prescription medicine, a prescription label with the medical authority's name, the child's name, and a recent date may be accepted as showing that the drug may be administered to the child. Medicines or drugs kept at the facility for a child must be clearly labeled with the child's name and the dosage and must be inaccessible to children.

(b) Each day care facility must provide a place where a tired, ill, injured, or upset child may rest or play quietly, apart from other children, yet under adult observation. Ill children need not be sent home as a routine policy, but may be cared for during minor illness at the discretion of the parent and operator. If the child appears to be more than moderately ill or a communicable disease other than a cold is indicated, the child may not be allowed to expose other children to his or her illness and must be isolated in a separate room under adult observation until appropriate arrangements are made. Caregivers shall inform parents when their children have been exposed to illness or communicable disease.

(c) Extra clothing must be available for a child if needed.

(d) Children under age six who are in care for periods longer than four hours must have a time and place to lie down and sleep or rest quietly, as follows:

(1) in day care centers, individual cots, mats, or beds and bedding must be provided and must be clean and individually labeled;

(2) in family day care homes, there must be sleeping arrangements with clean individual bedding provided; and

(3) infants must be provided a crib or other safe and suitable place to sleep. (Eff. 4/4/62, Reg. 5; am 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.255. IMMUNIZATIONS REQUIRED. (a) The operator of a day care center shall maintain evidence of current

immunization, or exemption from it, for each child in attendance. This evidence must be obtained from the child's parent or guardian upon his admission, and show that he has received or has begun and is continuing to receive immunizations appropriate to his age as prescribed in the Alaska Division of Public Health's schedule for active immunization, or that he is exempt from immunization under (b) of this section. Satisfactory compliance requires that each child's day care center health record contain evidence of immunization or evidence of exemption. Evidence of immunization must include

(1) the name of the health service provider, and the date of immunization against diphtheria, tetanus, polio, measles, rubella and, if the child

is less than six years of age, pertussis; and

(2) only valid immunization certificates, which are limited to

(A) an international immunization certificate; or

(B) a statement by a physician listing the date each required immunization was given; or

(C) a copy of a clinic or health center record listing the date each required immunization was given.

(b) Evidence of exemption from immunization must include

(1) a signed affidavit by a doctor of medicine (M.D.) or osteopathy (D.O.) licensed in Alaska attesting that immunizations would, in his professional opinion, be injurious to the health of the child or members of the child's family or household; or

(2) an affidavit signed by the parent or guardian, affirming that immunization conflicts with the tenets and practices of the church or religious denomination of which the applicant is a member; or

(3) an entry demonstrating that the child is attending for the first time a day care center providing drop-in care.

(c) A day care center providing drop-in care must require immunization as provided in (a) of this section, if not exempt, on the child's second admission date.

(d) A day care center in a community where regular medical services are not available on at least a weekly basis may provisionally admit a child who does not have the required immunizations, for a reasonable period of time in exceptional circumstances, but for no longer than 90 days. Provisional admissions must be reported to the Communicable Disease Control Section of the Division of Public Health of the department, which shall then determine that the required immunizations are completed during the provisional period if the child is to be admitted.

(e) Day care centers may not admit a child who does not comply with the provisions of this section. (Eff. 2/24/78, Reg. 65)

Authority: AS 47.35.030

7 AAC 50.260. NUTRITION. (a) To ensure adequate nutrition and promote good eating habits and attitudes, a day care facility must ensure that

(1) at least one nutritious meal is offered to each child in care for five hours or more;

(2) a wholesome snack is offered between breakfast and lunch and between lunch and dinner;

(3) each child in care over 10 hours is offered an additional snack or meal unless parents request otherwise; and

(4) with respect to all snacks and meals offered, the National Academy of Science's Recommended Dietary Allowance, 8th Ed. 1974, available from the division, is met.

(b) Vitamin and mineral supplements may be provided to a child only with parental permission.

(c) Children may be encouraged but not forced to eat.

(d) An infant must be fed according to his own schedule, and by the same person insofar as possible. Typically, infants not able to hold their own bottles should be held, and bottles may be propped only when the caregiver is unable to hold the child and only when he or she is present within sight of the child.

(e) When more than one infant is in care, bottles of formula must be labeled with each child's name.

(f) The caregiver shall obtain information from the parents concerning any food allergies or special needs the child has and shall plan his or her meals accordingly.

(g) In a day care center, menus must be planned, be available to parents, be retained for inspection for one year after the day for which

they are prepared, and reflect actual food served. (Eff. 4/4/62, Reg. 5; am 2/3/77, Reg. 61)

Authority: AS 47.35.030

7 AAC 50.270. PROVISIONS REGARDING LICENSURE. Repealed. (Eff. 2/3/77, Reg. 61)

7 AAC 50.275. DEFINITIONS. In secs. 125 - 275 of this chapter, unless the context requires otherwise

(1) "an establishment whose primary purpose is educational" means

(A) a public or private educational facility registered with the Department of Education as providing legally authorized educational and related functions; or

(B) a pre-elementary school for children aged three through five years that is certified by the Department of Education;

(2) "caregiver" means a person whose duties include direct care, supervision, and guidance of children in a day care facility;

(3) "day care" means the care, supervision, and guidance of a child or children unaccompanied by a parent or legal guardian on a regular basis, for periods of less than 24 hours a day;

(4) "day care center" means

(A) a facility other than an occupied residence, in which day care is regularly provided for any number of children;

(B) an occupied residence in which day care is regularly provided for 11 or more children, counting both children living in the home and children received for day care whether or not they are related to the resident caregiver;

(5) "day care facility" means a day care center or family day care home as defined in this section, but does not include any establishment whose primary purpose is educational;

(6) "day care operator" means the person or organization ultimately responsible for the

overall operation of a day care facility;

(7) "department" means the Department of Health and Social Services;

(8) "director" means the director of the division;

(9) "division" means the Division of Social Services;

(10) "family day care home" means an occupied residence in which day care is regularly provided for no more than 10 children, some of whom are not related to the resident caregiver;

(11) "infant" means a child aged six weeks to 12 months;

(12) "licensing representative" means a staff member of the division or an authorized designee;

(13) "newborn" means a child from birth to age six weeks;

(14) "regularly or on a regular basis" means a frequency of providing day care services of more than one day a week for at least five continuous weeks;

(15) "related" means any of the following relationships by marriage, blood, or legal adoption: parent, grandparent, brother, sister, stepparent, stepsister, stepbrother, uncle, aunt; it also means the relationship of a legal guardian and ward;

(16) "school age child" means a child aged six through 14;

(17) "toddler" means a child aged 12 months to 24 months;

(18) "drop-in care" means care provided when no space is reserved in advance by the day care facility. (Eff. 2/3/77, Reg. 61; am 2/24/78, Reg. 65)

Authority: AS 47.35.030

Editor's Note: 7 AAC 50.275 replaces 7 AAC 50.140 which became effective 4/4/62, Register 5.

COMMUNITY CARE FACILITY LICENSING

PURPOSE

Children by their very nature are dependent. Children and dependent adults survival and their physical, intellectual, and social development depend on the love, care, and protection of others. Alaska child care facilities are licensed to care for 9,641 children. In addition, adult facilities are licensed to care for 276 dependent adults.

The purpose for regulating day care and residential facilities providing care for children or dependent adults is to reduce predictable risk to their health and safety and to ensure adequate programs and opportunity for development. Licensing establishes a floor of quality which must be met for a program to be permitted to operate.

THE STATUTE

The licensing law, AS 47.35, contains the language prohibiting the operation of a child or dependent adult facility without a license. It specifies the types of facilities that are regulated by the State. These include, day care centers, family day care homes, residential child care facilities, child foster homes, adult residential care facilities, adult foster homes, and child placing agencies. The statute gives the authority to regulate to the Department of Health and Social Services where the direct responsibility has been delegated to the Division of Family and Youth Services in the Department. Regulations are authorized to implement the broad language of the statute by establishing statewide standards. Some standards are based on the knowledge that certain practices are necessary to promote health, safety, and well being, and other practices, if permitted, would be detrimental to those in care.

REGULATIONS

Most regulations were designed to reduce predictable risk to health and safety. These include fire, sanitation, and equipment safety; planning for evacuation, handling serious illness, or serious injury, and reporting child abuse; assuring sufficient numbers of careprovider adults and emergency back-up staff; ensuring that careprovider adults have adequate background or preparation for child or dependent care and tuberculin clearance; ensuring that dietary needs are met, immunizations are current, medical care is provided, when needed, and emergency reports are provided to persons responsible; ensuring that medicines, poisons, guns and other hazardous objects are in a place inaccessible to children and adults with impaired judgement; ensuring discipline and behavior management are acceptable and that persons in care are not humiliated, shamed, frightened, locked up, or force fed.

Some regulatory standards are designed to promote appropriate developmental opportunities. A toddler who is routinely left in a playpen for long periods of time without adult contact and without toys or other materials is safe, but is deprived of adequate developmental opportunities. Developmental standards are few, but are of significant importance. Each set of regulations requires a program that provides a balance of quiet and active, group and individual activity. Opportunities for intellectual and social development, correcting problem behaviors, and appropriate recreational, cultural, or religious activity are required. There is special emphasis on maintaining or enhancing parental or other relative contacts. Materials and equipment must be available in sufficient number and appropriate to the development needs of persons in care and the program. Indoor and outdoor footage must be adequate.

Parents of infants and children in day care facilities have quite a lot of opportunity to observe their children in care, so the need for regulation is not as extensive as in 24-hour care of children. In order for parents or other relatives of children or dependent adults to make an informed judgement about the appropriateness of a program for their child or relative, they need certain information. The most important consumer protection provision in each set of regulations is the requirement that policies and the specifics of a program be presented and explained to parents and agency personnel prior to the admission of a child or dependent adult. In residential facilities pre-admission planning and placement agreements are an essential consumer protection.

THE LICENSING PROCESS

Most licensing studies are performed by licensing specialists located in six regional locations. Some home-sized facility licensing is performed by Division field office staff. Approved public or private agency staff perform some child foster home studies. The number of facilities licensed in January of 1983 was 1,365.

For information and planning assistance, individuals contact a regional or field office of the Division. In many communities there are monthly or semi-monthly meetings to familiarize potential applicants with licensing requirements and procedures. In one community, pre-licensing foster care training is being conducted. For a residential facility or a day care center, one year of planning and organization prior to opening is realistic. Except in emergency circumstances, 60 days is appropriate for planning and licensing prior to the opening of a home-sized facility.

An applicant generally submits an application form that requires a number of supporting documents such as a report of tuberculosis clearance, an authorization to conduct a background check including references and a law enforcement clearance, background applicant information, plans for operation, facility forms, and an operational manual, if required. In home-sized facilities the applicant is visited by a licensing specialist who inspects the home and discusses the applicants background and plans to provide care and to otherwise meet the requirements. For the larger facilities the specialist also requests inspections by appropriate fire safety and environmental health authorities. The prelicensing and review process in larger facilities may entail several visits by a specialist and include file reviews, policy reviews, program observation, and interviews with parents, staff, and placing agencies. Generally, within 60 to 90 days of receipt of an application when there has been adequate planning and after the study and inspection to verify compliance with requirements, a license is issued. There are no fees for an Alaska Community Care Facility License.

Specialists also provide professional consultation to facilities and agencies to upgrade the quality of services. Because of their unique position of knowledge about community facilities, they also serve as referral resources to families, social service staff, and others in selecting an appropriate facility for an individual child or adult, and in stimulating related community support services for facilities and agencies.

FAIR TREATMENT

While licensing protects children, dependent adults, and their families, the Administrative Procedures Act, AS 44.62, has built-in procedures which ensure that laws, such as the Licensing Statute, will be administered fairly. The rights of those regulated include, the right to notice if the requirements, notice of non-compliances, and reasonable time limits for corrections, receiving information on how to achieve correction, equitable enforcement, and access to administrative hearings and court decisions. Consultation from the Division is offered to new programs and to programs that have experienced difficulty following licensure.

ALASKA STATUTE TITLE 47

Chapter 35. Private Institutions
(Includes 1982 Amendments)

Article

1. Foster Homes, Boarding Homes and Institutions for Children (AS 47.35.010 - 47.35.080)
2. Maternity Homes (AS 47.35.090)
3. Agencies for Placement and Counseling (AS 47.35.100)

Article 1. Foster Homes, Boarding Homes and
Institutions for Children.

Section

10. Powers of department
20. License or permit required
30. Authority to issue regulations
40. Licensing
55. Provisional license
60. Records required
70. Violations
75. Licensure of providers of care for dependent adults by municipalities
80. Definitions

Sec. 17.35.010. Powers of department. (a) The department may

- (1) license and supervise boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults;
- (2) investigate and supervise licensees;
- (3) enforce the standards established by it;
- (4) contract with private or municipal agencies to investigate and make recommendations to the department for licensing and supervision of boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults under procedures and standards of operation established by the department.

(b) The department shall, within 90 days after receiving a written request that it do so, delegate its powers relating to nurseries under this section and under AS 47.35.040, 47.35.050, and 47.35.060 to a municipality which has adopted an ordinance providing for day care licensing under home rule powers or as authorized under AS 29.48.035 (a)(20). A municipality to which these powers have been delegated may waive or modify any regulation or standard established by the department under the authority of AS 47.35.010 -- 47.35.080 as it applies to nurseries or the application of any such regulation or standard as it applies to a particular day care licensee but must notify the department of any waiver.

Sec. 47.35.020. License or permit required. No person may, without a license or permit to do so, (1) maintain or conduct, for more than 90 days, a boarding home, foster home, group home, institution or other place for the regular reception or care of children under 16 years of age, or a foster home, group home or institution for the care of

dependent adults, or (2) engage in the business of receiving or caring for children under 14 years of age, with or without compensation, in a nursery in which five or more children not related by blood or marriage, or legal adoption, to the owner, operator or manager of the business are lodged.

Sec. 47.35.030. Authority to issue regulations. The department may adopt regulations and standards consistent with other requirements of law. This authority does not deny a religious group from establishing and operating an institution solely because of the prior installation or operation of another religious group in the same area. The authority to adopt regulations and standards shall be exercised to insure compliance with the intents and purpose of AS 47.35.010 -- 47.35.100. The department may inspect and examine an institution, home or place, or the performance of a service.

Sec. 47.35.040. Licensing. (a) The department shall issue a license to a facility if it determines that the facility has met the standards for operation set out in AS 47.35.010 -- 47.35.080 and the regulations adopted under AS 47.35.010 -- 47.35.080.

(b) A license is valid for two years after the date of issuance unless it is revoked or modified. The department may revoke a license or modify a license to provisional status if it determines that a facility is not in compliance with AS 47.35.010 -- 47.35.080 or the regulations adopted under AS 47.35.010 -- 47.35.080.

(c) The department may waive compliance with a standard set out in regulations adopted under AS 47.35.010 -- 47.35.080 if an acceptable alternative is established which meets the purpose of the provision, and reasonably assures the well-being of persons in care.

(d) A license may not be transferred to a different facility or owner.

(e) The department shall give written notice of revocation or modification under (b) of this section 30 days before the effective date of the action. However, if the health or well-being of children or dependent adults is in jeopardy, the revocation or modification action is effective immediately upon the issuance of written notice by the department.

Sec. 47.35.055. Provisional license. (a) The department shall issue a provisional license to a new facility if the facility submits to the department an acceptable plan for operation which is in conformity with the provisions of AS 47.35.010 -- 47.35.080, and the regulations adopted under AS 47.35.010 -- 47.35.080. After the department determines that the new facility is operating in conformance with the provisions of AS 47.35.010 -- 47.35.080, and the regulations adopted under AS 47.35.010 -- 47.35.080, the department shall issue a license under AS 47.35.040 to the facility.

(b) The department may issue a provisional license to a facility which is licensed under AS 47.35.040 but is temporarily unable to conform to the provisions of AS 47.35.010 -- 47.35.080 or the regulations adopted under AS 47.35.010 -- 47.35.080.

(c) The department may issue a provisional license under (b) of this section only if the facility submits to the department an acceptable plan to bring the facility into conformity with the provisions of AS 47.35.010 -- 47.35.080, and the regulations adopted

under AS 47.35.010 -- 47.35.080 within the time specified in the provisional license.

(d) A provisional license is valid for a period not exceeding one year from the date of issuance. The department may renew a provisional license for an additional period not to exceed one year.

Sec. 47.35.060. Records required. Each licensee or permit holder shall keep records regarding each child or adult in its control and care, or placed by it, which the department prescribes, and shall report to the department the facts which the department requires with reference to the children or adults. All records regarding individuals placed for care in an institution or home under this chapter are confidential and shall be safeguarded from improper disclosure by the agency or department.

Sec. 47.35.070. Violations. A person who violates a provision of AS 47.35.010 -- 47.35.100 or a rule or regulation adopted under AS 47.35.010 -- 47.35.100 is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$200.

Sec. 47.35.075. Licensure of providers of care for dependent adults by municipalities. A first or second class borough or a first or second class city outside a first or second class borough may license and supervise institutions caring for dependent adults. If a borough or city chooses not to license care providers for dependent adults, the department shall be the licensing authority; if a borough or city chooses to license care providers for dependent adults, the borough or city may exercise any power or responsibility granted to the department under this chapter and shall enforce standards and regulations adopted by the department under AS 47.35.030.

Sec. 47.35.080. Definitions. In AS 47.35.010 - 47.35.100

(1) "boarding home or foster home" means an establishment providing regular care for less than six children not related by blood or marriage to the foster parents;

(2) "department" means the Department of Health and Social Services;

(3) "institution" means an establishment providing regular care and services for 11 or more children not related by blood or marriage to the owner or operator;

(4) "nursery" means an establishment providing care and services for any part of the 24-hour day for a child not related by blood or marriage to the owner or operator, but does not include any establishment whose primary purpose is educational;

(5) "group home" means a small establishment providing care and services for 10 or fewer children not related by blood, marriage, or legal adoption to the foster parent, and which is

(A) noncontiguous to another institution; and

(B) stresses normal family living.

(6) "facility" means the administration, program, and physical plant of a nursery caring for children, or a foster home, group home, or institution caring for children or dependent adults.

Article 2. Maternity Homes.

Section

90. Licensing and supervision of maternity homes

Sec. 47.35.090. Licensing and supervision of maternity homes. Maternity homes shall be licensed and supervised in the same manner as boarding homes or foster homes, nurseries and other institutions caring for children as provided in AS 47.35.010 -- 47.35.080. In this section "maternity home" means an institution or place of residence whose primary function is to give care to pregnant girls or women, regardless of age, before or during confinement, or which provides care, as needed, to mothers and their infants after confinement, with or without compensation.

Article 3. Agencies for Placement and Counseling.

Section

100. License required

Sec. 47.35.100. License required. (a) Without a license issued by the department in accordance with its regulations no person may operate an agency providing any of the following services:

- (1) the placement of children for foster home care;
- (2) the placement of children for adoption; or
- (3) individual and family counseling.

(b) The license shall remain in effect until revoked for cause. The department shall give written notice of revocation at least 90 days before the effective date of the revocation.

(c) In this section "agency" does not include an individual who occasionally provides the services set out in (a) of this section.

DRAFT

DEPARTMENT OF EDUCATION

CHAPTER 60

PRE-ELEMENTARY (EARLY CHILDHOOD) SCHOOL

ARTICLE 1

PRE-ELEMENTARY SCHOOLS

SECTION

4 AAC 60.009	Applicability
4 AAC 60.010	(Repealed)
4 AAC 60.019	Application Process
4 AAC 60.020	(Repealed)
4 AAC 60.029	Certificate
4 AAC 60.030	(Repealed)
4 AAC 60.031	Provisions of Certificate
4 AAC 60.039	Conditional Certificate
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4 AAC 60.041	Duration of Approval; Hearings
4 AAC 60.049	Special Changes Affecting Certification
4 AAC 60.050	(Repealed)
4 AAC 60.051	Certification Renewal
4 AAC 60.059	Waiver of Requirements
4 AAC 60.060	(Repealed)
4 AAC 60.061	Voluntary Certification
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4 AAC 60.070	(Repealed)
4 AAC 60.079	Ensuring Care In Emergency
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4 AAC 60.139	Sanitation and Environmental Protection
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4 AAC 60.149	Health Program
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SECTION

4 AAC 60.169	Nutrition
4 AAC 60.170	(Repealed)
4 AAC 60.175	(Repealed)
4 AAC 60.179	Transportation
4 AAC 60.180	(Repealed)
4 AAC 60.189	General Educational Program
4 AAC 60.191	Handicapped Children
4 AAC 60.199	Definitions

DEPARTMENT OF EDUCATION

4 AAC 60.009. APPLICABILITY. The provisions of 4 AAC 60.009 - 4 AAC 60.101, apply to pre-elementary schools as defined in 4 AAC 60.199.

4 AAC 60.010. REQUIREMENTS. Repealed

4 AAC 60.019. CERTIFICATE REQUIRED. (a) A person who does not have a certificate issued under 4 AAC 60.009 - 4 AAC 60.191 may not:

- (1) operate a pre-elementary school; or
- (2) advertise or represent that which the person offers pre-elementary educational services to children.

4 AAC 60.020 is amended to read:

EXEMPTIONS. (a) The following programs are exempt from the requirements of 4 AAC 60.009 - 4 AAC 60.199.

- (1) schools operated by the federal government
- (2) programs licensed as day care facilities under 7 AAC .009 - 7 AAC.

4 AAC 60.029. CERTIFICATE. (a) An applicant must apply for a certificate on a form provided by the department.

(b) Within 60 days after receipt of a completed application, a department representative will

- (1) review the application, confer with the applicant if necessary, and schedule an inspection of the pre-elementary school; and

- (2) request appropriate authorities to verify compliance with applicable fire safety regulations, environmental health regulations, building codes, zoning ordinances, and other state and municipal laws.

(c) If the results of the application review indicate that the pre-elementary school meets the requirements of 4 AAC 60.009 - 4 AAC 60.199, the department will issue a certificate to the applicant.

(d) If the department finds that the program does not comply with the requirements of 4 AAC 60.009 - 4 AAC 60.199, the department will deny a certificate, and provide the applicant in writing with reasons for the denial.

4 AAC 60.030. APPLICATION FOR A CERTIFICATE OF APPROVAL.
Repealed.

4 AAC 60.031. PROVISIONS OF CERTIFICATE. (a) A certificate issued in accordance with 4 AAC 60.009 - 4 AAC 60.191 must state

(1) the period for which it is in effect;

(2) the name of person certified to operate the pre-elementary school;

(3) the address of person certified to operate the pre-elementary school;

(4) the maximum number of children who may enroll in the program;

(5) ages of children who may enroll in the program;

(6) the minimum number of staff members required to be in attendance for the number of children enrolled;

(b) The certificate must be displayed in the pre-elementary school in plain view of the public.

4 AAC 60.039. PROVISIONAL CERTIFICATE. (a) The department will, in its discretion, issue a provisional license to a pre-elementary school for a period not to exceed one year if the school complies with all the requirements of 4 AAC 60.009 - 4 AAC 60.199 other than a requirement that does not cause an immediate risk to life or safety is failure to comply with the requirement is caused by practical considerations including weather or shipping.

~~4 AAC 60.040. DENIAL OF APPROVAL; HEARING. Repealed.~~

4 AAC 60.041. DURATION OF APPROVAL. (a) A certificate issued under 4 AAC 60.009 - 4 AAC 60.191 is valid for a period of two years from the date of issuance.

(b) A certificate may be modified, revoked, or suspended for failure to comply with the requirements of 4 AAC 60.009 - 4 AAC 60.199 or other statutes and regulations covering the health, safety and welfare of students and staff.

(c) If the department finds that the holder of a certificate does not substantially the requirements of 4 AAC 60.09 - 4 AAC 60.199, the department will deny or revoke the certificate subject to 4 AAC 60.039. The holder of the certificate may request before a hearing of the commissioner

within 15 days after receipt of the accusation or statement of issues in accordance with AS 44.62.360 and AS 44.62.370.

(d) The commissioner will appoint a hearing officer to preside over the hearing and to control its proceedings. The hearing must be public and all interested persons who have information relevant to the inquiry shall be permitted to be heard or to submit written statements and arguments. A record shall be kept of the hearings.

(e) Following the hearing, the hearing officer shall prepare the findings and recommend appropriate action to the commissioner. The commissioner shall review the hearing officer's recommendations and determine what action shall be taken. The decision of the commissioner is subject to review in the manner outlined in AS 44.62.560.

4 AAC 60.049. SPECIAL CHANGES AFFECTING CERTIFICATION. (a) The certificate holder shall report an anticipated change in any of the following to the department as early as possible but not more than 90 days before the change occurs.

- (1) a change in the administrator of the program;
- (2) a change in the name of the person certified to operate the facility;
- (3) a change of the location of the facility;
- (4) a change in the name of the pre-elementary school;
- (5) a substantial change in the program offered, or
- (6) a substantial change in the building housing the pre-elementary school.

(b) An applicant or certificate holder shall permit certification representatives to inspect the pre-elementary school at any time during the facility's hours of operation. In carrying out these visits, certification representatives will call upon governmental agencies for appropriate assistance. Applicants or certificate holders shall cooperate in these visits by providing access to their facilities, records, children and staff.

4 AAC 60.050. DURATION OF APPROVAL. Repealed.

4 AAC 60.051. CERTIFICATE RENEWAL. (a) The department will provide the certificate holder with a renewal application form at least 60 days before the expiration of the certificate holder's existing certificate.

(b) The certificate holder shall submit the completed renewal application to the department at least 30 days before the expiration of the existing certificate; however, the department will, in its discretion, waive the requirements of this subsection if it determines there is good cause for the waiver.

(c) The department will conduct a review and take appropriate action within ten days before expiration of the existing certificate.

(d) If the department cannot complete the review within the period set out in (c) of this section, it will issue the applicant a temporary certificate effective until completion of the department's review.

4 AAC 60.059. WAIVER OF REQUIREMENTS. (a) The commissioner will, at his discretion, waive a requirement of 4 AAC 60.009 - 4 AAC 60.199, if an alternative method of satisfying the purpose of the requirement is established.

(b) The appropriate municipal or state authority must review a request for a waiver involving fire safety, environmental health, or other municipal or state requirements within their jurisdiction before the commissioner will allow the waiver.

(c) An applicant for a waiver shall apply in writing to the department. The application must include

(1) a statement of the requirement for which the waiver is requested;

(2) an explanation of the reasons why the requirement cannot be satisfied; and

(3) a description of the alternative method proposed to satisfy the purpose of the requirement for which the waiver is requested.

(d) A waiver granted under this section is effective for the time specified on the certificate. The department will review a waiver upon the termination of the waiver and will, at its discretion, renew the waiver.

(e) The department will answer a request for a waiver in writing within 30 days.

4 AAC 60.060. DISPLAY OF CERTIFICATE. Repealed.

4 AAC 60.061. VOLUNTARY CERTIFICATE. A pre-elementary school for which a certificate is not required under 4 AAC 60.009 - 4 AAC 60.199 may apply for a certificate. The department will,

in its discretion, issue a certificate if it determines that the pre-elementary school satisfies the requirements of 4 AAC 60.009 - 4 AAC 60.199.

4 AAC 60.069. ADMINISTRATIVE REQUIREMENTS. (a) The name, address, and telephone numbers of the person with the legal responsibility and the person with the administrative authority for operating the pre-elementary school must be provided to the department and, if the facility is operated by an association, corporation or other entity, the name, address, and telephone numbers of each member of its board or governing body must also be provided to the department.

(1) specific responsibilities and duties of the governing body must be written and communicated to the administrator of the pre-elementary school and to parents and staff when applicable.

(b) A pre-elementary school

(1) shall provide an educational program and facility which meets the requirements of 4 AAC 60.009 - 4 AAC 60.191;

(2) shall provide the department with a description and the name of the owner of the land and building in which the pre-elementary school is located;

(3) shall comply with AS 18.80.230 to ensure that enrollment policies, and access to services and activities of the program are non-discriminatory with regard to the sex, color, race, creed, and national origin of children and their parents;

(4) shall ensure the confidentiality of records and information pertaining to an individual child or the parents, except as required by program staff in working with the child and the family, or when a release of information form is signed by the parents;

(5) shall maintain current individual records including:

(A) individual child emergency information records;

(B) staff employment and health records;

(C) staff and child attendance records.

(6) shall maintain records on forms provided by the department unless prior department approval is given to use alternate forms.

(7) shall maintain bodily liability insurance (including transportation coverage if applicable) in an amount not less than \$100,000 per child, \$300,000 per accident with a company authorized to write insurance policies and must contain the following endorsement:

"In the event of cancellation or non-renewal of this policy, the company agrees to give 30 days prior notice to the Department of Education, Pouch "F", Juneau, Alaska 99811."

(8) shall have written materials covering non-discrimination, provisions to be made for the special needs of individual children, program description, enrollment requirements and procedures, fees and payment arrangement plans, insurance coverage, transportation arrangements, parental permission for trips and related activities outside the classroom, cold weather outdoor play policies, cold weather closure, child abuse reporting, ill children, disclosure of information, and notifications of changes in programs; these materials must be presented and explained to parents at the time of the child's enrollment, and a copy filed with the department.

4 AAC 60.070. CERTIFICATE OF APPROVAL. Repealed.

4 AAC 60.079. ENSURING CARE IN EMERGENCY. (a) A pre-elementary school shall have a plan for the evacuation of all children including the handicapped in case of fire or other disaster. The plan must include provisions for accountability for each child until released to an appropriate authority. The plan must be written and posted. Staff must be aware of the plan and hold evacuation drills at least once every month.

(b) Provision must be made in a pre-elementary school facility for emergency electrical lighting by generator or battery power for use in case of power failure.

(c) A pre-elementary school facility shall have a telephone or radio-phone if that service is locally available. Emergency telephone numbers must include fire, police, physician, poison control, and must be conspicuously posted on or adjacent to the telephone.

(d) In a pre-elementary school facility, first aid supplies appropriate to the size of the facility must be maintained and readily available for use at all times.

(e) A facility must have at least one staff member with a current first aid certificate on duty at all times unless first aid courses are not regularly available in the community in which the facility is located. If courses are not regularly available, the pre-elementary school must enroll one or more employees in the first available first aid course offered in the community to meet this requirement.

(f) A staff member, who, in the performance of duties, has cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the Department of Health and Social Services. If the staff cannot reasonably contact the nearest office of the Division of Family and Youth Services of the Department of Health and Social Services, and immediate action is necessary for the well-being of the child, the administrator shall make the report to a peace officer.

(g) A pre-elementary school must have an emergency back-up staffing plan for periods when only one staff member is on duty.

(h) When a child is left in the pre-elementary school by parents for a period extending more than one hour after the closing of the program without contacting the staff, the administrator shall immediately report that situation to the nearest office of the Division of Family and Youth Services of the Department of Health and Social Services.

4 AAC 60.080. INSURANCE. Repealed.

4 AAC 60.089. ADMINISTRATIVE QUALIFICATIONS. (a) The administrator of a pre-elementary school is responsible for the screening, scheduling and supervising of all staff, volunteers and others who provide services in the pre-elementary school, and for designating a staff member to be in charge of the facility in the administrator's absence.

(b) The administrator of a pre-elementary school must be at least 19 years of age.

(c) The administrator shall furnish the names, addresses, and telephone numbers of three person unrelated to the administrator, who could provide character references to the department with the certificate application; the references, one of which must be from a supervisor in previous work experience, shall attest to the good character and reputation of the administrator and to the management and interpersonal skills which enable the administrator to work successfully with children, staff, and parents.

(d) An individual may not be the administrator of a pre-elementary school if the individual is under indictment or has been convicted of a felony or has had a child adjudicated as a child in need of aid within the last five years. The department will, in its discretion, require a release to review law enforcement records for each administrator. In this subsection, "child in need of aid" means a child who has been adjudicated, a dependent child under AS 47.10.010 or under a similar statute in another state or jurisdiction.

(e) The administrator must also meet the staff qualifications in 4 AAC 60.099.

4 AAC 60.090. RECORDS. Repealed.

4 AAC 60.099. STAFF QUALIFICATIONS. (a) A staff member shall possess tuberculin clearance before contact with children in a facility. The tuberculin clearance must be renewed annually.

(b) A staff member, excluding the administrator, and parent classroom volunteers must furnish the names, addresses, and telephone numbers of three persons unrelated to the staff member, to the administrator. Personnel files, including references, must be kept on file at the pre-elementary school.

(c) A staff member, excluding the administrator, must have reached the age of 18 to be counted toward meeting the staff-to-child ratio requirements. However, a person aged 14 and older may be employed as staff members and counted toward staff-to-child ratio requirements if he/she:

(1) works under the close supervision of an adult staff member;

(2) constitutes no more than one third of the total staff; and

(3) is never placed in sole charge of a group of children in a classroom;

(4) is enrolled in or have completed a training program or have demonstrated competence to an administrator.

(d) A staff member must be able to

(1) provide children with a variety of learning and social experiences appropriate to their age;

(2) recognize and act against hazards to health and physical safety.

(e) A staff member shall be provided an orientation within the first month of employment which shall include

(1) administrative procedures, program goals and objectives;

(2) written specific personnel policies including written job responsibilities;

(3) crisis management, duties to be carried out in an emergency, and emergency and safety procedures;

(4) acceptable behavior management techniques, including the pre-elementary school's discipline policy;

(5) available appropriate resources to carry out their responsibilities.

4 AAC 60.100. PHYSICAL EXAMINATIONS FOR CHILDREN.
Repealed.

4 AAC 60.109. NUMBER OF STAFF REQUIRED. (a) A facility must have sufficient personnel to ensure that the children are never left without supervision by a responsible staff member.

(1) there must be one staff member for every eight children between their third and fifth birthdays;

(2) there must be one staff member for every ten children between their fifth and sixth birthdays;

(b) In a facility where there are more than ten children present, there must be a minimum of two staff members on the premises.

(c) In a pre-elementary school, only a staff member who spends at least 75 percent of his/her working time in direct contact with children will be counted in meeting staff-to-child ratios.

4 AAC 60.110. Repealed.

4 AAC 60.115. STAFF. Repealed.

4 AAC 60.119. ENVIRONMENT REQUIREMENTS. (a) a pre-elementary school facility must have sufficient indoor and outdoor space in relation to the number and ages of children to accommodate the physical and other developmental needs of

children served. Satisfactory compliance with this subsection requires that:

(1) there be at least 35 square feet of indoor space per child capacity used for the care of children, exclusive of hallways, bathrooms, lockers, closets, laundry and furnace rooms, and the kitchen;

(2) there be at least 75 square feet per child of outdoor play space for the maximum number of children on the playground at any one time. Where outdoor play space is not available at the facility, parks or other outdoor facilities that are easily accessible may be used.

(b) A pre-elementary school must have appropriate storage and work space for children and staff, convenient to the areas of use, to accommodate the following functions:

(1) record storage and administrative function;

(2) food preparation and serving, if applicable;

(3) meeting space for staff;

(4) storage of program materials and resources for staff and parents;

(5) storage of repair and maintenance supplies.

4 AAC 60.120. RECOGNITION OF SPECIAL NEEDS. Repealed.

4 AAC 60.129. FIRE SAFETY. (a) The building housing a pre-elementary school must meet the standards for buildings and life safety contained in 13 AAC 50.010 - 13 AAC 50.030 and 13 AAC 55.010 - 13 AAC 55.150.

(b) When the department receives a certification application from a pre-elementary school, or when any new construction or remodeling is completed, a fire inspection of the premises must be made by the fire marshal or his local designee to determine conformity with existing safety standards. Subsequent annual fire inspection may be required.

(c) A facility must satisfy the following additional fire safety requirements:

(1) the facility must make and retain a record of each drill required under 13 AAC 50.060(6)(1) or 13 AAC 50.060(s) which must be made available upon request to the state fire marshal or his authorized representative and to the department;

(2) the facility may not use open flame heaters except approved fireplaces;

(3) the facility may not use window screens which obstruct egress;

(4) the facility must designate an area for smoking, if smoking is permitted;

(5) at least one 5-pound ABC dry chemical fire extinguisher must be charged at all times and strategically located;

(6) no accumulation of any combustible waste materials is permitted in or around the premises. Flammable liquids must be stored in metal containers with tight fitting lids;

(7) heating appliances:

(A) that which presents a hazard because of exposed flame or heating elements must be equipped with guards in such a way that small children cannot place articles inside or on the heater or heating element;

(B) must be maintained in a safe and serviceable manner.

4 AAC 60.130. DISASTER PLAN. Repealed.

4 AAC 60.139. SANITATION AND ENVIRONMENTAL PROTECTION. (a) Pre-elementary school facilities must meet applicable standards for sanitation and environmental protection set out in 7 AAC 22.550 - 7 AAC 22.680.

(b) When the department receives a certification application—~~from~~ a pre-elementary school or when any new construction or remodeling is completed, an environmental health inspection by the Department of Environmental Conservation or its local designee to determine conformity with existing standards must be made. Subsequent annual inspection may be required.

(c) Medicines, cleansers, and other harmful chemicals must be stored so as to be inaccessible to the children.

4 AAC 60.140. FACILITY INSPECTIONS. Repealed.

4 AAC 60.149. HEALTH PROGRAM. (a) Pre-elementary school staff shall not administer medicines or drugs to any child except with written permission of the child's parent or physician or other medical authority; however, in the case of prescription medicine, a prescription label with the medical authority's name, the child's name, and a recent date may be accepted as showing

that the drug may be administered to the child. Medicines or drugs kept at the pre-elementary school for a child must be clearly marked with the child's name and the dosage, and must be inaccessible to children.

(b) A pre-elementary school must provide a place where a tired, ill, injured, or upset child may rest or play quietly, apart from other children, yet under adult observation. Ill children need not be sent home as a routine policy, but may be cared for at the pre-elementary school at the administrator's discretion and with the concurrence of the parents.

(c) If a child appears to be more than moderately ill or a communicable disease other than a cold is indicated, the child must not be allowed to expose other children to the illness and must be isolated in a separate room under adult observation until appropriate arrangements are made. Staff members shall inform parents when their children have been exposed to illness or communicable disease.

(d) Children under age six, who attend a pre-elementary school for periods longer than four hours must have a time and place to lie down and sleep, or rest quietly.

4 AAC 60.150. CHANGES IN MAJOR WRITTEN POLICIES, PLANS, PROGRAMS. Repealed.

4 AAC 60.159. IMMUNIZATIONS REQUIRED. (a) The administrator of a pre-elementary school shall maintain evidence of current immunization, or exemption from it, for each child in attendance. This evidence must be obtained from the child's parent or guardian upon admission, and show that the child has received or has begun and is continuing to receive immunizations appropriate to age as prescribed in the Alaska Division of Public Health's schedule for active immunization or that the child is exempt from immunization under (b) of this section. Satisfactory compliance requires that each child's health record contain evidence of immunization or evidence of exemption. Evidence of immunization must include

(1) the name of the health service provider, and the date of immunization against diphtheria, tetanus, polio, measles, rubella, and, if the child is less than six years of age, pertussis, and

(2) only valid immunization certificates, which are limited to

(A) an international immunization certificate; or

(B) a statement by a physician listing the date each required immunization was given; or

(C) a copy of a clinic or health center record listing the date each required immunization was given.

(b) Evidence of exemption of immunization must include:

(1) a signed affidavit by a doctor (M.D. or P.O.) licensed in Alaska, attesting that immunizations would, in his professional opinion, be injurious to the health of the child or members of the child's family or household; or

(2) an affidavit signed by the parent or guardian, offering that immunization conflicts with the tenets and practices of the church or religious denomination of which the applicant is a member.

(c) A pre-elementary school in a community where regular medical services are not available on at least a weekly basis may provisionally admit a child who does not have the required immunizations for a reasonable period of time in exceptional circumstances, but for no longer than 90 days. Provisional admissions must be reported to the communicable disease control section of the Division of Public Health of the Department of Health and Social Services, which shall then determine that the required immunizations are completed during the provisional period if the child is to be admitted.

(d) A pre-elementary school may not admit a child who does not comply with the provision of this section.

4 AAC 60.160. NONDISCRIMINATION. Repealed.

4 AAC 60.169. NUTRITION. (a) To ensure adequate nutrition and promote good eating habits and attitudes, a pre-elementary school must ensure that:

(1) at least one nutritious meal is offered to each child in the program for five hours per day or more;

(2) a wholesome snack is offered between breakfast and lunch and between lunch and dinner;

(3) all snacks and meals, meet the standards of the National Academy of Science's Recommended Dietary Allowances, 9th Ed. 1974.

(b) Vitamins and mineral supplements may be provided to a child only with parental permission.

(c) Children may be encouraged but may not be forced to eat.

* Editor's Note: A copy of the 9th Edition of the "Recommended Dietary Allowances" mentioned in (3) of this section is available for review from the Department of Health and Social Services.

4 AAC 60.170. PROGRAMMATIC REQUIREMENTS OF THE PRE-ELEMENTARY SCHOOLS. Repealed.

4 AAC 60.175. TRANSPORTATION. Repealed.

4 AAC 60.179. TRANSPORTATION. (a) A pre-elementary school must provide means for transporting children in case of emergency.

(b) A vehicle used in transporting children must be licensed in accordance with state law.

(c) A staff member of the pre-elementary school or other person acting on behalf of the program operating a vehicle for the purpose of transporting children shall be properly licensed to operate that class of vehicle according to state law.

(d) A pre-elementary school must ensure that there is prudent supervision in a vehicle used by the program to transport children, including but not limited to, use of seat belts, and prohibiting riding in the back of open pickup trucks and other similar open vehicles.

4 AAC 60.180. DEFINITIONS. Repealed.

4 AAC 60.189. GENERAL EDUCATIONAL PROGRAM. (a) The educational program conducted in a pre-elementary school must provide pre-planned experiences which promote the individual child's physical, emotional, social, and intellectual growth. Satisfactory compliance of this section requires that:

(1) a staff member generally follow a written schedule of daily activities which provide a balance of quiet and active, group and individual, indoor and outdoor, teacher-directed, and child-initiated activities, as well as adequate time for meals, snacks, sleep, and toileting according to individual needs, as appropriate;

(2) opportunities be provided for individual self-expression in conversation, imaginative play, art, and creative expression;

(3) opportunities be provided for vigorous physical activities and gross motor activities, both indoors and outdoors;

(4) opportunities be provided to foster independence.

(5) opportunities be provided for intellectual and social development through use of a variety of books, games, toys, crafts, puzzles, crayons, blocks, and other activities and materials;

(6) the amount and variety of materials and equipment available, and its arrangements and use, are appropriate to the developmental needs of the children; and

(A) the quantity of materials and equipment is sufficient to avoid excessive competition and long waits by children and to meet the criteria contained in paragraphs (2), (3), and (5) of this section;

(B) individual storage areas are accessible to each child for storage of his own belongings;

(C) furniture and equipment is durable and safe and developmentally appropriate.

(7) staff members may 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, cruel, shaming, frightening, or otherwise damaging to the child.

4 AAC 60.191. EXCEPTIONAL CHILDREN. In accordance with 30 AAC 14.30.180. - .350 competent educational services will be provided for exceptional children who are at least three years of age and for whom regular school facilities are inadequate or not available. Pre-elementary schools shall cooperate with school districts in correctly identifying exceptional children between the ages of three and five.

4 AAC 60.199. DEFINITIONS. IN 4 AAC 60.009 - 4 AAC 60.191, unless the context requires otherwise.

(1) "administrator" means the person delegated the responsibility for the daily management of the pre-elementary school;

(2) "board" means the State Board of Education;

(3) "certificate" means a certificate of approval issued to the pre-elementary school from the Department of Education;

(4) "certification representative" means an employee of the Department of Education given the responsibility to conduct reviews and on-site inspections of pre-elementary schools to determine compliance with this chapter;

(5) "commissioner" means the Commissioner of Education;

(6) "department" means the Department of Education;

(7) "facility" means the administration, program and physical plant of a program calling itself a pre-elementary school.

(8) "guardian" means an individual who is appointed by a court to manage the affairs of another person;

(9) "person" means an individual, a corporation, a company, partnership, firm, association, organization, business trust, or society, as defined in Alaska statutes and used in regulations;

(10) "pre-elementary school" means a program for children ages three through five years, with more than six unrelated children regularly attending the program, and which is established and operated primarily for educational purposes to meet the developmental needs of the children served;

(11) "staff member" means anyone who provides direct services to children in the classroom and may be one of the following:

(A) a person 18 years or older who is salaried;

(B) classroom volunteers who are at least 17 years of age;

(C) persons who are at least 14 years of age, and who are enrolled in or have completed a training program or have demonstrated competence to an administrator.

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House of Representatives HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

MEMORANDUM

To: Senate HESS Committee Members Date: May 9, 1983
House HESS Committee Members

From: Rep. Milo Fritz, Co-Chairman *MFR*
House HESS Committee

Re: State Teleconference/ HB 357/ Regulation of
Religious Schools

The House HESS Committee is extending an invitation to the Senate HESS Committee to join in a statewide teleconference in regard to the proposed legislation cited above. The teleconference will take place on Friday, May 13, from 1:00 p.m. until 3:00 p.m. PST. The public hearing will be held in Court Room A of the Court Building, Juneau, Alaska.

Testimony of Barbara Tyndall before the Senate H.E.S.S. Committee
on Wednesday, June 1, 1983.

My name is Barbara Tyndall. I am here to speak in favor of the Committee Substitute for House Bill 357, "an act relating to the regulation of religious schools."

As the mother of five children, four of them of school age, I am vitally interested in this bill. For the past nine years our children have attended Christian Schools and we have seen excellent results, both academically, emotionally, and morally. We have appreciated the fact that in Alaska our schools have enjoyed a widespread freedom to function as they please.

My husband and I have had our children in three different Christian Schools and also in the public school system. All three Christian schools (two in the Juneau area and one in Anchorage) have maintained high academic standards and provided a wholesome, comfortable environment for our children to work and grow in.

My husband and I have spent over \$13,000 in the past nine years for a Christian education for our children. Parents who are spending that much money for education are going to insist on quality. I know that I do, and I am satisfied that I am getting it. I do not regret the money spent.

Christian Schools are on the increase and are saving the state money. At the State Teleconference in May of this year, Pete Harvey of Soldotna, stated that the 460 students attending Christian Schools on the Kenai Peninsula are saving the state an estimated 3.2 million dollars a year.

The public schools can benefit from the challenge presented by the religious schools. Because of the excellent results our religious schools have produced, I urge you to work toward the passage of this bill.

Thank you very much.

Barbara Tyndall

Barbara Tyndall

FOREWORD

[Background]

Since 1977, the Faith Baptist Church of Louisville, NE, [population 1,000], has been in a running argument with the State of Nebraska. State Dept. of Education demands church's Christian day school be licensed and only "certified" [i.e. State-approved] teachers be employed. Faith Baptist and its pastor, Everett Sileven, decline licensure and seek first to employ teachers approved unto God rather than the State.

1978 - Faith Baptist Church charged with violating 14 State laws by operating "unlicensed" day school (11 of the "laws" are administrative regulations).

Feb., 1979 - Court orders Faith Baptist Church to cease and desist operation of Christian day school. Church continues to operate school.

Sept. 13, 1981 - District Judge Raymond Case orders Faith Baptist Church closed.

8:30 P.M. - While evening services are being held, Cass County Sheriff, Fred Tesch, instructs congregation to vacate church building. Members leave sanctuary to avoid confrontation. Church chained and padlocked. Judge subsequently approves opening church for Sunday and midweek services only. Christian school "moved" 40 miles away to Baptist church in Iowa.

Oct. 4, 1981 - Pastor Sileven announces congregation has voted not to allow its doors to be relocked. Volunteers will occupy church 24 hours a day; vow to leave only if physically removed.

Oct. 5, 1981 - U.S. Supreme Court declines to hear appeal filed by Christian Law Association for Faith Baptist Church.

Church's education ministry returns to Nebraska. Declares pastor, "Our people live in Nebraska. They work and pay taxes here. Their church is here. This is their State and they intend to worship and educate their children here." Faith Baptist school reopens in Louisville.

[Continued on Inside Back Cover]

[Continued from Inside Front Cover]

Feb., 1982 - Judge Case finds Pastor Sileven in contempt of court; orders him to jail. After pastor serves 13 days congregation votes to close school; pastor is released.

April, 1982 - Faith Baptist Church reopens school. Judge Case orders Pastor Sileven to serve balance of jail sentence, starting on Sept. 1, 1982.

Sept. 1, 1982 - Pastor Sileven does not return to jail.

Sept. 2, 1982 - Judge Case issues bench warrant for Pastor Sileven's arrest.

Sept. 3, 1982 - Pastor Sileven remanded to county jail. Faith Baptist Church again chained and padlocked.

6:08 A.M., Oct. 13, 1982 - Sheriff deputies and State highway patrolmen invade Faith Baptist Church during early morning prayer service.

85 visiting ministers and some laymen are forcibly evicted. Pastors and laymen carried out of sanctuary and deposited on church lawn. Church then padlocked from the inside; armed guards posted at entrances.

Feb., 1983 - Sixty-six of the Christians evicted during worship service at Faith Baptist on Oct. 13, 1982, file suit for violations of civil rights. Total damages sought: \$66 million.

March-April, 1983 - Pastor Sileven in "voluntary exile" travels nation with story of Faith Baptist's battle. Parents at Faith Baptist continue to operate Christian school to claim freedom to worship and to assert fundamental right to educate their children according to Biblical mandate.

Two fathers charged and convicted of truancy; sentenced to 15-days each. State Supreme Court agrees to hear their appeal. Meanwhile, several mothers of children attending Faith Baptist school are charged with encouraging "habitual truancy"; fined \$5.00-a-day the first week, \$10.-a-day the second week, with per diem fine to be doubled each week mothers fail to enroll their children in government schools.

[Plymouth Rock acknowledges with gratitude the assistance of Dan Whisner and the Christian Law Association in the preparation of this brochure.]

June 1, 1983

My name is Kathy Brown. I am a mother of three children, a former public school teacher, a former NEA member and building representative, and a present Christian school teacher.

I am opposed to HB 357 as it now reads. My understanding is the original intent for the bill was to exempt Christian schools from DOE regulations. However, the result of this bill places more regulations on the Christian elementary school.

As I read the working draft of the bill, three questions arose: Who owns the child? Who is responsible for his education? Is the church answerable to the State?

I am responsible to see that my children receive a quality education centered around Jesus Christ. God has given that responsibility to me, not the State of Alaska or any other agency of government. If I submit to any regulation of the State concerning the education of my children, then I am saying that the State has authority over me and my children in this area. This is not so. I love my country. I appreciate the freedoms we enjoy and will teach my children to be loyal to God, their families, and our country. I will render unto Caesar what he is due, but I am forbidden by God to render my children to you.

This bill as it is written is part of the continuing conflict between those who would deny our God-given and inalienable rights of religious liberty and those who would preserve and defend those rights.

Government was ordained by God as a result of the breakdown of individual human responsibility and is NOT inherently evil. My intent or responsibility is not to destroy government but to make sure to mold it on Biblical principles.

Some of these Biblical principles are:

- 1) All authority is God's. "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God." Romans 13:1
- 2) God has given government limited authority.
All throughout the Bible, God tells what power and over which matters government is allowed to control.
- 3) God has given children as a special heritage to parents for their protection and development.

Psalms 127: 3 "Lo, children are a heritage of the Lord:
and the fruit of the womb is his reward.

Galatians 4:2 "But is under tutors and governors until
the time appointed of the father."

- 4) God has given parents the responsibility of educating their children. "Now these are the commandments, the statutes, and the judgments, which the Lord your God commanded to teach you, that ye might do them in the land whither ye go to possess it: And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up." Deuteronomy 6: 1, 6-7

"Thus saith the Lord, Learn not the way of the heathen, and be not dismayed at the signs of heaven; for the heathen are dismayed at them." Jeremiah 10:2

Others are: Proverbs 1:8, 10, 15; 2:1; 3:1; 5:1; 6:1,2;
7:1; Ephesians 6:4

- 5) God owns the child. "Behold, the heaven and the heaven of heavens is the Lord's thy God, the earth also, with all that herein is." Deuteronomy 10:14

In view of the above, I object to the following lines of HE 357:

Page 2, lines 10 - 14, lines 17 - 21, lines 23 - 29

Page 3, lines 1 - 17, lines 21 and 23.

Over the past decades, American Christians have been careless about their involvement in civil government. As a result liberal educators, bureaucrats, and politicians have fostered legislation that is now being used to harass Christian schools and to put parents and pastors in jeopardy. Since 1977, the Faith Baptist Church of Louisville, Nebraska, has been in a running argument with the State of Nebraska. In 1978, the church was charged with violating 14 State laws, 11 of which were administrative regulations.... I will read to you the events that followed.

I have considered the "token" exemption that this bill offers. I agree with Christian schools being exempt from State regulations, but with no strings attached..... TOTAL exemption. I will not compromise God's standards!

Thank you for your time.

Sincerely,

Kathy Brown

Kathy Brown
P. O. Box 2869
Juneau, Alaska 99803

SECTION ANALYSIS OF CSHB 357 (RULES) - An Act relating to the regulation of religious schools.

SECTION 1 Adds to the duties of the Department of Education language that excludes pre-elementary schools and nurseries operated by a church or nonprofit religious organization from supervision.

NOTE: The House HESS CS kept language in the bill allowing the Department to oversee the educational component of these schools.

SECTION 2 Adds subsection (D) to the Compulsory attendance law which exempts children from attendance if enrolled in a church or religious nonprofit educational program.

SECTION 3 EXEMPTS RELIGIOUS SCHOOLS FROM ALL LAWS WITHIN THE CHAPTER EXCEPT LAWS AND REGULATIONS DEALING WITH HEALTH, FIRE SAFETY, SANITATION, IMMUNIZATION, AND PHYSICAL EXAMINATIONS.

SECTION 4 Adds language referencing new subsections (b) and (c).

SECTION 5 Adds new subsection (b) to Attendance and annual reports required (private and Denominational schools) section which gives the parent the responsibility of notifying the superintendent of the area public school that the child is attending a religious school. The religious school is to notify the public school immediately if the child is no longer in attendance,

(c) is a new subsection that adds language that if a religious school elects to comply with this chapter, they will send monthly reports, operate on a regular schedule of 180 days and make an annual report to the commissioner.

SECTION 6 Standardized testing requirements is a new section which provides that religious schools that elect to comply with this chapter shall administer a nationally standardized test to students enrolled in grades 1,3,6,and 9.

(b) lists subjects to be tested.

(c) relates to record keeping of tests, with those records open to parents, guardians and authorized representatives of the state.

SECTION 7 Adds to Duties of the Department of Education language to exclude educational components of religious schools from their administration.

SECTION 8 Repeals language that the Commissioner may furnish final examination questions and issue diplomas to eighth grade students.

MEMORANDUM

TO: SENATE HESS COMMITTEE
FROM: NANCY DEITRICK
RE: TODAY'S MEETING

HB 403 am

This bill, concerning insurance trade practices, was up before the committee before. Senator Halford had moved two amendments: To add the word "unfair" before discrimination on line 11, and delete the word "midwife" putting "and" before nurse midwife.

Wes Coiner has contacted the committee that he had resolved the problem with the bill and had no other objections.

CSHB 352

This bill, relating to the definition of death is based on a model Act endorsed by medical and legal professions. Dr. Stu Rabeau from DH&SS testified that the Department supports the bill but would rather have the exact language of the Uniform Definition of Death (see the DH&SS position paper).

The major problem identified by Dr. Rabeau is the language on lines 10, 11, and 12 which states that a person is dead only after a pronouncement of a physician, when, in fact, there are many areas of Alaska that do not have physicians. In these areas, death is pronounced by a wide variety of people.

The Department also suggested the following changes:

Deleting the last sentence, beginning on line 15 - 17.

There is no fiscal impact.

CSHB 357 (RULES)

This bill, dealing with the regulation of religious schools, is coming before the LBRC to settle the position of the Departments involved on Thursday at 3:00.

At this time I know that Education has not taken a position on the bill, leaving the policy decision involved to the Legislature.

Health and Social Services is concerned about equal protection for the three and four year olds. I have not yet seen a legal opinion, but the Department is considering the current lawsuit in Arkansas and its implications to Alaska. I have not yet seen a fiscal note.

Additional information in your files since last meeting:

A copy of Title 47, Alaska Statutes.

Community Care Facility Licensing - a handout from DH&SS describing the intent of licensing.

A copy of regulations from the Administrative Code concerning licensing requirements.

A copy of the Department of Education's DRAFT regulations for pre-elementary schools

SENATE AMENDMENT

By Josephson

To: _____ SENATE BILL No. _____

To: Committee substitute for HOUSE BILL No. 357 (RULES)

PAGE: 1 LINE: 9-18

Section 1. 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)] excluding the educational component of pre-elementary schools [and nurseries] operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive direct state or federal funding; pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

NEA - ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

Jean Krause, President

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Don Osberg
Past President
Box 1084
Kenai, Alaska 99611

May 12, 1983

Goyla Pierce
President Elect
SR Box 51577
Fairbanks, Alaska 99701

TO: House HESS Committee

Bill Potter
NEA State Director
177 Behrends Avenue
Juneau, Alaska 99801

FROM: NEA-Alaska

Bob McGregor
Region I Director
Box 1043
Sitka, Alaska 99835

RE: HB 357

Heleen Cooke
Region I Director
9410 Belmont
Juneau, Alaska 99801

NEA-Alaska members wanted to participate in this teleconference for HB 357; but, because of the timing of the teleconference to fall during the peak hours of the school day, in every region of Alaska, they find themselves unable to testify. Therefore, on behalf of over 6,000 teachers NEA-Alaska submits this written testimony in opposition to HB 357 "An Act relating to the regulation of religious schools".

Gregory Ward
Region II Director
Box 23
Glennallen, Alaska 99586

Our opposition is premised both on constitutional and educational grounds.

Frank Furrer
Region III Director
Box 1019
Kodiak, Alaska 99618

The State of Alaska is not and cannot be concerned with instruction in sectarian, religious matters; but in non-sectarian disciplines such as mathematics, science, English, history, civics, physical and vocational education, etc. the state is and must be concerned. The Alaska State Constitution in Article I, Section I, "Inherent Rights", states:

Jean Robb
Region IV Director
Box 187
Ketchikan, Alaska 99901

Ray Virgin
Region IV Director
P.O. Box 10000
Anchorage, Alaska 99507

"SECTION 1. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

Chris Richards
Region V Director
Box 1020
Fairbanks, Alaska 99701

Pet Abney
Region VI Director
Box 461 SRA
Anchorage, Alaska 99507

Lee Wilson
Region VI Director
6410 Pioneer Drive
Anchorage, Alaska 99504

HB 357 removes all oversight and regulation by the State for those educational programs offered by religious institutions who do not receive federal or state funds. In doing so, HB 357 forces the State to abdicate its responsibility in the education, health and social services of youngsters enrolled in religious schools. The State of Alaska will not be able to ensure that religious school students are enjoying equal rights, opportunities and protections under the law:

Lori Sears
Region VI Director
SRA Box 581B
Anchorage, Alaska 99511

Peg Stout
Region VI Director
6208 E. 34th Avenue
Anchorage, Alaska 99504

Frank Holmes
Director at Large
Box 102
Haines, Alaska 99827

Section 14.45.030 as amended denies the State the power to receive and examine reports about the educational programs offered in religious schools;

Section 14.30.010 (b)(1)(D) and Section 14.45.030 as amended denies the State to compel attendance in an educational program offered in religious schools;

Section 14.30.010 (b)(1)(D) as amended denies the State the authority to ensure the presence of competent and capable staff who meet established criteria to teach in the State of Alaska.

These amendments serve to weaken substantially our educational system in Alaska. It appears to us that this bill sets the stage for anarchy: any religious order could establish and maintain any "educational" program it wanted to, even if that program did not include basic instruction in reading, math, science, etc., or require that pupils attend. It is conceivable and probable that this piece of legislation, if enacted, could create whole groups of citizens who have received no instruction in basic skills and/or in disciplines essential to one's ability to function in a democratic and technological society.

We cannot condone this abrogation of the State's authority to oversee and regulate the education of all its citizens. Whether or not a religious school receives federal or state funds is immaterial; the overriding consideration is the education of our youth. It seems most ironic that at the same time the National Commission on Excellence in Education and The Twentieth Century Fund both call for higher, more stringent standards this bill gives broad latitude to diminish educational standards in Alaska by removing accountability for certain schools.

NEA-Alaska urges you to strengthen, not weaken Alaska's system of education. We ask that you, too, oppose Hb 357.

Respectfully submitted:



Jean Krause
President

JK:jc

APR 5 1983

ROUTING AND TRANSMITTAL SLIP

Date 3/15

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. Pat		
2.		
3.		
4.		
5.		

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS *None*

This "complaint" from Little Rock will be very significant, especially since it's in the U.S. District court. It's also pretty well done. I thought the other things might be helpful, or in some way useful.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
<i>Jake</i>	Phone No.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

MAR 4 1983

CARL R. BRENTS, CLERK

By: _____
DEP. CLERK

ARKANSAS DAY CARE ASSOCIATION, INC.,
DR. BETTY CALDWELL; TIFFANY WELCH, by
her parents and next friends Mike and
Karen Welch; KATI MARTIN AND SHAWN
MARTIN, by their parents and next friends
Timothy and Vicki Martin

PLAINTIFFS

VS.

CIVIL ACTION

NO. LR-C-83-192

BILL CLINTON, Governor, State of Arkansas;
ARKANSAS CHILD CARE FACILITY REVIEW BOARD;
LOYD SCHUH; LEROY ACREE; JOHN LUSK; DR. SUSAN
KEATHLEY; RAY ALLEN; LARRY ROBERTSON; DR. P. B.
GREENHOUSE, all individually and in their official
capacities as members of the Arkansas Child Care
Facilities Review Board

DEFENDANTS

COMPLAINT

I. Jurisdiction

1. The court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343 (3) and (4) for causes of action arising under the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.

II. Nature of the Action

2. This is an action for declaratory and injunctive relief declaring Act 245 of 1983 and Act 518 of

1981, and Act 123 of 1973, Acts of Arkansas, which exempts "religious" child care facilities from regulation by the Child Care Facilities Review Board (hereafter "Act 245" and "Act 518" and Act 123), in violation of the First and Fourteenth Amendments to the Constitution of the United States, and of 42 U.S.C. §1983, and enjoining its implementation and/or enforcement.

3. Acts 245, 518, and 123 (a) constitute an establishment of religion, (b) are impermissably vague, and (c) deny to plaintiffs equal protection of the law, all in violation of the Constitution and laws of the United States.

4. Plaintiffs request injunctive relief prohibiting defendants from in any way implementing and/or enforcing the provisions of Acts 245, 518, and 123 including the promulgation of any rules or regulations incident to issuance of any certificate of exemption or exempting any facility from inspection or regulation.

III. Plaintiffs

5. Plaintiffs are:

A. Arkansas Day Care Association Inc. is an Arkansas non-profit corporation made up of proprietary day care providers.

B. Betty Caldwell is a resident of Pulaski County, Arkansas. She is National President of the National Association for the Education of Young Children. She has devoted her professional career to the advancement of health, education and welfare of minor children.

C. Tiffany Welch is a resident of Pulaski County, Arkansas who attended an unlicensed day care center in Little Rock until she suffered physical abuse there. She is four years old and now attends a licensed religious day care center in Little Rock.

D. Kati Martin and Shawn Martin are residents of Pulaski County who also attended an unlicensed day care center facility in Little Rock until they suffered physical abuse there. They are two years old and one year old respectively, and are now attending a licensed religious day care center in Little Rock.

IV. Defendants

6. Defendants are:

(A) Defendant Bill Clinton is the Governor of the State of Arkansas. He signed Act 245 which was enacted by the legislature of the State of Arkansas.

(B) Defendant State of Arkansas Child Care Facility Review Board (hereafter, the "Board") is established and functions pursuant to the laws of Arkansas.

(C) Defendants Kenny Whitlock, Chairman, and Arkansas Child Care Facility Review Board, Loyd Schuh, Leroy Acree, Dr. Susan Keathley, Ray Allen, Larry Robertson, and Dr. P. B. Greenhouse, all individually and in their official capacities as members of the Arkansas Child Care Facility Review Board.

FACTS

7. A. The State of Arkansas has regulated child care facilities since at least 1969. In 1969 the legislature enacted Act 434 of 1969 being Ark. Stats. Ann., §§83-901 through §83-919. Pursuant to these statutes the Board has inspected and licensed all child care facilities.

B. The Board has promulgated various minimum standards for various types of child care facilities covering all aspects of the operation of these facilities. These standards are designed to insure the health, safety and welfare of all children under the care of these facilities.

C. In 1973 the legislature enacted Act 123 of 1973 which provided that religious child care facilities organized and operating as of July 1, 1969, were required to be inspected but could apply for an exemption from licensing.

8. A. In 1981 the legislature enacted Act 518 of 1981 which provided that any religious child care facility organized and operating as of July 1, 1969 was entitled to

apply for exemption from inspection and licensing. The request for exemption is sufficient to entitle any such facility to exemption.

B. Only religious facilities were exempted by Act 518 and no legitimate or compelling interest was brought before the legislature to justify such exemption from traditional regulation.

9. A. On or about January 24, 1983, a subcommittee of the, Committee on State Agencies and Governmental Affairs Committee Arkansas House of Representatives considered a bill known then as House Bill (HB) 223. HB 223 bill proposed that child care facilities operated by church groups be exempted from regulation by the defendant Board. The sole purpose of the bill was to exempt these facilities from state regulation.

B. At the time of the initial deliberations the Attorney General of the State of Arkansas, the Honorable Steve Clark, had already issued a formal Attorney General's Opinion dated January 24, 1983 and numbered 83-15. In this opinion, attached hereto as Exhibit A and made a part hereof, Clark set forth several constitutional difficulties with the bill and concluded (p.5) "...it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned."

/ 10. The subcommittee deliberated concerning the bill approximately two hours without being able to reach

consensus on the merits of the bill. The subcommittee then created a special ad hoc committee to which HB 223 was to be referred. This ad hoc committee was made up of five representatives of church groups favoring exemption from licensing, five persons opposing exemption from licensing and at least three members of the Board. Each of the five persons selected for those favoring legislation were clergy.

11. The ad hoc committee met on at least four separate occasions to consider "compromise legislation". The first meeting was for approximately six hours on January 26, 1983. The proposals made were referred to the Attorney General. The Attorney General issued a memorandum opinion attached hereto as Exhibit B and made a part hereof. This opinion, dated January 28, expressed the view that the proposed legislation continued to remain "constitutionally suspect and unlikely to be upheld as constitutional if challenged."

12. On January 28, after receipt of Exhibit B, the ad hoc committee met again for approximately three hours. The draft reached as a result of this meeting was dated January 29 and, again, was submitted to the Attorney General for his opinion. The Attorney General again reviewed the legislation. A copy of the Attorney General's opinion dated January 31 is attached hereto as Exhibit C and made a part of. The opinion again expressed the view that the proposed legislation possessed significant constitutional infirmities.

The Attorney General concluded his opinion "...it is my opinion that this draft is unlikely to be upheld as constitutional if challenged."

B. On January 31, the ad hoc committee met again for four hours. As a result of this meeting the proposed changes were submitted to Representative Lloyd George, the Chairman of the subcommittee. The submission was in the form of a letter from Ray Scott, Director of the Arkansas Department of Human Services, to Representative George. A copy of the letter from Scott forwarding the amendments is attached as Exhibit D and made a part hereof. Attached to this letter by Scott are the amendments as well as the names and affiliations of the members of the ad hoc Committee.

13. A. The members of the ad hoc committee in favor of exemption for religious facilities and their affiliations were:

<u>Name</u>	<u>Affiliation</u>
1. Dr. W. A. Dillard	President, American Baptist Association
2. Rev. Jerry Millikin	Faith Christian Home for Children, Forrest City, AR
3. Dr. Glenn Riggs	President, Arkansas Christian Schools Association
4. Rev. Bill Thomas	United Pentecostal Church
5. Rev. David Wiggins	Supervisor, Assemblies of God of Arkansas

B. At the time of the meetings of the ad hoc committee the Faith Christian Home for Children was a

defendant in an action brought by the State of Arkansas, concerning child abuse allegations in the operation of that facility covered by the State's licensing provisions.

C. At the time of the enactment of Act 518 of 1981 a facility under the supervision of W. A. Dillard was a defendant in an action brought by the State of Arkansas concerning aspects of the operation of that facility covered by the State's licensing provisions.

14. A. The Attorney General in a formal opinion dated February 2 and numbered 83-32 expressed the opinion that the amendments attached to the Scott letter dated February 1, 1983 were also unconstitutional. A copy of that opinion is attached hereto as Exhibit E and made a part hereof.

B. The Attorney General's opinion concluded, "...it is my belief that these proposed amendments are constitutionally suspect and would not withstand a legal challenge in state or federal court.

15. A. The ad hoc committee met for the final time on February 7, 1983 to consider their prior suggested amendments. They developed their final version of the proposed legislation, which was again forwarded to Representative George by Ray Scott in a letter dated February 9, 1983, a copy of which is attached hereto as Exhibit F and made a part hereof. Attached to the Scott letter was the proposed amended legislation. The proposed amendments were

identical in all material respects to the legislative enactment which became Act 245 of 1983.

B. The last version was not submitted to the Attorney General for his opinion.

C. The last version was not submitted to the Attorney General because his opinion would remain the same regarding constitutionality.

D. The last version was not materially different from prior versions in those matters found constitutionally suspect by the Attorney General.

16. A copy of Act 245 is attached hereto as Exhibit G and made a part hereof. The title as well as the actual provisions of Act 245 explicitly provide only for the exemption of religious child care facilities and no others.

17. The preamble to Act 245 notes that "many religious child care facilities have been organized since July 1, 1969" and that "many religious child care facilities are now included within the definition of child care facilities."

18. A. Act 245 provides that "Any church or group of churches, exempt from the State income tax levied by Act 118 of 1929, as amended, [Ark. Stat. Ann. §84-2006(3)] operating a child care facility, shall be exempt from obtaining a license...".

B. There is no definition of church contained in Ark. Stat. Ann. §84-2006(3). The only reference contained in

that statute which could possibly be applicable to Act 245 is "...corporations organized for religious, charitable, scientific or educational purposes."

19. A. Act 245 requires of church run facilities that they be in "substantial compliance" with published standards in order to maintain their exempt status.

B. Act 245 contains no definition of substantial compliance.

C. The existing regulations contain no definition of substantial compliance.

D. There nowhere exists a definition of substantial compliance as it is used in Act 245.

20. A. Act 245 establishes the concept of exemption only for church operated facilities.

B. Act 245 establishes a concept of being in substantial compliance only for church operated facilities.

C. Act 245 establishes a process of judicial review outside of and in conflict with the Arkansas Administrative Procedures Act only for church operated facilities.

D. Act 245 represents an unlawful delegation of legislative authority.

21. Act 245 establishes a scheme of self-regulation only for church operated facilities.

22. A. No secular or neutral legislative purpose was advanced by the ad hoc committee, the subcommittee of the

legislature, or the Governor to justify the exemption of church operated facilities from licensing.

B. Act 245 denies equal protection of the law to the children of the State of Arkansas who are in uninspected and unlicensed facilities as contrasted with those in licensed facilities.

23. A. Acts 245, 518 and 123 are the latest attempts in a longstanding pattern and practice of the State of Arkansas to promote religion and to assist in the establishment of religion.

B. Many religious leaders in Arkansas, as well as groups and associations, oppose the exemption from licensing for religious institutions and position statements are attached hereto as Exhibit H and made a part hereof.

24. A. The cost of being in "substantial compliance" for the exempt centers will be significantly less than the cost of complying with the requirements imposed on nonexempt centers by the licensing standards set forth in the Arkansas minimum standards. Exempt centers may also reduce their fixed costs per child, as compared with nonexempt centers, by increasing their enrollments beyond the levels imposed on nonexempt centers by the licensing standards.

B. A copy of minimum standards for one type of child care facility, the Day Care Center is attached hereto as Exhibit H and made a part hereof.

25. The opening of exempt centers will increase the supply of child care spaces in particular neighborhoods. Most children attend centers within a few miles of their home or within a few miles of their parents' workplaces. As a result of the increase in supply in particular neighborhoods caused by the opening of new exempt centers, the number of available spaces exceeds and will exceed the number of children in such neighborhoods who would attend day care centers, which in turn will lead to further unfair and unlawful competitive pressures on plaintiffs' costs and revenues.

26. Plaintiffs will suffer, if relief is not granted, substantial injury because they will lose customers to newly opened exempt centers.

27. This injury is continuing and irreparable and will persist until and unless defendants require religiously affiliated centers to comply with the minimum standards for day care licensing set forth in Exhibit I. Defendants will not be able to require compliance, because of Acts 245, 518, and 123 unless the relief prayed for herein is granted. Plaintiffs have no adequate remedy at law nor adequate administrative remedy to secure the relief requested herein.

28. The classifications established by Acts 245 and 518 constitute an invidious discrimination against plaintiff. Such classification furthers no valid or legitimate governmental purpose. The differences and

distinction between the established classification and the plaintiff classification of non-exempt facilities deprives plaintiffs of the equal protection of the law.

29. Acts 245, 518 and 123 constitute the establishment of religion by the State of Arkansas.

30. Plaintiffs have no plain or adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that this court:

1. Declare and adjudge Acts 245, 518 and 123 to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and therefore null and void and of no legal effect;

2. Issue a preliminary and permanent injunction (a) requiring the licensing of all child care facilities without regard to their religious affiliation; (b) enjoining defendant Board from exempting any child care facility from inspection and licensing by the State of Arkansas;

3. Award plaintiffs a reasonable attorney's fee and their costs;

4. Grant such other relief it may deem just and proper.

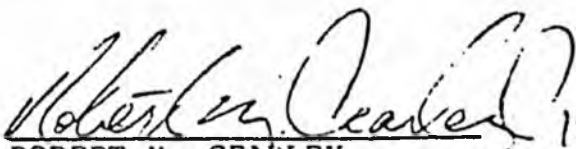
Respectfully submitted,

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& BREWER, P.A.
955 Tower Building
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By: 
PHILIP E. KAPLAN

By: 
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By: 
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STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

Wood
Nina
Mike

(501) 371-2007

February 2, 1983

Opinion No. 83-32

The Honorable Jodie Mahony
State Representative
1983 General Assembly
State Capitol
Little Rock, AR 72201

Dear Representative Mahony:

I am writing in response to your request for an opinion regarding the constitutionality of the proposed amendments to House Bill 223.

Having reviewed these provisions according to the standards for constitutional validity in the areas of equal protection and clarity of language, it is my judgment that they are constitutionally suspect as drafted and could not withstand a legal challenge in state or federal court.

First, the provisions in Section 2 which permit an exempt facility to do a self-inspection and verify compliance establishes a dual standard of regulation between church (self-inspection) and non-church facilities which are inspected and must fully comply with the standards of the Child Care Facility Review Board. The issue of denial of equal protection can thus be argued.

The amendments do not offer any rational and legislatively neutral justification to support such a double standard of regulation.

Additionally, these amendments provide exempt facilities, church operated, a different legal remedy to appeal any adverse action of the Child Care Board than the remedy provided to secular facilities. This is the appeal de novo to Chancery Court.

January 2, 1983
Page Two

It is clear that such a provision is unconstitutional under Arkansas' constitution, which although authorizing the legislature to create Chancery courts, does not allow the legislature to expand chancery court jurisdiction. Article 7 §11 and §15; Gladish v. Lovewell, 95 Ark. 618; Nethercutt v. Pulaski County Special School District, 248 Ark. 143, 450 S.W.2d 277. Since there was no such equitable recourse when our Constitution was adopted, the foregoing legal authority forbids the legislature to create it now.

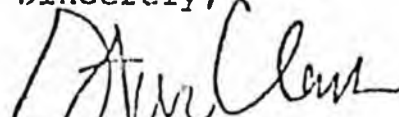
Additionally, this proposed chancery appeal do novo is in direct conflict with the award of circuit court jurisdiction of administrative appeals in Ark. Stat. Ann. §5-701 et seq. and the current Child Care Facility Review Board Act. Such conflicts, as a practical matter, destroy the remedy of judicial review, for the state or the facility, by leaving in doubt which court has jurisdiction and what standards of review are intended for the court to use.

Moreover, in the area of definitional clarity, this proposal fails in Section 2 to define the meaning of ". . .in substantial compliance with published standards that similar non-exempt facilities are required to meet."

Also the provision stating that substantial compliance standards shall not include those of a "religious or curriculum nature" leaves these terms undefined. Such vague language in a legislative regulatory scheme which is enforced by the state fails to meet constitutional due process standards of "notice" clarity as explained in Davis v. Smith, 266 Ark. 112.

In view of the comments above, it is my belief that these proposed amendments are constitutionally suspect and would not withstand a legal challenge in state or federal court.

Sincerely,



STEVE CLARK

Attorney General



STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

January 24, 1983

OPINION NO. 83-15

The Honorable Joseph K. Mahony
The Honorable Robert L. McGinnis
State Representatives
1983 General Assembly
State Capitol
Little Rock, AR 72201

RE: House Bill 54

Gentlemen:

I am writing in response to your request for an opinion regarding the constitutionality of House Bill 54. An examination of the bill reveals an obvious concern that House Bill 54 is legally invalid as a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article 2, Section 3 of the Arkansas Constitution.

The Fourteenth Amendment states, in pertinent part, as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis supplied]

These constitutional provisions have consistently been interpreted to strike down statutes which discriminate between different groups of citizens or businesses which are regulated by the same legislation

That is to say, when the law attempts to regulate a business, industry or practice, it must do so on an equal basis to all the members of the regulated class unless there is a significant difference in the way the exempted class operates its business, industry or practice and the exemption is reasonably related to the purpose of the original legislation. Jacks v. State, 219 Ark. 392, 242 S.W.2d 704; Wanetco Services, Inc. v. Gaddy, 272 Ark. 452, 616 S.W.2d 466, Rayco Construction Co., Inc. v. Vorsanger, 397 F.Supp. 1105; Milnot Co. v. Douglas, 452 F.Supp. 505. See also Milnot v. Arkansas State Board of Health, 388 F.Supp. 901 and Dicks v. Naff, Mayor, 255 Ark. 357.

The Honorable Joseph K. Mahony
The Honorable Robert L. McGinnis
January 24, 1983
Page Two

In the Rayco case the Court stated:

A state may validly differentiate between people or corporations on the basis of classifications providing that the state has legitimate and significant (in some contexts a "compelling") interest in the differentiation and provided that the classification is based on some reasonable and rational criteria or criteria; however, absent an appropriate state interest or absent rational and relevant standards of classification, state-imposed differentiation amounts to unconstitutional discrimination. [Emphasis supplied]

The exemption which H.B. 54 creates is the type of "classification" which these cases address.

Therefore unless the exemption can be justified because of differences in the operation of religious child care facilities as opposed to non-religious facilities this bill appears to discriminate, unlawfully, against not one but two classes of citizens; the children the Child Care Facility Review Board Act was intended to protect and the owners and operators of non-religious facilities.

Since there is no language in the bill indicating that children in these religious facilities are fed, supervised, etc. any differently from children in secular facilities and since there is no language in the bill indicating that children in the religious facilities are any less likely to be neglected, abused or left in hazardous circumstances than children in secular facilities there is no justification for denying to the children in these centers the protection of the state and forcing the owners of secular facilities to compete with unlicensed facilities who are operating the identical kind of business.

It is important to remember in this regard that the intent of the original act, as stated at Ark. Stat. Ann. §83-904(b), is the protection of children:

(B) In establishing requirements and standards for the granting, revoking, refusing, and suspending of a license for a Child Care Facility the Welfare Department [Child Care Facility Review Board] shall adopt such rules and regulations as will: promote the health, safety and welfare of children attending a Child Care Facility; promote safe, comfortable, and healthy physical facilities for the children who attend the Child Care Facility; insure adequate supervision of the children who attend the Child Care Facility, insure adequate supervision of the children by capable, qualified and healthy individuals; insure appropriate educational programs and activities within each Child Care Facility; and insure adequate and healthy food service where food service is offered by the Child Care Facility.

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With this in mind H.B. 54 demonstrates no rational, much less compelling state interest, in exempting facilities from licensure simply because they happen to receive no state or federal money and are associated with a religious organization.

The source of the facilities' funds and its association with a religious association simply does not appear to be connected in any way with whether or not these children deserve the same protection from abuse, neglect or hazardous circumstances as children in secular centers.

Likewise the source of the facilities' money and association with a religious organization does not appear to justify compelling a secular facility to spend the money and resources necessary to comply with the original act when the religious facilities operate the identical type of business enterprise.

Since there is no language in the original act which appears to authorize the Child Care Board to interfere with the religious beliefs of any church, this exemption seems irrelevant to any need to protect the First Amendment rights of religious groups.

However, if a religion's beliefs are manifested in practices which may threaten the safety and well being of children, then the state through its police power and the doctrine of *parens patriae* can and should lawfully discover and prevent such dangers. See Cude v. State, 237 Ark. 927, 377 S.W.2d 816.

In the Cude case the Arkansas Supreme Court overruled parents' religious objections to having children vaccinated, saying that the state's police power superceded the dangerous beliefs of parents which threaten the well being of the children. The Court quoting the United States Supreme Court in Prince v. Massachusetts, 321 U.S. 158, said:

The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death.

. . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Again however, it is important to note that the intent of the original legislation has nothing whatsoever to do with parents' religious rights or the rights of a religious association but simply with the

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protection of all children, religious or not, in facilities which are religious or secular.

Therefore any argument that this exemption is necessary to protect the First Amendment rights of the prospectively exempt facilities is without support from any language in H.B.54.

In fact the bill itself appears that it may violate the doctrine of church/state separation by awarding an unjustifiable benefit to religious organizations not enjoyed by private facilities which operate identical enterprises.

Without a justifiable secular legislative purpose which neither advances or inhibits religion, the bill is, in fact also suspect from the point of view of the First Amendment. Rosner v. Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179

Again, it is difficult to see, from the bill itself, a secular and neutral legislative purpose for exemption of only the religious facilities. Rather it appears that this legislation is clearly intended to further the alleged religious interests of certain denominations since there is no rational justification for the exemption in view of the legislative purpose quoted above.

The courts, in reviewing a challenge to this bill, can look behind the legislation into the history of the bill, something that has been done recently in McLean v. Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982) and Epperson v. Arkansas, 363 U.S. 97, 89 S.Ct. 260, 21 L.Ed. 2d 228 (1968).

Since the burden is on those defending a discrimination to make out a claim for justification (Wengler v. Druggist Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107) I can advise you that this bill presents no such justification and the state could therefore not carry that burden in a court action.

It is important to remember that:

1. Many children in the so-called religious centers are not members, nor are their parents, of the religious facility seeking exemption. So again the particular beliefs of the religious association are irrelevant to protecting the children at the facility. Circle H and Faith Christian homes recruit children from all over Arkansas regardless of the children's religion at the time of their arriving at these facilities. The Alamo foundation solicits new born babies from all over the nation totally disregarding any beliefs of the child.

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There is simply no rational justification for denying these children protection of state law because the institution they end up in, through no choice of their own, has a religious objection to licensure.

2. This exemption would not have protected Circle H Ranch because records at social services reflect it received well over \$100,000 in state and federal aid.

3. Many of these children come from broken homes, and have learning disabilities which require expert counseling and often special education which, as Judge Barrier found in the Circle H case, are not available at some of these facilities. These are children who need society's protection and assistance.

4. Health department inspections are inadequate to insure the safety of children because they do not have specific day care rules and regulations to address vital areas of the operation of a child care center such as playground safety, etc. The same is true with the Fire Marshal. Such problems were observed at the Alamo Foundation where an unfenced swimming pool and unfenced fishing pond were less than 100 feet from a playground serving 70 children.

5. Current criminal laws against child abuse are not adequate to protect children in these centers because: (1) These laws cannot operate without a report of abuse by a witness. At some facilities absolute loyalty is the rule and therefore it is unlikely that employees will file such a complaint; (2) Employees at other centers are not likely to report abuse because it may cost them their job; (3) Criminal statutes don't authorize closing the facility where abuse or neglect is practiced. They only allow prosecution of individuals. And if the only witnesses are children who are too young to testify, there is no case to take to a prosecutor although the abuse, unreported, is nonetheless occurring.

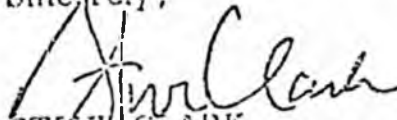
In conclusion, House Bill 54 is constitutionally suspect as being without rational justification and thus discriminates both against a large class of children and the owners and operators of secular facilities.

I am informed of the likely prospect of an immediate court challenge if the bill is enacted. In that eventuality, it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned.

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If I may be of assistance in providing additional information on this or other proposed legislation, please do not hesitate to contact this office.

Sincerely,


STEVE CLARK
Attorney General

SC:mgv

Minister Promises to Close School, Is Freed

Local Post

LOUISVILLE, Neb.—A fundamentalist preacher was freed from jail yesterday after promising to temporarily close his nonaccredited Faith Christian School in Louisville.

During a brief hearing before Cass County District Judge Raymond Case, the Rev. Everett Sileven pledged that he would shut down the school until the end of November or the end of the special session of the Nebraska Legislature scheduled to start start Nov. 5, whichever comes first.

The legislative session was called to deal solely with state budget problems, but supporters of the school will try to convince senators to take up the issue. If the matter is not resolved by that time, Sileven said he would return to jail.

The national secretary of the Moral Majority, Greg Dixon of Indianapolis, attributed Sileven's release to teachers from around the country who have been in Cass County all week to support the school.

Several times during the five-year-old dispute over the pastor's refusal to use state-certified teachers, Sileven has promised to close the school, only to reopen it later.

Minister Again Freed in School Case

PLATTSMOUTH, Neb.—The Rev. Everett Sileven, head of the Faith Christian School, was released from jail yesterday for the fourth time and prayed that officials who jailed him for four months for operating an illegal church school be converted, killed or restrained from interfering with his ministry.

Sileven, pastor of Faith Baptist Church in Louisville, who had been sentenced for refusing to use state-certified teachers, said on the jail-house steps:

"Well, it's good to be out . . . I do ask in the authoritative name of Jesus, the supreme law of the universe, that God Almighty bind the officials of the state of Nebraska and Cass County from further interference with the ministry of God at Faith Baptist Church and the saints of God of Nebraska by either converting them or restraining them or removing them or killing them."

He declined further comment. The Associated Press called his home for elaboration on his condemnation of officials, but the wife of his

AROUND THE NATION

associate pastor said Sileven had no more to say. Sileven was sentenced to jail nearly a year ago.

He was freed three times last year when he temporarily closed the school, only to reopen it again and be returned to jail.

The school's legal battle has spanned five years.

The U.S. Supreme Court refused to hear the case.

Washington Post 2/1/82

Ark. Baptist, 1/29/83

License Issue's 'Other Side' Seen

According to a report in the January 27 issue of the *Arkansas Baptist Newsmagazine*, a Southern Baptist newspaper in the state, "both local churches and state denominational leaders appear to be squarely on the other side" from those who believe that licensing of religious-affiliated child care facilities is a violation of the principle of separation of church and state.

Johnny Biggs, director of Child Care Services for the Baptist State Convention, said his agency has "not found state licensing to be an infringement of our religious liberty."

The article said that none of the church-sponsored child care facilities that have applied for exemption are associated with a Southern Baptist church or child care center.

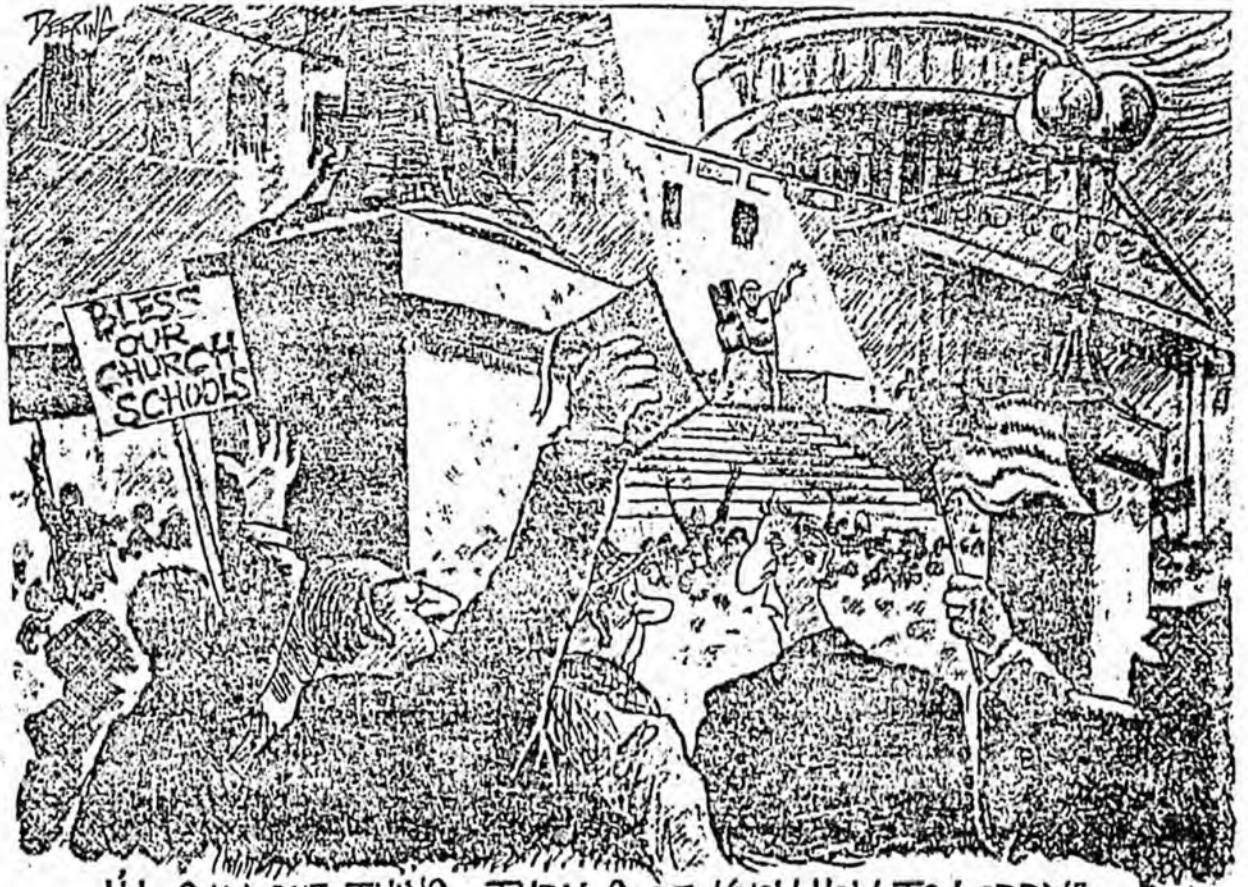
Marilyn Hall, director of the child development center at Park Hill

Baptist Church in North Little Rock, called licensing "just for the protection of the child."

"They [state officials] in no way tell us what to teach," Hall said. "They don't even talk about curriculum. They give us good guidelines to work from as far as establishing the proper ratio of teachers to children, amount of room per child and in making nutritious meals."

Cult Activity Observed

WALLA WALLA, Wash. (AP) — University of Washington sociologist Rodney Stark says religious cults appear stronger where traditional religions are weakest. He says that ratio shows up on the West Coast where church membership is lowest but where cult activity is high.



I'LL SAY ONE THING... THEY SURE KNOW HOW TO LOBBY!

Arkansas Democrat/John Deering

Voices page
airs views

JOHN S. WORKMAN Gazette Staff

Church, State, Children

NOT SINCE THE creation-science bill has Arkansas seen so much excitement over a religious issue — or a supposed religious issue — as that



generated by the question of state licensing of religious-affiliated child care facilities.

At a "religious freedom" rally Wednesday, the rotunda of the State Capitol was packed to overflowing with an excited crowd of folk from Christian schools throughout the state. They had come in response to pleas from fundamentalist ministers and Moral Majority leaders to defend the principle of separation of church and state.

The separation principle is worthy of such gatherings, and more. But there's a problem with Wednesday's rally, as with much of the other uproar relating to House Bill 54 and Senate Bill 98: The matters at hand are not, in essence, church-state separation issues. They are matters relating to the state's responsibility to care for its citizens.

Indeed, judging from the crowd at Wednesday's rally, most of the participants were from institutions that are not even affected by the proposed measures. They were, by all indications, from Christian schools for older youth.

One can understand how those who

licensing are a minority. That fact would be irrelevant if the issue were truly one of church-state separation. Matters of principle are not determined by popular vote.

But it is important to know that the large majority of religious-affiliated child care agencies are on record favoring license by the state.

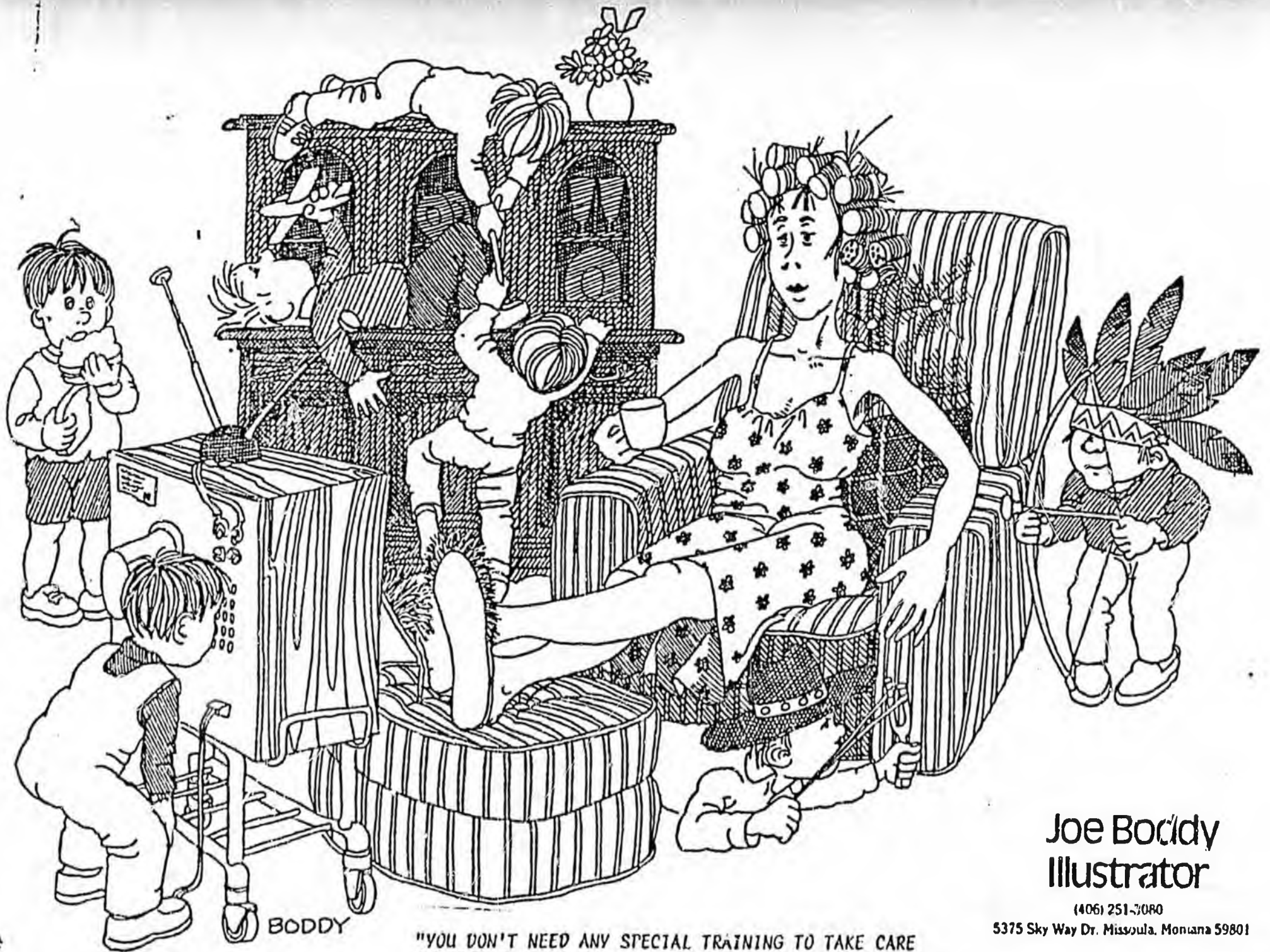
The National Association of Homes for Children, a principal professional organization, long has opposed "action by any state body that would exempt any residential group care agency from minimum licensing standards." More than half of that organization's 460 agencies, in every state in the union, are religious-affiliated.

The issue could conceivably be different — though there remains some question even here — if church groups were operating such facilities solely for their own congregations. But these are churches that have entered the public arena. They are dealing with citizens for whom the state quite properly has a responsibility.

It long has been established in law that the state has responsibility to guard against abuse of any of its citizens — including abuse of children by their parents.

Rather than to try to circumvent, or seek exemption from sharing in the protection of children, religious groups should be the first to support such a benevolent concern.





BODDY

"YOU DON'T NEED ANY SPECIAL TRAINING TO TAKE CARE OF LITTLE KIDS, THEY TAKE CARE OF THEMSELVES"

Joe Boddy
Illustrator

(406) 251-7080
5375 Sky Way Dr. Missoula, Montana 59801

BANGOR BAPTIST CHURCH, et
al., Plaintiffs,

v.

STATE OF MAINE, DEPARTMENT OF
EDUCATIONAL AND CULTURAL
SERVICES, and Harold Reynolds, Jr.,
Commissioner, Defendants.

Civ. A. No. 81-0180-B.

United States District Court,
D. Maine.

Oct 26, 1982.

Action was brought by fundamentalist
Christian churches, teachers, pastors, par-
ents and association of fundamentalist

schools against Maine Department of Educational and Cultural Services alleging that Maine compulsory education laws violate the First, Ninth and Fourteenth Amendments. On defendants' motion to dismiss, the District Court, Cyr, J., held that: (1) Maine statute requiring every child between seven and 17 to attend public school unless receiving "equivalent instruction" in a private school, provided that equivalent instruction was approved by commissioner, was not overbroad; (2) regulatory requirement of "equivalent instruction" was not facially vague; (3) regulatory requirements of information concerning school philosophy and financial information and teacher certification and pupil-teacher ratios in elementary schools were not *ultra vires*; but (4) summary judgment was inappropriate on fundamentalist Christians' free exercise and establishment laws claims.

Motion granted in part and denied in part.

1. Federal Civil Procedure ⇐2544

Defendants had to satisfy district court that there were no material facts in dispute and that they were entitled to judgment as matter of law in light of all disputed facts and any reasonable inferences from those facts, viewed in light most favorable to plaintiffs; summary judgment had to be denied if there remained the slightest doubt as to any material fact.

2. Constitutional Law ⇐84

Test in determining whether regulation of religiously motivated conduct violates the free exercise clause contemplates determination whether challenge is motivated by and rooted in legitimate and sincerely held religious belief, whether and to what extent state regulation burdens free exercise rights and whether any such burden is justified by sufficiently compelling state interest. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84

Governmental regulation which significantly burdens free exercise of religion cannot withstand constitutional challenge unless it represents the least restrictive means

of achieving compelling state interest but exemption of religious activity from regulation is not constitutionally required where it would unduly interfere with fulfillment of compelling governmental interest. U.S. C.A. Const.Amend. 1.

4. Constitutional Law ⇐84

Although at least some state regulation may be imposed upon private schools attended by students of compulsory school age, Christian fundamentalists were entitled to present evidence at trial that Maine's compulsory education laws and regulations burdened their religiously motivated activities and state defendants would bear burden of proving that any governmental regulation which did burden free exercise of religion represented least restrictive means of achieving compelling state interest. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐42(1)

The constitutional rights of others may be asserted by one whose compliance with a legal duty would deny others their constitutional rights.

6. Courts ⇐107

Federal Courts ⇐480

Summary disposition of appeal by United States Supreme Court results in judgment on merits even though there has been no briefing, oral argument or written opinion but rationale of affirmance may not be gleaned solely from opinion below and summary action, which has precedential value in virtually indistinguishable cases and in cases involving but slightly different facts and issues, should not be understood as breaking new ground.

7. Courts ⇐107

Federal Courts ⇐513

Supreme Court's summary dismissal of appeal from Nebraska decision which upheld judgment enjoining operation of elementary and secondary Christian schools for failure to comply with school approval requirements similar to those imposed in Maine did not entitle state defendants to

summary judgment in Christians' action challenging Maine compulsory education laws. Where Maine compulsory education laws had not been shown to violate the First Amendment, accepted reasoning of Nebraska decision, 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84

Where Maine's compulsory education laws imposed upon fundamentalist Christians, state defendants had to show that laws caused excessive entanglement with government or imposition of educational standards on fundamentalist Christians at public schools and it was no part of their burden to submit requested evidence in whatever form, and await the line" if and when it arose. 20 M.R.S.A. § 1281, subd. 3, 1286; U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⇐84

Once it appears that a challenge implicates constitutional rights, court will require specificity of statutory language in that context.

10. Constitutional Law ⇐84

Overbreadth doctrine is based on belief that persons whose constitutional rights are protected may be chilled by exercising their rights for fear of retaliation. A statute would constitute violation of the free exercise clause if it facially overbroadly burdens a substantial number of persons.

11. Schools ⇐160

Maine's compulsory education laws are not unconstitutional. 20 M.R.S.A. §§ 102, subd. 3, 1281, 1286; U.S.C.A. Const. Amend. 1.

12. Constitutional Law ⇐84

A challenge predicated on constitutional vagueness implicates the right of due process, requiring a distinction between lawful and unlawful government action. A sufficiently explicit legislative

summary judgment in Christian fundamentalists' action challenging provisions of Maine compulsory education laws since it had not been shown that Supreme Court accepted reasoning of Nebraska court. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84

Where Maine's compulsory education regulatory scheme imposed some burden on fundamentalist Christians' religious practices, state defendants had to show that no excessive entanglement would result from imposition of educational scheme upon fundamentalist Christians and their private schools and it was no answer that they should submit requested information, in whatever form, and await litigation "down the line" if and when specific disputes arose. 20 M.R.S.A. § 1281; U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⇐82(4)

Once it appears that statutory challenge implicates constitutionally protected conduct, court will require greater degree of statutory specificity than in nonconstitutional context.

10. Constitutional Law ⇐82(4)

Overbreadth doctrine is predicated on belief that persons whose conduct is constitutionally protected may refrain from exercising their rights for fear that to do so would constitute violation of law, thus insulating statute from constitutional challenge, but before statute may be invalidated on its face for overbreadth, overbreadth must be substantial.

11. Schools ⇐160

Maine's compulsory education laws and regulations are not unconstitutionally overbroad. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const.Amend. 14.

12. Constitutional Law ⇐251.4, 253.2(1)

A challenge predicated on unconstititutional vagueness implicates dual principles of due process, requiring fair notice of line between lawful and unlawful conduct and sufficiently explicit legislative limitations

on discretion of law enforcement officials to avoid arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 5, 14.

13. Constitutional Law ⇐82(4)

A statute may neither forbid nor require doing of act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

14. Constitutional Law ⇐82(4)

A statute is unconstitutionally vague on its face if it is expressed in such general terms that no standard of conduct is specified at all but facial vagueness challenge can succeed only when statute cannot validly be applied to any conduct.

15. Schools ⇐8

Maine's requirement that students not attending public schools receive "equivalent instruction" was not unconstitutionally vague on its face since term "equivalent" was not so vague that persons of common intelligence would necessarily have to guess at its meaning and differ as to its application and since term was capable of objective measurements and had core meaning that could reasonably be understood. 20 M.R.S.A. § 911, subds. 3, 3, pars. A, B; U.S.C.A. Const.Amend. 14.

16. Schools ⇐164

Since Maine statute which authorizes Commissioner of Educational and Cultural Services to prescribe courses of study and to withdraw school approval "for cause" had potential of affecting First Amendment rights of Christian fundamentalists', vagueness doctrine demanded narrowly drawn, definite and reasonable standards for guidance of administering officials. 20 M.R.S.A. § 102, subd. 7.

17. Administrative Law and Procedure ⇐749

Presumption that administrative rules are valid when statute specifically delegates to administrative agency power to make rules is rebuttable on showing that challenged regulation is unreasonable exercise of delegated power.

18. Schools ⇐ 7, 8

Maine Department of Educational and Cultural Services' regulations requiring submission of statement of educational philosophy, goals and course of study of private school, requiring statement of private school's financial position and policies, and requiring that all teachers hold valid teaching certificate and that all schools maintain pupil-teacher ratio of not more than 30 to 1 represented reasonable exercise of power delegated to State Board of Education and thus were not ultra vires. 20 M.R.S.A. §§ 21, 51, 51, subd. 3, par. B, 102, subd. 7, 1281, subd. 4, 1286; 5 M.R.S.A. § 8051 et seq.

19. Federal Civil Procedure ⇐ 2481

Maine Board of Education's regulatory requirement of school approval prior to commencement of operations of private school may have transformed truancy scheme selected by legislature for enforcement of compulsory educational laws into unauthorized administrative system for licensing of private schools, and thus state defendants' contention that administrative convenience warranted licensing and closing of private schools provided insufficient basis for summary judgment on fundamentalist Christians' constitutional claim that regulatory prohibition against operation of unapproved schools was ultra vires. 20 M.R.S.A. §§ 911, subds. 5, 6-A, 6-A, pars. A-D, 7, 8, 914.

1. On April 15, 1982 the Maine Legislature repealed the education laws codified in title 20, Maine Revised Statutes Annotated, and enacted title 20-A, effective July 1, 1983. See 1982 Me.Legis.Serv. No. 4, Laws 1982, c. 693.

Part 2, chapter 117, subchapter 1 of the new education laws sets out the approval requirements and procedures applicable to private schools. The five sections of the subchapter read as follows:

§ 2901. Requirement for basic school approval

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:

Kevin M. Cuddy, Bangor, Me., William B. Ball, Philip J. Murren, Kathleen A. O'Malley, Harrisburg, Pa., for plaintiffs.

Ellen E. George, William R. Stokes, Asst. Attys. Gen., Augusta, Me., for defendants.

MEMORANDUM DECISION

CYR, District Judge.

The Court is presented with a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, which is accompanied by matters outside the pleadings, not excluded by the Court, and is to be treated as a motion for summary judgment. Fed.R.Civ.P. 12(b). *Medina v. Rudman*, 545 F.2d 244, 247 (1st Cir.1976). The parties have supplemented the record, both before and after oral argument, with affidavits and memoranda of law.

The plaintiffs include fundamentalist Christian churches, teachers, pastors, parents and an association of fundamentalist Christian schools. The defendants are the Maine Department of Educational and Cultural Services [Department] and the Commissioner of Educational and Cultural Services [Commissioner].

The amended complaint, which seeks declaratory and injunctive relief, as well as costs and counsel fees, alleges that certain provisions of the Maine Compulsory Education Law, 20 M.R.S.A. §§ 102.7, 911.3, 1281 & 1286, are violative of the First, Ninth,

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.

§ 2902. State requirements

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 es-

and Fourteenth Amendment of the United States Constitution.

The fundamentalist complaint brought under constitutional provisions of the plaintiffs is 20 M.R.S.A. requires every child between 6 and 17² to attend

established by rule by section 4601, subsection 1.

5. Certified teachers; and

6. Secondary schools; and

A. Meet the requirements of the school year under section 4601, subsection 1.

B. Provide a sufficient length of time to allow for improved education; and

C. Have a student-teacher ratio of more than 30 to one; and

D. Include not less than grades from 9 to 12; and

E. Maintain adequate records; and

7. State board of education rules applicable to private schools for attendance purposes by the state board of education, subsection 3, paragraph 1.

§ 2903. Governmental authority. Nothing in this section shall constitute authority of the government to require instruction in their schools.

§ 2904. Removal of a school. Nothing in this section shall constitute authority of the government to require instruction in their schools.

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and Fourteenth Amendments to the Constitution of the United States.

The fundamental statutory provision brought under constitutional challenge by the plaintiffs is 20 M.R.S.A. § 911, which requires every child between the ages of 7 and 17² to attend a public school, unless

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 4601;

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.

§ 2903. *Governing body requirements*

Nothing in this subchapter shall restrict the authority of the governing body of a private school to require additional subjects to be taught in their school.

§ 2904. *Removal of basic approval*

1. *Commissioner may remove basic approval.* Notwithstanding any other provision of law, the commissioner may remove basic approval from any private school for failure to meet applicable approval requirements.

2. *Procedural requirements.* Whenever a school fails to meet these requirements the commissioner shall:

A. Give due notice; and

B. Hold a hearing.

3. *Hearing.* The hearing on removal of basic approval shall be in accordance with the applicable provisions of the Maine Administrative Procedure Act, Title 5, chapter 375 and rules of the state board adopted pursuant to section 405, subsection 3, paragraph E.

§ 2905. *Nonrenewal of basic approval*

The decision of the commissioner on nonrenewal of basic approval of any school applying for renewal shall be in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375 and rules adopted by the State Board of Education under section 405, subsection 3, paragraph E.

The provisions regarding course requirements referred to in § 2902 are as follows:

receiving "equivalent instruction in a private school ... [provided] the equivalent instruction is approved by the commissioner."

Title 20, Maine Revised Statutes Annotated, section 102.7, which directs the defendant commissioner, *inter alia*, to "...

§ 4601. *Basic curriculum*

1. *Required courses in American and Maine history.* The following courses shall be required.

A. American history and civil government, including the Constitution of the United States, the Declaration of Independence, the importance of voting and the privileges and responsibilities of citizenship, shall be taught in and [be] required for graduation from all elementary and secondary schools both public and private.

B. A course in the history [of Maine], including the Constitution of Maine, Maine geography and the natural and industrial resources of Maine[,] shall be taught in at least one grade from grade 7 to grade 12, in all schools, both public and private.

2. *English.* Four years of English shall be required for graduation from a secondary school.

4. *Courses prescribed by the commissioner.* The commissioner shall prescribe by rule the basic curriculum to be taught in public schools.

The minimum school year requirements referred to in § 2902(6)(A) are as follows:

§ 4801. *School days*

The following provisions shall apply to school days.

1. *Number.* A school administrative unit shall make provision for the maintenance of all of its schools for at least 180 days a year. At least 175 days shall be used for instruction. In meeting the requirement of a 180-day school year, no more than 5 days may be used for in-service education of teachers, administrative meetings, parent-teacher conferences, records' days and similar activities.

A. The commissioner may reduce or waive the minimum number of days required on application from a school board. The application must be supported in writing with a statement of the reasons for the request.

Section 405(3)(E) of the new law, referred to in § 2902(7), reposes in the State Board of Education [Board] the power and duty to "[a]dopt or amend rules on requirements for approval and accreditation of elementary and secondary schools."

2. Exceptions to this requirement are found in 20 M.R.S.A. § 911.1.A.

prescribe the studies to be taught in the public schools and in the private schools approved for attendance . . . " and permits the Commissioner to "remove basic approval from any school for cause," is also assertedly unconstitutional.

Plaintiffs further challenge various requirements for the approval of private secondary schools imposed pursuant to 20 M.R.

3. 20 M.R.S.A. § 102.7 (Supp.1981). Section 102.7 further provides:

American history and civil government, including the Constitution of the United States and the Declaration of Independence, the importance of voting and the privileges and responsibilities of citizenship, shall be taught in all schools of elementary and secondary grades, both public and private, and American history and civil government shall be required for graduation from all elementary schools, both public and private . . . ; [a] course in history, geography and the natural and industrial resources of Maine shall be taught in at least one grade from 7 to 12, in all school systems, both public and private.

The officers in charge of a private school founded after September 3, 1965 shall furnish the commissioner with a copy of the course of study arranged by said officers.

Notwithstanding any other section of law, the commissioner may remove basic approval from any school for cause. Whenever a school fails to meet requirements, the commissioner shall give due notice and shall hold a hearing. If the school fails to comply and does not take necessary remedial action, the commissioner may remove basic approval. 20 M.R.S.A. § 102.7 (Supp.1981).

4. § 1281. Requirements

The secondary schools of this State shall be evaluated for basic approval and may be evaluated for accreditation. No school shall be given basic approval for attendance, tuition or subsidy purpose (sic) within this Title unless it meets the following requirements:

1. *Course of study approved.* It maintains a course of study approved by the commissioner. [20 M.R.S.A. § 1281(1) (1964)].

2. *Length of school day.* It has a school day of sufficient length to allow the operation of its educational program as approved by the commissioner.

3. *Minimum school year.* It has a minimum school year of 180 school days, of which not less than 175 shall be actual school days and no more than 5 may be devoted to in-service education of teachers, administrative meetings, parent-teacher conferences, record days and other such teacher work activities. The State Board of Education shall have the right to reduce or waive the minimum number of days

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S.A. § 1281 (Supp.1981), which mandates that "[t]he secondary schools of this State shall be evaluated for basic approval . . ." and establishes ten basic requirements. The specific requirements for state approval of private secondary schools to which plaintiffs object are: (1) that each school maintain "a course of study approved by the defendant commissioner;"⁵ (2) that

required upon application from any school committee, board of directors or board of trustees of any academy in the State, such application to be supported in writing with a statement of the reasons for such request.

4. *Certified teachers.* It employs only certified teachers.

5. *Pupil-teacher ratio.* It has a pupil-teacher ratio of not more than 30 to one. [20 M.R.S.A. § 1281(5) (1964)].

6. *Hygienic facilities and equipment.* It has safe and hygienic facilities, adequate equipment and supplies, all of which comply with the regulations established by the Department of Human Services and the Department of Educational and Cultural Services.

7. *Consecutive grades.* It is organized to include not less than 2 consecutive grades from 9 to 12.

8. *Requirements for graduation.* The requirements for graduation shall include American history and 4 years of English in a planned program approved by the Commissioner of Education. Notwithstanding the foregoing, a student who has satisfactorily completed the freshman year in a degree-granting institution may receive a secondary school diploma from the school he last attended.

9. *Records.* It has adequate, safely protected records. [20 M.R.S.A. § 1281(9) (1964)].

10. *Size.* Any public school enrolling fewer than 100 pupils may be approved by the State Board of Education on an emergency or continuing basis only after the school committee or board of directors have (sic) presented in detail reasons for such emergency, or continuing approval. Any such school which is adjudged by the board to be geographically isolated shall receive the board's approval for a 6-year period subject to the right of the board to terminate its approval, on the ground of size, only if the school receives at least 5-years' notice of such termination, and subject also to the satisfactory meeting in every case of the other requirements of this section.

20 M.R.S.A. § 1281 (Supp.1981).

5. The amended complaint also alleges that 20 M.R.S.A. § 1286 interferes with "the religious mission of the [plaintiff] churches." The challenge to § 1286 does not, however, pose any additional or different issues not raised by the challenge to § 1281.

each schoolers;"⁶ and "pupil-teacher one."⁷

Plaintiffs have sought to require that the requirements are violated in furtherance of their church's religious mission. They have requested that the court enjoin the defendant from enforcing the requirements and regulate the defendant's actions in the province of the church. Plaintiffs insist that the requirements substantially limit the church's religious mission of church-school program elements.

The amended complaint alleges a constitutional violation of the Free Exercise Clause of the First Amendment and a violation of the Process Clause of the Fourteenth Amendment. Plaintiffs allege that the defendant's regulations are "impermissibly burdensome and impede the church's authority to act in violation of the First Amendment of parental, private and (5) violation of the Fourteenth Amendment. Plaintiffs seek to transmit, or receive

The defendant's allegations are the reason that

6. The amended complaint alleges that the defendant's actions do not hold the

7. The amended complaint alleges that the requirement of school size is a violation of the defendant's right to public school

each school employ "only certified teachers;"⁶ and (3) that each school have "a pupil-teacher ratio of not more than 30 to one."⁷

Plaintiffs contend that the Commissioner has sought to impose these statutory requirements and various regulations promulgated in furtherance thereof upon plaintiffs' church-schools. Plaintiffs assert that they have refused to comply for reasons of religious conviction, insofar as the statutes and regulations require greater burdens than plaintiffs acknowledge to be the lawful province of the defendants to impose. Plaintiffs insist that compliance would substantially limit and interfere with their religious mission and permit state surveillance of church-schools, review of their church-school programs and other excessive entanglements.

The amended complaint pleads constitutional violations in five counts: (1) violation of the Free Exercise Clause of the First Amendment and denial of parental rights guaranteed by the Ninth Amendment; (2) violation of the Establishment Clause of the First Amendment; (3) violation of the Due Process Clause of the Fourteenth Amendment, in that the challenged statutes and regulations promulgated thereunder are "impermissibly vague, overbroad, *ultra vires* and improperly delegate legislative authority to administrative personnel;" (4) violation of the First, Ninth, and Fourteenth Amendments, by depriving plaintiffs of parental, property, and enterprise rights; and (5) violation of the First, Ninth, and Fourteenth Amendments, by denying plaintiffs their rights "in education to express, transmit, or receive ideas."

The defendants deny most of the material allegations of the amended complaint for the reason that they are without sufficient

6. The amended complaint alleges that "... plaintiff Churches employ teachers in their schools who, while proficient instructors ... do not hold Maine State teaching certificates."

7. The amended complaint challenges the requirement of 20 M.R.S.A. § 1281.10 as to school size. But that subsection is applicable to public schools only.

knowledge or information upon which to form a belief as to the truth of the matters asserted. Defendants invoke the ancillary jurisdiction of the Court by way of counterclaim against nine church-school plaintiffs and against persons, known and unknown to defendants, charged with the direction of the church-school defendants-in-counterclaim, for declaratory and injunctive relief aimed at the implementation of the compulsory education laws of the State of Maine. The second claim for relief asserted in defendants' counterclaim seeks a judicial declaration that certain church-school plaintiffs cannot qualify for initial school approval absent prior compliance with state health, sanitation, fire, and safety requirements. Plaintiffs admit that the nine church-school defendants-in-counterclaim are operating private schools without the approval of the Commissioner and that they have refused to provide the information required by the Commissioner, except information relating to state fire, safety, health and sanitation standards.⁸ By way of affirmative defense to the counterclaims, the defendants-in-counterclaim reassert each of the constitutional claims alleged in their amended complaint and further allege that the plaintiffs-in-counterclaim will suffer no irreparable harm and have an adequate remedy at law.

I

FACTS

Title 20 M.R.S.A. § 911.1.A mandates that "[e]very child between his 7th and 17th birthdays shall attend a public day school during the time it is in session." However, "[a] child shall be excused from attending a public day school if he obtains equivalent instruction in a private school ... if the equivalent instruction is approved by the

8. At oral argument on the pending motion for summary judgment, counsel represented that plaintiffs do not challenge and will comply (or have complied) with the requirements relating to fire, safety, health, and sanitation. In so doing, however, plaintiffs concede no right on the part of the Department or the Commissioner to condition prior approval of their church-schools upon compliance with these standards.

Cite as 549 F.Supp. 1206 (1982)

commissioner." 20 M.R.S.A. § 911(3)(A). For purposes of exercising his statutory responsibility under this provision, the Commissioner is guided by: (1) the regulations of the State Board of Education,⁹ issued pursuant to 20 M.R.S.A. § 51(3)(B), establishing requirements for approval of elementary and secondary schools; (2) the regulations of the Board, issued under 20 M.R.S.A. § 59, regarding certification of teachers; (3) the studies required to be taught, as prescribed in 20 M.R.S.A. § 102(7); (4) the rules issued by the Commissioner regarding such studies; (5) the requirements for approval of secondary schools, established by 20 M.R.S.A. § 1281; and (6) various provisions of title 22 M.R.S.A. and of the rules and regulations of the Department of Human Services, prescribing state health and sanitation standards applicable to schools, and of the Life Safety Code, containing fire safety standards issued by the Department of Public Safety pursuant to title 25 M.R.S.A.

The Department issues regulations, codified at 05-071 CMR 127, sections 1 and 2, prescribing the minimum instructional requirements for public schools and for private schools approved for attendance purposes under 20 M.R.S.A. § 911(3).

The qualification and procedural requirements for teacher certification are set forth in the regulations of the Department, codified at 05-071 CMR 115. The regulations governing school evaluation procedures and prescribing standards for obtaining school approval are codified at 05-071 CMR 125, as modified by an "Addendum" issued in September, 1981 which further explains the procedures for obtaining private sectarian school approval. These three sets of regulations are at the heart of plaintiffs' constitutional challenges and for that reason are summarized in the Appendix.

II

LAW

[1] Defendants insist that there is no genuine issue as to any material fact re-

9. The State Board of Education is organized within the Department of Education and Cul-

pecting any of plaintiffs' claims for relief and that defendants are entitled to judgment as a matter of law. Plaintiffs have not moved for summary judgment on any of their claims for relief or on either of defendants' counterclaims. Defendants assert that their supporting affidavits have not been met by the plaintiffs with opposing affidavits setting forth specific facts raising any genuine issue for trial. See Fed.R.Civ.P. 56(e). For their part, plaintiffs point out that the pending motion may not be used as a vehicle for turning an adversary proceeding into a trial by affidavit, see *Thyssen Plastik Anger KG v. Induplas, Inc.*, 576 F.2d 400, 402 (1st Cir.1978); *Redman v. Warrenner*, 516 F.2d 766, 768 (1st Cir.1975), and that the parties are entitled to try the material facts in genuine dispute, see *Associated Press v. United States*, 326 U.S. 1, 6, 65 S.Ct. 1416, 1418, 89 L.Ed. 2013 (1945).

Defendants must satisfy the Court that there are no material facts in dispute, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Ramsay v. Cooper*, 553 F.2d 237, 240 n. 8 (1st Cir.1977), and that defendants are entitled to judgment as a matter of law in light of all undisputed facts and any reasonable inferences which may be drawn from those facts, viewed in the light most favorable to the plaintiffs, see *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Creative Environments, Inc. v. Estabrook*, 650 F.2d 822, 829 (1st Cir.1982). Summary judgment must be denied where there remains the *slightest doubt* as to any material fact. *United States v. Del Monte De Puerto Rico, Inc.*, 586 F.2d 870, 872 (1st Cir. 1978); *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948). There are numerous material facts in genuine dispute and, with but few exceptions, it is far from clear that defendants are entitled to judgment as a matter of law in light of the undisputed facts.

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A. *Free Exercise—Parental Rights—Right to Receive and Express Ideas—Counts I, IV and V*

Counts I, IV and V present interrelated constitutional claims. Count I alleges that the compulsory education laws impose prior restraints upon plaintiffs' federal and state constitutional rights to the free exercise of their religion and deny the parent-plaintiffs' Ninth Amendment rights to determine the religious education of their children. It is alleged that enforcement of the compulsory education laws and regulations would deprive the church-plaintiffs "of their liberty to freely carry out their religious mission in the form of Christian education" and "chill, if not destroy," the evangelical ministry of the pastor-plaintiffs "in the religious mission of the schools in their charge." The school principal- and teacher-plaintiffs assert that they would "be denied entirely the right to carry out a calling to the religious ministry of educating young Christians." Plaintiffs contend that no compelling state interest justifies the burden placed on their religious freedoms and that if any such interest exists it can be achieved through less restrictive means.

Count IV alleges that these state-imposed requirements would deprive plaintiffs of their parental rights and their property and enterprise rights under the First, Ninth and Fourteenth Amendments, and under Article 1, sections 1 and 6-A of the Constitution of the State of Maine.

Count V claims deprivations of plaintiffs' rights "in education to express, transmit or receive ideas," as guaranteed by the First, Ninth and Fourteenth Amendments, and by Article 1, sections 3 and 4 of the Constitution of the State of Maine.

10. See L. Tribe, *American Constitutional Law* § 14-10, at 851 (1978); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 *Yale L.J.* 350, 354 (1980); Pheffer, *The Supremacy of Free Exercise*, 61 *Geo.L.J.* 1115, 1139 (1973).

11. *Sherbert v. Verner*, *supra*, involved a Seventh-Day Adventist who was fired by her employer for refusing to work on her Sabbath and

1. *Exemption From Government Regulation.*

In 1878 the United States Supreme Court upheld the polygamy conviction of a Mormon, declaring that *religious belief* alone, not *religiously-motivated conduct*, is protected by the First Amendment and that polygamy laws serve an important secular purpose by preserving monogamous marriage and preventing the exploitation of women. See *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878). More recently, the Court accorded broadened constitutional protection to certain religiously-motivated conduct on the part of religious groups. See *Murdock v. Pennsylvania*, 319 U.S. 105, 109, 63 S.Ct. 870, 873, 87 L.Ed. 1292 (1943) [first amendment right in spreading beliefs, by distributing pamphlets without a license, outweighs legitimate secular purpose in generating revenue from persons using public streets]; *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) [first amendment right to solicit contributions and play religious recordings in public streets cannot be conditioned upon licensing determination by state as to whether a cause is religious, since state interest in preventing fraud and preserving peace can be achieved by less drastic means]. In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court took a significant step beyond earlier case law,¹⁰ by holding that only a compelling state interest could justify burdening the free exercise of religion and that the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims. *Id.* at 403, 407, 83 S.Ct. at 1793, 1795.¹¹ In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), after a careful consideration of the religious and state interests involved, the Court concluded that Amish

was denied unemployment compensation. The Supreme Court held that the denial of unemployment compensation placed a burden on the exercise of plaintiff's religion, disproportionate to any state interest in avoiding "fraudulent claims of unscrupulous claimants feigning religious objections to Saturday work." 374 U.S. at 407, 83 S.Ct. at 1795.

parents need not comply with compulsory education laws requiring their children to attend school beyond the eighth grade. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court stated:

The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."

Id. at 718, 101 S.Ct. at 1432, quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). See also *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) [state may limit religious liberty on sufficient showing that regulation is essential to overriding governmental interest].

[2, 3] The test presently applied in determining whether regulation of religiously-motivated conduct violates the free exercise clause contemplates a three-part determination:

1. whether the challenge is motivated by, and rooted in, a legitimate and sincerely-held religious belief;

2. whether and to what extent state regulation burdens free exercise rights; and

3. whether any such burden is justified by a sufficiently compelling state interest. *Wisconsin v. Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533. Governmental regulation which significantly burdens the free exercise of religion cannot withstand constitutional challenge unless it represents the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). But exemption

12. In *Kennedy v. Meacham*, 540 F.2d 1057, 1061 (10th Cir.1976), the Sixth Circuit decided that the dismissal of a complaint brought by prison inmates alleging unconstitutional re-

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of religious activity from regulation is not constitutionally required where it would "unduly interfere with fulfillment of the [compelling] governmental interest." *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

For purposes of the pending motion, the defendants concede that plaintiffs' constitutional claims are motivated by, and rooted in, legitimate and sincerely-held religious beliefs, contending instead that plaintiffs' religiously-motivated activities are but minimally burdened by the compulsory education laws. Defendants argue that the Commissioner possesses the requisite administrative power and willingness to accommodate plaintiffs' religious beliefs and that the Court should determine, as a matter of law, that Maine's scheme of compulsory education is reasonable and that it serves compelling state interests warranting whatever minimal burdens may be imposed on plaintiffs' religious activities.

The important interests competing for judicial protection in the context of constitutional challenges brought under the free exercise clause are rarely susceptible to the requisite balancing on motion for summary judgment. See *Minkus v. Metropolitan Sanitary Dist.*, 600 F.2d 80, 84 (7th Cir. 1979) [challenge to state refusal to conduct civil service testing on date other than Sabbath raised substantial factual issues as to whether accommodation could be made by the state without undue hardship, requiring reversal of summary judgment in favor of defendant]. See also *Attorney General v. Bailey*, 386 Mass. 367, 436 N.E.2d 139, 150 (1982); 10 Wright & Miller, *Federal Practice and Procedure* § 2732, at 614 n. 67 (1973). Courts normally permit the parties to present a complete factual record to facilitate the requisite balancing of competing interests in considering first amendment claims. See *Developmental Disabilities Advocacy Center Inc. v. Tuttle*, 689 F.2d 281 at 288-289 (1st Cir. 1982).¹²

restrictions on the free exercise of their same religion was improper, since the state neither established that no religion was involved nor that any burdens on its free exercise were war-

[4] Although constitutional history of free exercise claim governmental regulation *Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). *Board of Indian Affairs v. United States*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherrill v. United States*, 437, 91 S.Ct. 888, 56 L.Ed.2d 321 (1979). *Sherbert v. Verner*, 374 U.S. 1790, 10 L.Ed.2d 225, 321 U.S. 645 (1944). 310 U.S. 296, 300, 31 L.Ed. 1213 (1943). *States*, 98 U.S. 1235, 25 L.Ed. 117, 118. It seems clear that the regulation may be in violation of the Constitution, attended by state action, see *Board of Education v. Rowley*, 458 U.S. 236, 245-47, 47 L.Ed.2d 1060 (1982). *Education*, 330 U.S. 91, 92 L.Ed. 711 (1948). *Board of Education v. Rowley*, 458 U.S. 624, 631, 63 S.Ct. 1313 (1982); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 20 L.Ed. 131 (1925). plaintiffs are entitled to a trial that Maine laws and regulations are unconstitutionally-motivated and that they bear the burden of proving that governmental regulation of free exercise of

warranted by a constitutional regulation of private

We do not see how every instance of regulation by affidavits, responses to the fact out factual disputes by defendants and as to obviate a hearing. In would, of course, burden of just See *United States v. Allstate Life Insurance Co.*, 655, 82 S.Ct. 990, 340 (10th Cir.

ants refused to seek state approval of their curriculum, despite assurances of approval, and refused to employ only state accredited teachers and to seek approval to operate their schools. The defendants maintained that the operation of their schools was an extension of their church ministry and that the state had no authority to approve or accredit their schools, asserting that the basic philosophy of the public education system ran contrary to their belief in biblical Christianity and that the state was therefore "not capable of judging the philosophy of the defendants' school," *id.* 301 N.W.2d at 574. Finally, the defendants in *Faith Baptist* refused to submit to school inspection as required by Nebraska law "because the State has no right to inspect God's property."

Nebraska law provides penal sanctions for "violations of the various statutory provisions relating to compulsory education and operation of private, denominational and parochial schools." *Id.* 301 N.W.2d at 575. The Nebraska Supreme Court held that injunctive relief, as opposed to criminal prosecution, was appropriate to prevent a continuing and flagrant course of violations of Nebraska criminal law. *Id.*

The defendants in the present action claim that the summary dismissal of the *Faith Baptist* appeal is dispositive of plaintiffs' First and Ninth Amendment claims, since the Nebraska Supreme Court had rejected essentially these same claims. On the weight of the summary affirmance by the United States Supreme Court, these defendants seek summary judgment under Counts I, IV and V. See Defendants' Supplementary Memorandum, dated April 7, 1982, at 29.

[6] "It is ... often difficult to understand the proper reach of Supreme Court summary affirmances and dismissals for want of a substantial federal question. . . ." *Preston v. Seay*, 684 F.2d 172, 173 (1st Cir. 1982) (*per curiam*). The summary disposition of an appeal results in a judgment on the merits even though there has been no briefing, oral argument or written opinion. However, "[b]ecause a summary affirmance

is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (*per curiam*). See also *Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976). A summary disposition has precedential value in cases virtually indistinguishable from the case summarily disposed of, see *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), and in cases involving but slightly different facts and issues from those in the case summarily disposed of, see *Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (*per curiam*). "Summary actions, however, . . . should not be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. at 176, 97 S.Ct. at 2240. Mr. Justice Brennan, concurring in *Mandel v. Bradley*, announced two clear standards by which courts should determine the precedential significance of a summary disposition:

After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is possible.

Id. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). See also Comment, *The Precedential Weight of Summary Dispositions of Appeals*, 29 Me.L.Rev. 325, 353 n. 104 (1978).

The issues before the Supreme Court in the *Faith Baptist* case were:

- (1) Do Nebraska educational statutes and rules promulgated thereunder per-

taining to state schools and to private appellants applied, of free violation of [

- (2) Do Nebraska rules promulgating to state schools and to late, on their individual rights to bear children as guaranteed by the Fourteenth Amendment? See 49 U.S.L.W. 39 Subject Matter Summary Filed.

[7] Although it is the constitutional question presented in the United States Supreme Court in the *Faith Baptist* case as those in the present case, that to be the the summary affirmance of either of these questions there possibly determined that the United States Supreme Court's decision of those questions restably upon some alternative ground." *Mandel v. Bradley*, 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). The defendants

14. A simple comparison of the Nebraska regulatory provisions of the constitutional rights of the Baptist cannot with the same as the constitutional rights of the Baptist.

The Nebraska law required curriculum, equipment, the length of the year, health and safety of a "Fall Approval Term Summary Report" that all professional Nebraska certificationally speaking," me a baccalaureate of the Baptist Church, 30 Nebraska law also required approval of schools by 574. The Nebraska law were "very minimal" the state did not provide at 580.

taining to state approval of church schools and teacher certification deprive appellants, on their face and as applied, of free exercise of religion in violation of [the] First Amendment?

- (2) Do Nebraska educational statutes and rules promulgated thereunder pertaining to state approval of church schools and teacher certification violate, on their face and as applied, individual appellants' fundamental rights to bear, raise and educate their children as guaranteed by [the] Ninth and Fourteenth Amendments?

See 49 U.S.L.W. 3940 (June 16, 1981), Subject Matter Summary of Cases Recently Filed.

[7] Although it is far from clear that the constitutional questions with which the United States Supreme Court was presented in the *Faith Baptist* appeal are the same as those in the present action,¹⁴ even assuming that to be the case it is doubtful that the summary affirmance rested upon a decision of either of the broad constitutional questions there posed. It simply cannot be determined that the judgment of the United States Supreme Court "rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." *Mandel v. Bradley*, 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). The defendants in *Faith Baptist* re-

14. A simple comparison of the Maine and Nebraska regulatory schemes demonstrates that the constitutional questions raised in *Faith Baptist* cannot with certainty be considered the same as the constitutional issues here presented.

The Nebraska regulations prescribed a required curriculum, necessary materials and equipment, the length of the school day and year, health and safety requirements, the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and the requirement that all professional staff members hold a valid Nebraska certificate or permit which, "[g]enerally speaking," meant that teachers must hold a baccalaureate degree. See *State v. Faith Baptist Church*, 301 N.W.2d at 573, 575. Nebraska law also required inspection and approval of schools before operation. See *id.* at 574. The Nebraska curriculum requirements were "very minimal in nature." *Id.* at 579, and the state did not prescribe a course of study, *id.* at 580.

fused even to provide the state with the names and addresses of students enrolled in their schools. The Nebraska court enjoined the operation of the school "because there had been no compliance with the school laws of the State of Nebraska." *State v. Faith Baptist Church*, 301 N.W.2d at 573. (Emphasis added.) The United States Supreme Court was not of necessity required to rule on the broad constitutional issues there presented in order to reach its judgment and it has not in any event been made to appear that the Court accepted the reasoning of the Nebraska court.

B. Excessive Entanglement (Count II)

[8] Count II of the complaint asserts that the imposition of the Maine compulsory education laws and regulations would violate the Establishment Clause by: (1) imposing state-chosen values on religious entities; (2) involving the state in purely religious matters; and (3) fostering an excessive governmental entanglement with religion.

The mode of analysis for Establishment Clause questions is defined by the three-part test that a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive governmental entan-

The Maine statutes and regulations require, *inter alia*, submission to the state of: (1) a statement of school educational philosophy, goals, and objectives and a plan for their implementation; (2) a description of grading methods and procedures; (3) a statement of the school's financial position and policies; and (4) a statement of the school's tuition refund policy. Schools are required to maintain a pupil-teacher ratio not exceeding 30 to 1 and a physical environment "acceptable to the Department of Educational and Cultural Services." Private schools must provide parents with a statement of Maine's school-entrance age requirements. The Maine regulations contain elaborate curriculum requirements and permit withdrawal of approval of a course of study "for cause." Teacher certification regulations in Maine require a baccalaureate degree, with two years of liberal education, appropriate subject matter concentration, professional knowledge, and supervised teaching experience. See 05-071 CMR Ch. 115, Introduction.

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gument with religion. See *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 748 [96 S.Ct. 2337, 2345, 49 L.Ed.2d 179] (1976); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 [93 S.Ct. 2955, 2965-2966, 37 L.Ed.2d 948] (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612, 613 [91 S.Ct. 2105, 2111, 29 L.Ed.2d 745] (1971).

Wolman v. Walter, 433 U.S. 229, 235-36, 97 S.Ct. 2593, 2598-2599, 53 L.Ed.2d 714 (1977). Plaintiffs do not argue that the compulsory education laws and regulations have no secular legislative purpose or that their primary effect either advances or inhibits religion, but that those laws and regulations "foster an excessive governmental entanglement with religion." *Id.*

Defendants demand summary judgment under Count II on the grounds that the Commissioner is prepared to accept the requested information in any form plaintiffs wish to submit it, and even to arrange school visitation by the Department should plaintiffs desire, thereby obviating, defendants believe, any possibility of excessive entanglement.

An unconstitutional entanglement generally involves "the government's continuing monitoring or potential for regulating the religious activity under scrutiny." *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir.1979). "[I]n determining whether there is excessive entanglement, the question is 'whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.'" *Id.* quoting *Walz v. Tax Commissioner*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).

The decision by the First Circuit in *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir.1979), outlines the appropriate judicial approach to the present entanglement challenge. *Surinach* found free-exercise and establishment clause violations where the Puerto Rico Consumer Affairs Department, pursuant to legislative directive, subpoenaed church-school records relating to operating costs, financial sources, school services, supplies and equipment, personnel salaries, scholarships, and related matters. [526]

The First Circuit began its analysis by rejecting the distinction drawn by the district court between the gathering of the information and the regulatory purpose (restraint of inflationary trends) for which the information was sought. Observing that the gathering of information from the schools was not an end in itself, but rather a first step in a process which might lead to the imposition of ceilings on educational costs at the religious schools, Chief Judge Coffin said that the schools were not obliged to show, as a condition to relief, that the precise scenario of price regulation would in fact unfold. *Id.* at 75.

To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems. In *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir.1977), *aff'd on statutory grounds*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), the court of appeals held that the exercise of jurisdiction by the NLRB over schools operated by the Roman Catholic Church violated the separation between church and state. Reasoning from the cases which have found various forms of aid to sectarian schools to be unconstitutional, it expressly rejected the Board's contention that any constitutional problems should be litigated 'down the line' if and when disputes arose between the Board and schools subject to its jurisdiction:

The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only, but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists.

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Surinach v. Pesquera de Busquets, 604 F.2d 73, 75-76 (1st Cir.1979).

The court in *Surinach* found that the effect of the governmental demand for information "constitutes a palpable threat of state interference with the internal policies and beliefs of [the] church related schools." *Id.* at 77. The court expressed concern that the information could eventually be used to "interfere seriously" with the church canons requiring church-schools to maintain academic excellence, *id.*, and that, if it were administratively determined that church-school costs were to be contained, the schools would likely have to cut back on their curricula and facilities, thus affecting their religious objective of offering the highest quality education possible, *id.* Moreover, the court feared that the regulatory process might require a determination as to which school costs were necessary and reasonable, giving rise to a possible conflict between religious and secular values. *Id.* at 77-78 (e.g., state could determine student-teacher ratio in religious schools unusually low).

The First Circuit took little comfort from the fact that the Commonwealth had not yet made determinations in conflict with religious doctrine or yet concluded that cost controls were necessary. *Id.* at 78. The court observed that these first steps on the road to regulation could chill the recruitment, allocation and expenditure of funds, *id.*, and that the regulatory scheme authorized continuing governmental involvement in church affairs which could "intrude upon decisions of religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the schools," *id.* at 79.

Surinach held that the Commonwealth had not met its burden of showing a compelling state interest justifying the imposition of its regulations on the religious schools, nor its burden of showing that its secular interests could not be served by less intrusive means. *Id.* at 79-80. The court cogently observed that the Commonwealth had not even argued that it "would be

unable to fulfill its wide ranging duties if any portion of one segment of the economy were to be excluded from its investigation and subsequent regulation," *id.* at 80.

The defendants contend that the imposition of the challenged regulations would place no burden on plaintiffs' religious practices. On the contrary, the burdens clearly appear, though their extent remains subject to proof at trial. For example, the defendants admit that their schools are not operating in compliance with the requirement of Maine law that only certified teachers be employed, see 20 M.R.S.A. § 1281 (Supp. 1971), which constitutes cause to close schools pursuant to Board regulation, see 05-071 CMR 125, at 4. Other regulatory requirements under challenge may give rise to excessive governmental entanglements with religion; for example, the informational requirements pertaining to school finances, tuition policies, and educational philosophy; and departmental inspection and approval of the physical facilities and environment of church-schools.

Once it is recognized that the regulatory scheme imposes some burden on plaintiffs' religious practices, it is clear that defendants have yet to meet their burden of showing that no excessive entanglement would result from the imposition of the scheme upon plaintiffs. It is no answer that plaintiffs should be required to submit the requested information (in whatever form) and await litigation "down the line" if and when specific disputes arise. See *Surinach v. Pesquera de Busquets*, 604 F.2d at 75-76; see also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458-59, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493-99, 94 S.Ct. 669, 674-677, 38 L.Ed.2d 674 (1974). The defendants must show that the regulatory scheme to be imposed on plaintiffs represents the least restrictive means of achieving some compelling state interest and that the information required of plaintiffs would serve a specific and sufficiently compelling state interest to warrant burdening their

religious practices. See *Surinach v. Pesquera de Busquets*, 604 F.2d at 79-80. These are matters of proof.

The Commissioner asserts on affidavit that certain of the information required by the form of application for initial approval, see Exhibit 7, attached to Affidavit of Commissioner Reynolds, October 19, 1981, need not be provided by the plaintiff-schools and that it is the policy of the Department to waive, on request, any regulatory requirement "to accommodate . . . religious . . . schools," provided "the basic requirements of the compulsory education laws deemed necessary for the benefit and protection of the children of this state will not be unduly compromised." The Commissioner avers that the requirement that the school physical environment be "acceptable to the Department," see 05-071 C.M.R., at 5, has not been and will not be imposed. The Commissioner further proposes relaxation of the teacher certification requirement, stating that church-school teachers need not obtain certification "if this is against their religious convictions," but need only "demonstrate qualification for certification." See Second Supplemental Affidavit of Commissioner Reynolds, at 11. With respect to the request for information regarding school financial position and policies, the Commissioner asserts that church-schools need only identify their religious affiliation, *id.* at 13, and that church-schools need not provide information regarding school tuition policies. Finally, the Commissioner states that private schools ineligible for public tuition funds, which neither wish to obtain five-year approval status nor seek indirect public aid, through textbook loans, medical services, remedial services or standardized

15. The letter states that the *minimum* information required for approval is 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

testing, need not provide, with their initial application, information regarding their educational philosophy, goals and objectives.

The present action appears to have been precipitated by letters of the Commissioner, dated October 9, 1981, informing certain of these plaintiff-schools that they may not provide education to children of compulsory school age during hours of the day when such children would otherwise be attending public schools, absent approval by the Commissioner, and further advising that approval must be obtained in accordance with the rules adopted by the Department, copies of which had been previously provided.¹⁵ The Commissioner further stated, "I ask you once again to submit the necessary information by completing the school approval application, by submitting the required information in some other format or by making arrangements for a visit by representatives of the Department." Finally, the Commissioner advised that legal action would be commenced against the schools after October 20, 1981, should the schools fail to comply.

The Commissioner did not expressly state that only those portions of the application form which deal with the five topics specified in the letter need be completed in order to qualify a school for approval. Previously the schools had been provided with copies of the rules governing approval and with copies of the application form. The October 9 letter again requested "the information necessary for [departmental] review and approval" pursuant to the application previously provided and the application form enclosed.¹⁶ The addendum to the general

5. maintains and safeguards adequate attendance, health and academic records.

The Commissioner directed that such information be supplied pursuant to the application form enclosed with the October 9, 1981 letter. The Commissioner offered to accommodate any concerns about completing the application and to expedite reviews by making Department representatives available to visit the schools, observe operations, and inspect records "as an alternative to the completion of the forms."

16. The Attorney General of the State of Maine advised plaintiffs' counsel on October 8, 1981.

rules, which provisions for private indicate that private only submit information areas identified ter." Furthermore pose to obviate condition of approval as consistent. The Court does not made to appear mere compliance "evidence," regard would result in se

"A defendant plaintiff's claim allegedly unlawful American Constitution. See *DeFunis v. O* 94 S.Ct. 1704, 170 *Sanchez-Mariani* 592 at 595-596 (1981). In order to moot requests, at least

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The addendum (1) the certification of religion and (2) the requirement (3) the minimum ment for kindergarten daily teaching sch dendum does not from employing strate qualification requirement of information and political philosophy, from the requirement environment must partment."

rules, which prescribes procedural exceptions for private school approval, does not indicate that private sectarian schools need only submit information concerning the five areas identified in the Commissioner's letter.¹⁷ Furthermore, the letter does not propose to obviate departmental review as a condition of approval, but describes the "minimum information" required for approval as consisting of certain "evidence." The Court does not consider that it has been made to appear on the present record that mere compliance with the demand for such "evidence," regardless of its probativeness, would result in school approval.

"A defendant cannot ordinarily moot a plaintiff's claim by voluntarily ceasing allegedly unlawful conduct." L. Tribe, *American Constitutional Law* § 3-14 at 66. See *DeFunis v. Odegaard*, 416 U.S. 312, 318, 94 S.Ct. 1704, 1706, 40 L.Ed.2d 164 (1974); *Sanchez-Mariani v. Ellingwood*, 691 F.2d 592 at 595-596 (1st Cir. 1982). The affidavits of the Commissioner, however well intentioned, do not moot plaintiffs' claims. In order to moot plaintiffs' claims in these respects, at least defendants must establish

in response to their request for an interpretation of the school approval laws, that their concerns could "be answered by the enclosed materials: the school-approval regulations (with explanatory addendum for sectarian schools), the new minimum curriculum rule, and the application for school approval." See Exhibit E attached to Plaintiffs' Supplemental Memorandum, filed March 24, 1982.

17. A copy of the addendum is to be attached when copies of the general rules (05-071 CMR 125) are supplied to private sectarian schools. See Supplemental Affidavit of Commissioner Reynolds, filed April 8, 1982.

The addendum prescribes exemptions from: (1) the certification requirement, for teachers of religion and ministers who are headmasters; (2) the requirement of vision and hearing tests; (3) the minimum instructional time requirement for kindergarten; and (4) the maximum daily teaching schedule requirement. The addendum does not exempt sectarian schools from employing teachers who can "demonstrate qualifications for certification;" the requirement of information as to school financial position and policies, tuition policies, educational philosophy, goals and objectives; or from the requirement that the school physical environment must be "acceptable to the Department."

that they will not again seek the information sought at the time of the institution of the suit. See *United States v. Phosphate Export Association*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).

Defendants are not entitled to summary judgment under Count II.

C. Due Process (Count III)

[9] Count III alleges that the compulsory education laws "are impermissibly vague and overbroad and delegate legislative authority to administrative personnel wholly without statutory standards," in violation of the due process clause. Plaintiffs further claim that many of the regulations of the Department are *ultra vires* and that enforcement of the compulsory education laws would deprive plaintiffs of the use of the "educational enterprise to which they have devoted money and contributed personal services to help create and maintain."

1. Vagueness/Overbreadth.¹⁸

In a facial challenge to the overbreadth and vagueness of a law, a court's first

The application form itself does not exempt sectarian schools from these requirements, but purports to relax the requirement that information be provided as to school financial policies, by permitting sectarian schools merely to identify the religious affiliate from which it derives financial support.

18. While related, these two doctrines derive from somewhat different policies and look to different effects. Overbreadth analysis looks to whether a law 'sweeps within its ambit [protected] activities' as well as unprotected ones, *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940), while a vagueness inquiry focuses on whether a law states its proscriptions in terms sufficiently indefinite that persons of reasonable intelligence 'must necessarily guess at its meaning'. *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973), quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). See *Grayned v. City of Rockford*, 408 U.S. 104, 106-114, 92 S.Ct. 2294, 2298-2302, 33 L.Ed.2d 222 (1972); *Landry v. Daley*, 280 F.Supp. 938, 951-52 (N.D. Ill.1968) (three-judge court). *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1122 n. 9 (1st Cir., 1981).

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task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Village of Hoffman Estates v. Flipside, 455 U.S. 489, ——— n. 6, 102 S.Ct. 1186, 1191 n. 6, 71 L.Ed.2d 362 (1982). Once it is made to appear that the statutory challenge implicates constitutionally protected conduct, the Court will require a greater degree of statutory specificity than in nonconstitutional contexts. 455 U.S. at ———, 102 S.Ct. at 1193.

a. *Overbreadth.*

[10] "The Supreme Court has emphasized that overbreadth facial challenges to the constitutionality of a state law should prevail only in rare circumstances." *New England Accessories Trade v. City of Nashua*, 679 F.2d 1, 4 (1st Cir.1982). "[T]he overbreadth doctrine is 'strong medicine' and [courts] have employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, ——— U.S. ———, ———, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982). The doctrine is predicated on the belief that persons whose conduct is constitutionally protected may refrain from exercising their rights for fear that to do so would constitute a violation of law, thus insulating the statute from constitutional challenge. See *New York v. Ferber*, ——— U.S. at ———, 102 S.Ct. at 3359-3361, citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). But before a statute may be invalidated on its face for overbreadth, even one which arguably touches such traditional forms of free expression as books and films, the overbreadth must be "substantial," that is, susceptible to

19. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-2299, 33

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"a substantial number of impermissible applications . . .," *id.* ——— U.S. at ———, 102 S.Ct. at 3362.

[11] It is conceivable that some of these regulations may inhibit the free exercise of constitutional rights, but the Court is not persuaded that the regulations reach "a substantial amount of constitutionally protected conduct," see *Village of Hoffman Estates v. Flipside*, 102 S.Ct. at 1191, n. 6, or that this is one of those rare occasions when the plaintiffs are entitled to mount an overbreadth challenge on the ground that the Maine compulsory education laws and regulations could be unconstitutionally applied to others. See *New York v. Ferber*, ——— U.S. at ———, 102 S.Ct. at 3359-3361 ["arguably impermissible applications" of statute forbidding distribution of material depicting a sexual performance by child, outweighed by its legitimate reach]. The arguably impermissible applications of the challenged compulsory education laws are relatively insignificant. Any actual overbreadth may "be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied," *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16, 93 S.Ct. 2908, 2917-2918, 37 L.Ed.2d 830 (1973). See also *New England Accessories Trade v. City of Nashua*, 679 F.2d at 5.

Summary judgment must be granted for the defendants on plaintiffs' claim of unconstitutional overbreadth.

b. *Vagueness.*

[12-14] A challenge predicated on unconstitutional vagueness implicates dual principles of due process, requiring: (1) fair notice of the line between lawful and unlawful conduct; and (2) sufficiently explicit legislative limitations on the discretion of law enforcement officials to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972);¹⁹ *Papachristou v. City of Jackson-*

L.Ed.2d 222 (1972), the Supreme Court articu-

ville, 405 U.S. 116, 121 L.Ed.2d 116, 33 S.Ct. 1161, 1163 (1967). A challenge on its general term is specified *Westchester*, 1981, *quoting* 402 U.S. 61, 12 L.Ed.2d 214 challenge can "cannot valid *id.* at 50.

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L. Tribe, A § 12:35 at 7: ted). In *Fan Boston*, 652 1981), the Fi tions of a pul

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ville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *United States v. Professional Air Traffic Controllers*, 678 F.2d 1, 3 (1st Cir.1982). A statute may neither forbid nor require the doing of an act in terms so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); see also *Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967). A statute is unconstitutionally vague on its face if it is expressed in such general terms that "no standard of conduct is specified at all." *Brache v. County of Westchester*, 658 F.2d 47, 50-51 (2d Cir. 1981), quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). A facial vagueness challenge can only succeed when the statute "cannot validly be applied to any conduct." *Id.* at 50.

[W]hile legislatures "ordinarily may delegate power under broad standards . . . [the] area of permissible indefiniteness narrows . . . when the regulation . . . potentially affects fundamental rights," like those protected by the first amendment. And where a law authorizes a system of prior licensing, the Supreme Court has consistently required the statutory delegation to provide "narrowly drawn, reasonable and definite standards for the [administering] officials to follow . . ."

L. Tribe, *American Constitutional Law* § 12:35 at 732-33 (1978) (footnotes omitted). In *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1123-24 (1st Cir. 1981), the First Circuit upheld three sections of a public amusement licensing statute

lated the constitutional bases of the vagueness doctrine:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act

ute which permitted denial of a license whenever issuance would (1) unreasonably increase pedestrian traffic; (2) increase the incidence of disruptive conduct; or (3) unreasonably increase the level of noise. These standards, while not identifying the dispositive levels of noise, traffic, or disruption, "describe[d] a behavioral effect of at least potential objective specificity," and apprised applicants of factors which would determine the licensing decision, *id.* at 1123. Nevertheless, the court found invalid on its face a city ordinance authorizing the denial of a license where the operation of the public amusement would "significantly harm[] the legitimate protectible interests of . . . affected citizens of the city," *id.* The "public interest" standard was deemed defective because it "comprise[d] purely subjective evaluations of wholly unrestricted factors, and thus vest[ed] the denial of a license in the essentially unbridled discretion of a municipal administrator," *id.* at 1123, thereby imposing an unconstitutional standard "where a license is necessary for the exercise of [constitutionally] protected activity," *id.* at 1124. See also *City of Biddeford v. Biddeford Teachers Association, Me.*, 304 A.2d 387, 400 (1973) (statutory standards must guide agency in following legislative policy and prevent administrative arbitrariness).

[15] Plaintiffs challenge the requirement of 20 M.R.S.A. § 911.3 that students not attending public schools receive "equivalent instruction," by asking whether "equivalent" means measure-for-measure instructional equality; whether instructional equivalence is to be determined by reference to local public schools or to public schools in general; and whether overall instructional equivalence is to be determined

accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(Footnotes omitted.)

Third New International Dictionary (1976), at 769.

Whatever vagueness may inhere in the term "equivalent" appears to be necessarily necessary to embrace all of its legitimately intended objectives without creating an encyclopedic and unwieldy" statute. *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d at 1123. It must be presumed that Maine courts "will give [the term] a limiting construction that will preserve its facial constitutionality," *id.*, citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975). See also Me. Atty. Gen. Report 1963-64, at 160, 162 [correspondence course unapproved by district directors and Commissioner is not the equivalent of school attendance].

Defendants are entitled to summary judgment on plaintiffs' facial vagueness challenge to the term "equivalent".

[16] The vagueness challenge to the statutory and regulatory provisions authorizing the Commissioner to prescribe courses of study and to withdraw school approval "for cause" is more meritorious. 20 M.R.S.A. § 102.7; 05-071 CMR 125, §§ 1(D)(3) & 2(b)(2). The Commissioner is authorized to "prescribe the course of study" and to deny approval to schools which do not offer a course of study prescribed by the Commissioner. 20 M.R.S.A. § 102.7. Private schools founded after September 3, 1965 must furnish the Commissioner with a copy of their course of study. 20 M.R.S.A. § 102.7. Approval may be denied secondary schools unless their graduation requirements include American history, four years of English "and other courses approved by the Commissioner." See 05-071 CMR 125, at 3. Other provisions of law notwithstanding, the statute itself authorizes the Commissioner to withdraw approval "for cause." 20 M.R.S.A. § 102.7. Neither the compulsory education statutes nor the regulations define "cause," except that it is provided by Board regulation that "cause" includes, "but is not limited to, the failure . . . to provide the minimum course of study . . . and the failure . . . to file a course of study, or notice of changes in the

course of study or related reports as required by the Commissioner." 05-071 CMR 127, at 10. See *Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 854 (E.D.Va. 1980) [due process requires administrators to structure and confine their discretionary powers by means of safeguards, standards, principles, and rules]. A school which is denied approval may request a board of review, appointed in part by the Commissioner, but the recommendations of the board of review are subject to the final approval of the Commissioner. "If the school fails to comply [with requirements] and does not take necessary remedial action, the commissioner may remove basic approval." 20 M.R.S.A. § 102.7.

Even private organizations which accredit educational institutions have been required to maintain reasonable standards and to apply them with an even hand. See *Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 655-659 (D.C. Cir.1970), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970); *Rockland Institute v. Ass'n of Independent Colleges*, 412 F.Supp. 1015, 1018 (C.D.Calif.1976); *Parsons College v. North Central Ass'n of Colleges & Secondary Schools*, 271 F.Supp. 65, 73 (N.D.Ill.1967).

Since 20 M.R.S.A. § 102.7 has the potential of affecting the first amendment rights of these plaintiffs and the school approval statute and regulations establish a state licensing scheme, the vagueness doctrine demands narrowly drawn, definite and reasonable standards for the guidance of the administering officials.

Accordingly, defendants' motion for summary judgment must be denied.

2. *Ultra Vires Regulations.*

[17] "Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid." *United States v. Boyd*, 491 F.2d 1163, 1167 (9th Cir.1973). See *E.I. duPont de Nemours & Co. v. Collins*, 432

U.S. 45, 53-55, 97 S.Ct. 2229, 2233-2234, 53 L.Ed.2d 100 (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 379-81, 89 S.Ct. 1794, 1800-1801, 23 L.Ed.2d 371 (1969); *Ciampa v. Schweiker*, 511 F.Supp. 670, 677 (D.Mass.1981). The presumption is rebuttable on "a showing that the challenged regulation is an unreasonable exercise of the delegated power—i.e. inconsistent with the statute." *Id.* See *Commissioner v. Acker*, 361 U.S. 87, 90-92, 80 S.Ct. 144, 146-147, 4 L.Ed.2d 127 (1959); *United States v. Calamaro*, 354 U.S. 351, 358-59, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957). Courts "must reject administrative constructions of [a] statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate . . . [legislative] policy. . . ." *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981). See *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2496, 65 L.Ed.2d 532 (1980); *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d, 668 (1976); *Therhault v. Brennan*, 488 F.Supp. 286, 299 (D.Me.1980), *aff'd*, 641 F.2d 28 (1st Cir.1981).

21. Plaintiffs' *ultra vires* challenges fall into four categories. See Exhibits A & B, attached to Plaintiffs' Supplemental Memorandum, filed March 24, 1982.

(1) Plaintiffs challenge various regulations requiring the submission of a statement of educational philosophy, goals and objectives; a plan for accomplishing the same; a description of the methods and procedures to be utilized in measuring attainment; and information from which it may be ascertained that the course of study and pupil needs are consistent with the stated purpose of the school. See 05-071 CMR 125, at 1-2.

(2) Plaintiffs challenge, for lack of a statutory basis, the regulation requiring a statement of the school's financial position, financial policies and other financial information. See 05-071 CMR 125, at 2.

(3) Plaintiffs challenge, as *ultra vires*, the regulation requiring that all teachers hold a

[18] The challenged regulations governing school evaluation and approval, codified at 05-071 CMR 125,²¹ were adopted pursuant to 20 M.R.S.A. § 51 "to assure that Maine school children [receive] protection against unsafe facilities, inadequate curriculum and unprepared teachers." 05-071 CMR 125, at 9. The Board is empowered and directed to "establish requirements for approval and accreditation of elementary and secondary schools" and to "establish standards for certification of teachers and other professional personnel." 20 M.R.S.A. § 51(3)(B) (as amended by 1981 Me.Laws c. 464, § 2). The Board is required to fulfill its administrative responsibilities in accordance with 20 M.R.S.A. § 21, which mandates the promulgation of administrative rules and regulations pursuant to the Maine Administrative Procedures Act, 5 M.R.S.A. § 9051, *et seq.* The Commissioner is authorized to "prescribe the studies to be taught . . . in private schools approved for attendance . . . purposes . . . and the course of study prescribed by the commissioner shall be followed in . . . all private schools approved by the said Commissioner." 20 M.R.S.A. § 102.7. See also 20 M.R.S.A. § 1236.

Most of the challenged administrative regulations cannot be considered *ultra vires*. The un rebutted affidavit of the Commissioner asserts that the Department requires this information in order to assess "whether the minimum curricula are being taught in the context of a course of study reasonably

valid teaching certificate and that all schools maintain a pupil-teacher ratio of not more than 30:1, noting that though the statute requires that high schools employ only certified teachers and have a student-teacher ratio of not more than 30:1, see 20 M.R.S.A. § 1281(4), there is no such statutory requirement for elementary schools.

(4) Plaintiffs challenge the statutory basis for the regulation that private schools not operate with compulsory school age children in attendance without first obtaining written approval from the Department, see 05-071 CMR 125, at 3; 05-071 CMR 127, at 10, pointing out that the compulsory attendance statute penalizes parents for enrolling children in schools not approved for attendance purposes but does not forbid the operation of unapproved private schools.

adequate for that "[t]he adequate program is whether it is a program and whether anticipated to a stated educational mental Affidavolds, Jr., at 9. that the adequate cannot be evaluate all of the request for that purpose power to require from the duty to standards, imposed by the Legislature administrative reformation as to the goals, and courts schools represent the power deleg M.R.S.A. § 51.

The regulation schools state the policies and their able the gathering because of its relations, where public tuition pa "as a general economic stability." affidavit of Comm These regulations legislative mandable exercise by its administrative approval stand

The Board is M.R.S.A. § 51.3(E) elementary-school teacher certification as are imposed u statute, see 20 M that the approval

22. Plaintiffs' challenge which appear church-schools, s question 1(8); R 11(7); Exhibits 1 Commissioner R 1981, may in any Un. See Abbott

adequate for educational purposes" and that "[t]he adequacy of the total educational program is determined by assessing whether it is a planned and sequential program and whether it may reasonably be anticipated to accomplish the school's own stated educational goals." Second Supplemental Affidavit of Commissioner Reynolds, Jr., at 9. The affidavit further states that the adequacy of a course of study cannot be evaluated in a vacuum and that all of the requested information is relevant for that purpose. *Id.* The administrative power to require the information flows from the duty to establish school approval standards, imposed upon the Commissioner by the Legislature. The promulgation of administrative regulations requiring information as to the educational philosophy, goals, and course of study of applicant schools represents a reasonable exercise of the power delegated to the Board by 20 M.R.S.A. § 51.

The regulations requiring that applicant schools state their financial position and policies and their tuition refund policies enable the gathering of information "sought because of its relevance to school-municipal relations, where a private school receives public tuition payments" and, in addition, "as a general indicator of the school's economic stability." Second Supplemental Affidavit of Commissioner Reynolds, at 13. These regulations are consistent with the legislative mandate and represent a reasonable exercise by the Board in furtherance of its administrative duty to establish school approval standards.²²

The Board is authorized by statute, 20 M.R.S.A. § 51.3(B), to promulgate the same elementary-school approval standards as to teacher certification and pupil-teacher ratio as are imposed upon secondary schools by statute, see 20 M.R.S.A. § 1281. The fact that the approval standards for secondary

schools are prescribed by statute does not preclude the Board from adopting like administrative requirements for the approval of elementary schools. The certification requirement and the 30:1 pupil-teacher ratio are consistent with and tend to effectuate the legislative goals of compulsory education by assuring that all Maine children receive adequate instruction.

The defendants are entitled to summary judgment on each of plaintiffs' *ultra vires* challenges, except that relating to the regulatory prohibition against the operation of unapproved schools.

[19] The Commissioner asserts by affidavit that the regulatory requirement of school approval prior to the commencement of operations represents an "administrative interpretation and implementation of the approval requirement stated in 20 M.R.S.A. § 911.3 and the truancy prohibition of 20 M.R.S.A. § 911," Second Supplemental Affidavit of Commissioner Reynolds, at 3, and that it furthers the compulsory education scheme by assuring that private school students will obtain sufficient instruction from the outset of their attendance and that their education will not be interrupted in the event that a departmental review undertaken after the commencement of school operations should necessitate denial of approval, *id.* The requirement that an application for initial approval be filed nine months in advance of the opening of the school is said to be necessary to afford the Department and health and safety officials sufficient time to review school facilities and proposed programs, and to discuss and correct perceived deficiencies prior to student attendance. *Id.*

The promulgation of the regulations requiring prior written approval may have exceeded the power delegated to the Board

22. Plaintiffs' challenge to these regulations, which appear not to be enforced against church-schools, see Initial Application Form, question 1(8); Renewal Application, question 11(7); Exhibits 1 & 2, attached to Affidavit of Commissioner Reynolds, filed October 19, 1981, may in any case not be ripe for adjudication. See *Abbott Laboratories v. Gardner*, 387

U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) [ripeness doctrine prevents judicial interference until administrative decision formalized and its effects are felt in a concrete way]. See also K. Davis, *Administrative Law Treatise*, § 21.00 (1982 Supp.) [controversies are not ripe unless hardship due to lack of decision is substantial].

by the Legislature. These regulations prescribe administrative sanctions for the enforcement of the compulsory education laws which differ materially from the enforcement sanctions selected by the Legislature.

The Maine Legislature has mandated that a child who is absent from school, without excuse, for the equivalent of 10 full days or for one-half day on seven consecutive school days within any 6-month period is "an habitual truant." 20 M.R.S.A. § 914. Any person who has control of an habitual truant and bears primary responsibility for the truancy is guilty of "a civil violation for which a forfeiture of not more than \$200 shall be adjudged." 20 M.R.S.A. § 911.8. "Any person who induces a child to absent himself from school, or harbors or conceals such child when he is absent commits a civil violation for which a forfeiture of not less than \$500 shall be adjudged." *Id.*

Local school authorities are responsible for the implementation of the truancy laws and are directed, under the guidance of the Commissioner, to "promulgate reasonable rules and regulations," 20 M.R.S.A. § 911.5, for local enforcement of the truancy laws. See 20 M.R.S.A. § 911.6-A. If unable to resolve an habitual truancy the local school superintendent must refer the matter to the local school committee or board of directors, 20 M.R.S.A. § 911.6-A(A), which must hear the matter, after providing the parents or guardian at least seven days' written notice of the hearing, its purpose, the necessity of their and their child's presence, and their right to inspect their child's records and the principal's report. 20 M.R.S.A. § 911.6-A(C) & (D). Information presented to the committee or board "shall include, but not be limited to, the report presented by the principal to the superintendent of schools." 20 M.R.S.A. § 911.6-A(B). "After considering the facts presented and after discussing the matter with the child and his parents or guardian," the committee or board

shall determine by a majority vote to:

A. Instruct the child to attend school as required by statute and inform the par-

[536]

ents or the guardian of their legal responsibilities to assure the child's attendance; or

B. Waive the compulsory school attendance law provided the child is at least 14 years old;

(1) The parents or guardian may appeal this decision to the commissioner, who shall appoint a fair hearing officer to hear the appeal;

(2) The fair hearing officer shall make a report to the commissioner on the testimony presented at the hearing and shall make a recommendation to the commissioner as to the disposition of the appeal; and

(3) The commissioner shall review the report and recommendation of the fair hearing officer and shall affirm, modify or reverse the decision of the local school committee or board of directors.

20 M.R.S.A. § 911.7. Compulsory school age students not attending approved schools are considered truants and their parents and others who induce truancy are subject to civil forfeitures.

The Commissioner states, by way of affidavit, that he has discouraged local officials from undertaking truancy enforcement actions because parents may be sending their children to unapproved schools "in the good faith belief [that their children] . . . are receiving the benefits and protections of the state's compulsory education laws." Second Supplementary Affidavit of Commissioner Reynolds, at 4. The Commissioner represents that truancy actions conducted on a broad scale would be "unduly burdensome" and expensive for local school officials, the Department, and the courts, *id.* at 5, and would neither prevent the operation of unapproved schools nor satisfy "[t]he Department's duty to review and approve schools, according to a systematic administrative process and general standards." *Id.*

These 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 made to appear th has either mandat ministrative closing schools operating age children in att record it would ap has opted in fav scheme of compuls ing the initiation, statutory procedu scribed for truancy

A regulation with the manifest not be sustained "technically inconsi language." United er Co., 455 U.S. 827, 70 L.Ed.2d 792 & Elec. Co. v. Uni 1136 (9th Cir. 198 erroneous and in stringent legislativ be placed on adm officials delega ed deny licenses, see U.S. 290, 294, 71 S. (1951); Cantwell 296, 307, 60 S.Ct. (1940), the argum convenience warr closing of private s ficient basis for su constitutional claim

SU

Partial summar defendants shall breadth challenge; challenge to the r "equivalent instr challenge to the r information conce and financial info vires challenge to ment of teacher teacher ratio in el

In all other resp mary judgment m

SO ORDERED.

APPENDIX—Continued

name and address of the administrative head of the proposed school.

c. The applicant must submit the following additional information to the Department three months prior to the projected opening of school:

i. a copy of any certificate of incorporation;

ii. a statement of financial position and policies;

iii. a statement of the tuition refund policy;

iv. a list of the names, addresses and social security numbers of the certified teachers to be employed; and

v. evidence that all adult employees are "tubercular free."

d. The applicant must request facility inspection by the State Fire Marshal's office and by the Sanitary Engineering Division of the State Department of Human Services at least three months prior to opening. The sanitation inspection must extend to all food preparation facilities and demonstrate a clean and healthful environment. A licensed plumbing inspector may provide the requisite approval of school facilities in relation to the State Plumbing Code.

e. After notice of facility approval regarding sanitation and fire safety, the applicant must request inspection of its facilities, curriculum and staff by the Department and supply all information necessary to determine whether it has met Department standards, after which it is entitled to a prompt decision by the Commissioner. A school may not operate until it obtains written approval from the Department.

f. Secondary school approval requires a showing that the school has "a graded or sequential educational program of at least two years length . . . available to each student", and a statement of the graduation requirements, including American history, four years of English and "other courses approved by the Commissioner."

g. Within 30 days of the receipt of notice that the Department intends to withhold approval, the school may "request a

board of review." The board of review, consisting of one person appointed by the Commissioner, one by the school, and a third chosen by the other two, makes a recommendation to the Commissioner, whose decision "shall be final."

2. *Maintaining Approval.*

The regulations in subsection B, section 1, chapter 125 establish standards for *maintaining* school approval, including requirements that:

a. all teachers hold a valid Maine Teaching Certificate at the appropriate level, except teachers "of religion, theology, religious philosophy or similar courses in non-public schools" and ordained ministers functioning as headmaster or directors of sectarian schools;

b. pupil-teacher ratios not exceed 30 to 1 and that normal class size not exceed 30 pupils;

c. all children in grades K-12 be immunized against common childhood diseases, exemptions available on an individual basis by written parental request;

d. new staff prove that they are tubercular free;

e. the history, geography and natural and industrial resources of Maine be taught in at least one grade after 6th grade;

f. buildings be safe, hygienic, approved by the Department of Public Safety and by the Department of Human Services, and provide a physical environment acceptable to the Department;

g. new school construction meet the standards of the Division of School Facilities in accordance with existing statutes and with Board procedures;

h. the school year consist of at least 180 days, no more than 5 days to be devoted to in-service teacher education;

i. the total instructional time in a school week (normally Monday through Friday) equal at least 25 hours and not less than 3 hours in any one day;

j. the school safely maintain a daily register of student attendance and other student records, and record student accom-

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APPENDIX—Continued

plishment at least quarterly, forwarding such records upon student transfers; and

k. schools complete and submit to the Department "reports deemed necessary by the Commissioner."

The regulations further require that schools, once approved, must notify the Department of "any substantive changes in [their] program of studies, facilities, certified teaching staff, number of pupils, [or] administration." Private schools must file a roster, containing the name and residence of each pupil in attendance, with the public school superintendent of the school administrative unit within which the pupil resides, and must provide notification upon the withdrawal of any pupil from the private school. Private schools are required to "provide assurance" that the record of each pupil will be transferred to the appropriate public school superintendent in the event that the private school is closed. Finally, private schools are required to provide the parents of their pupils "a statement indicating the school entrance age requirements for entering public schools of the State of Maine."

Subsections C and D of chapter 125, section 1, prescribe the time periods for which approval may be granted. Newly established schools may not operate without the prior written approval of the Commissioner.¹ Annual approval is required for each of the first five years of operation. During the fifth year of operation, unless the school otherwise requests, a "self-evaluation study" must be conducted by the school, addressing its present needs and long-term goals, "using the instrument (sic) and procedures designed by the Department. . . ." Within three months after the completion of its study, the school must file with the Department a five-year plan regarding its facilities, curriculum and staff development. A school which has been continuous-

ly approved by the Commissioner for five years and completes the "futures planning process" receives a five-year approval certificate. A school which opts to omit the self-evaluation study and five-year plan must submit an annual report to the Department² and its certificate of approval must be renewed annually.

Secondary schools which participate in an accreditation program under the direction of the New England Association of Schools and Colleges (NEASC) need not conduct self-evaluation studies, but "must file a report indicating short- and long-range goals directing attention to facilities, curriculum and staff development." See 05-071 CMR 125, at 8. If such a school obtains NEASC accreditation, it will be granted approval by the Commissioner for a period commensurate with its accreditation. See 05-071, CMR 127, at 10.

Notwithstanding any other section of law, the Commissioner may remove basic approval from any school for cause. Whenever a school fails to meet requirements, the Commissioner shall give due notice and shall hold a hearing. If the school fails to comply and does not take necessary remedial action, the Commissioner may remove basic approval.

The Commissioner may waive any approval requirement, provided a written request is made by the school documenting the existence of extenuating circumstances warranting waiver in the interests of the state and of the pupils.

B. Course Requirements

In addition to the requirements of chapter 125 of the Board regulations, schools seeking state approval for purposes of the compulsory education laws must comply with the requirements of chapter 127, relating to the "course of study." The instructional requirements for the basic approval of nonpublic schools, codified at section

1. The information required for initial approval is normally provided on an eight-page questionnaire-application form issued by the Department. See Exhibit 1, attached to the Affidavit of Commissioner Reynolds, filed October 19, 1981.

2. The annual report is a seven-page questionnaire. See Exhibit 2, attached to Affidavit of Commissioner Reynolds, filed October 19, 1981.

APPENDIX—Continued.

2(A), 05-071 CMR 127, direct that the school:

1. teach in English (with certain exceptions);
2. instruct all students (grades one through eight) in reading, grammar, spelling, composition, and communications skills;³
3. provide four years of high school English, including instruction in grammar, spelling, composition, literature, and communications skills;
4. provide mathematics instruction in grades one through eight, including instruction in mathematical concepts, the metric system, computation skills, measurement skills, and problem-solving skills;⁴
5. provide at least one year of high school mathematics;
6. provide at least one year of instruction in American history and civil government, for grades one through nine, including the U.S. Constitution, the Declaration of Independence, voting and citizenship;
7. require students in grades seven through twelve to take at least one year of instruction in history, geography, and the natural and industrial resources of Maine;
8. require science instruction in grades one through eight and at least one year of science instruction in high school;
9. provide physical education to all students in grades one through twelve, in a program "appropriately adapted to the physical facilities available to the school;" and
10. provide at least one-half hour of instruction weekly "in correlation with appropriate components of the school curriculum[,] in the great principles of humanity as intended by 20 M.R.S.A. § 1221."

Elementary schools are required by chapter 127 to provide a planned, sequential program for the elementary grades, including the basic course requirements described

3. The addendum to the rules governing the approval of private schools states that the English and mathematics course requirements apply in grades one through six.

[5-10]

above. Secondary schools must provide instructional programs for at least two grade levels, including the basic course of study described above, and prescribe additional requirements for graduation. Graduation requires a minimum of 16 units of instruction, based on the Carnegie unit or an equivalent measure. Graduation requirements must "be published and made known to all students upon entry into high school." Schools must report to the Commissioner, in their annual reports or by other timely means, all changes in their courses of study, including their graduation requirements.

Section 2(B) of chapter 127 directs that "[n]o nonpublic school shall operate for purposes of the compulsory education law without the prior review and approval of the Commissioner . . . of its course of study." A certificate of basic school approval signifies that the school offers "equivalent instruction" for purposes of 20 M.R.S.A. § 911(3). "Basic approval of a school's course of study may be removed by the Commissioner for cause," including, "but not limited to, the failure to provide the minimum course of study required by law and regulation, and the failure . . . to file . . . a course of study, or [to provide] notice of changes in the course of study or related reports as required by the Commissioner."

Where it is believed that school officials have failed to provide the course of study requirements specified by this rule and applicable statutes, or school officials fail to provide information sufficient to demonstrate compliance with course of study requirements, the Commissioner shall give due notice of probable removal of basic approval and schedule a hearing on the matter pursuant to the requirements of the Administrative Procedure Act. The hearing may also consider allegations that the school has failed to comply with (1) any other requirement of basic school approval, as defined by the

4. See note 3 *supra*.

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or (2) of
05-071 CMR.
C. Teacher

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APPENDIX—Continued

State Board of Education in Chapter 125, or (2) specific statutory requirements.

05-071 CMR 127, at 11.

C. *Teacher Certification Requirements*

The teacher certification requirements contemplate "a bachelor's degree with two years of liberal education, appropriate subject matter concentration, professional knowledge and supervised teaching experience." See 05-071 CMR 115, Introduction.

An elementary school teacher must either have graduated "from a four-year baccalaureate program approved for the education of elementary teachers, together with the formal recommendation of the preparing institution" or (1) a bachelor's degree from an accredited institution; (2) at least 50% of all undergraduate study in liberal education courses; and (3) "thirty hours of approved general professional education courses," at least six of which must provide teaching experience.⁵ Teacher certification must be renewed every five years; "six hours of approved study" is a prerequisite to renewal.

A secondary school teacher can obtain certification either by graduating from a four-year baccalaureate program approved for the education of secondary school teachers and by obtaining the formal recommendation of the preparing institution, or by making a satisfactory showing that he or she has: (1) a bachelor's degree from an accredited institution; (2) devoted at least one-half of all undergraduate studies to courses in liberal education; and (3) an established teaching field⁶ and at least 18 hours of approved general professional teaching courses. Secondary school teachers must also complete six hours of approved study every five years to obtain renewal of their certification.

5. Teachers who complete a graduate program in elementary education and are recommended by their preparing institution need not meet the third requirement.

6. An "established teaching field" requires either a 30-credit hour major and an 18-credit

hour minor in any subject commonly taught in secondary schools, or at least 50 credit hours in one area of specialization, such as social studies, science, physical science and mathematics.

STATE OF ALASKA
FISCAL NOTE

Revision Date _____, 1983

I. REQUEST

Bill/Resolution No.: HB - 357
 Title: ...regulation of religious schools
 Sponsor: Fritz
 Requestor: House HESS

II. FISCAL DETAIL

Agency Affected: Education
 Program Category Affected: Elem. & Sec.
 BRU, Program of Subprogram(s) Affected: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

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

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Steve Hole Phone: 465-2865
 Division: Management, Law, & Finance Date: 4/18/83
 Approved by Commissioner: Marshall Lind Date: 4/18/83
 Department: Education

Distribution:

Original to Legislative Finance
 Copy to Office of Management and Budget (for Legislature introduced bills)
 Copy to Department (for Governor introduced bills)
 Copy to Sponsor
 Copy to Requestor (if different from Sponsor)

3/8/83

TO: Don

FROM: Jan

DATE: 5/14/83

RE: HB 357 - dregulation of religious schools

After reviewing the HESS committee information and the committee substitute for HB 357, I have some concerns about this bill.

Section 1 - This exempts "general supervision" over pre-elementary religious schools and "general supervision...over the educational component" of religious nurseries.

The regulations for pre-elementary schools govern:

- 1) certificate of approval
- 2) insurance
- 3) physical examinations for children
- 4) physical examinations for staff and volunteers
- 5) regulations for children with special needs
- 6) disaster plans
- 7) facility inspections for health and safety
- 8) curriculum
- 9) nondiscrimination
- 10) programs
- 11) transportation

While the state may not regulate the curriculum of a school it should be allowed to regulate health, safety and nondiscrimination in the schools.

The bill later says that religious schools can be regulated for health and safety reasons, the first section seems to take pre-elementary schools and nurseries out of the education laws all together.

I am told that these schools try to qualify as educational schools rather than as day care centers to avoid the strict regulations of DHSS. Under this bill, they can qualify as schools, rather than as daycare, then there are no regulations, for even safety, health or nondiscrimination reasons.

One of the dangers of the private schools is that they are formed in order to avoid integration.

AMENDMENT: qualify the exemption in sec. 1 so that the schools can be regulated for safety, health, and nondiscriminatory reasons. *or take sec. out all together - It's covered later.*

QUESTIONS: What are the regulations in HSS for these schools
What are the proposed regulations that the religious schools so adamantly oppose?

NOTE: Only three states exempt preschools all state certification and inspection except for health and safety coes: ARKansas, Illinois, Virginia (in Ark. the statute is being challenged on equal protection grounds (discriminates against private schools or treats preschool children differently)

Section 2 - This eliminates the requirement of meeting standards for education. The statute originally allows a religious school to qualify by requiring teachers to be certified or testing students on subjects set by the dept.

The bill exempts the religious schools from all of these requirements although it allows them to test their own students by means of a standardized test whose results must be made available to the dept.

It seems that the religious schools ought to have certified teachers or be required to conform to certain standards on national tests chosen by the dept. Recently, the U.S. Supreme Court refused to hear a challenge to NEbraska laws that would required teacher certification on the basis there were no constitutional or federal issues.

Note: I beleieve most states require the teachers to be certified (this needs to be checked). ONLY trhee states require standardized testing. North Carolina is the pattern for the bill.

AMENDMENT: REquire certified teachers or require standardized testing (possibly the dept. and the schools could work out which tests)

Section 6 - see above

CONSTITUTIONALITY: Keith Levy from legislative affairs thinks the bill is unconstitutional because it discriminates against other private schools. This is being litigated in Arkansas.

Steve Hole of DOE suggested that an amendment be added to require

MEMORANDUM

State of Alaska

TO: Steve Hole
Administrator
Department of Education

DATE: June 10, 1983

FILE NO: 366-657-83

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: CSHB 357 (Rules)

By: ^{TJR} Thomas H. Robertson
Assistant Attorney General
Human Services-Juneau

This memorandum is written in response to our recent telephone conversation in which you asked whether language in CSHB 357 (Rules) which would exempt certain pre-elementary schools from supervision by your agency raises a question of equal protection under the law.

A substantial question exists as to whether this and other provisions of CSHB 357 (Rules) violate the equal protection clauses of the state and federal constitutions.

Section 1 of CSHB 357 (Rules) would exclude pre-elementary schools and nurseries operated by "a church or other nonprofit religious organization that is exempt from federal taxation and does not receive direct state or federal funding" from supervision by your agency under AS 14.07.020(8). Other sections of the bill would amend AS 14.30.010 which governs compulsory attendance and would exclude other educational programs operated by these organizations from regulation by the state. In effect, this bill would establish two categories of private schools, church related and not church related, and would provide for disparate treatment of each.

To the extent CSHB 357 (Rules) is intended to assure that your agency does not infringe first amendment protections, it is unnecessary. 1/ Your agency has no power to violate the

1/ The first amendment to the United States Constitution provides, in part, that Congress shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof". Similar language is contained in Article 1, sec. 4, of the Alaska Constitution.

constitutional rights. To the extent CSHB 357 (Rules) would go beyond first amendment protections, it raises a serious question of equal protection under the state and federal constitutions.

Equal protection analysis under either the state or federal constitutions requires an evaluation of the purpose of the legislation at issue. CSHB 357 (Rules) does not contain a statement of purpose and none, other than that of accommodating first amendment rights, is readily apparent. If as a factual matter sufficient reasons cannot be articulated to support a distinction between these categories of private schools, then a court would probably find this legislation to deny equal protection. 2/

In an opinion dated January 24, 1983, the Attorney General for the State of Arkansas addressed the constitutionality of a similar bill under consideration in that state. That opinion, a copy of which is attached, concludes that the bill unlawfully discriminates against children in religious child care facilities and the owners and operators of non-religious facilities. In addition, it concludes that the bill may impermissibly benefit religious organizations in violation of the First Amendment. Unless circumstances in this state require a different result, we would probably reach a similar conclusion if asked to undertake a more comprehensive analysis of this legislation.

2/ Generally speaking, the Fourteenth Amendment to the United States Constitution requires that disparate treatment be supported by a rational basis unless a suspect classification (race, creed, etc.) or a fundamental right is involved, in which case it must be supported by a compelling state interest. In *State v. Erickson*, 574 P.2d 1 (Alaska 1978), the Alaska Supreme Court established a single standard for equal protection analysis under the Alaska Constitution. This standard, which is more demanding than the federal rational basis test, requires an evaluation of the purpose of the statute and, if the purpose is legitimate, a determination whether it is substantially furthered by the means chosen. Finally, the means must be balanced against the nature of any constitutional right which may be infringed.

Steve Hole
Department of Education
Our File 366-657-83

June 10, 1983
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If you have additional questions, or desire further research in this area, please do not hesitate to contact this office.

THR:ja



STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

STEVE CLARK
ATTORNEY GENERAL

January 24, 1983

OPINION NO. 83-15

The Honorable Joseph K. Mahony
The Honorable Robert L. McGinnis
State Representatives
1983 General Assembly
State Capitol
Little Rock, AR 72201

RE: House Bill 54

Gentlemen:

I am writing in response to your request for an opinion regarding the constitutionality of House Bill 54. An examination of the bill reveals an obvious concern that House Bill 54 is legally invalid as a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article 2, Section 3 of the Arkansas Constitution.

The Fourteenth Amendment states, in pertinent part, as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis supplied]

These constitutional provisions have consistently been interpreted to strike down statutes which discriminate between different groups of citizens or businesses which are regulated by the same legislation.

That is to say, when the law attempts to regulate a business, industry or practice, it must do so on an equal basis to all the members of the regulated class unless there is a significant difference in the way the exempted class operates its business, industry or practice and the exemption is reasonably related to the purpose of the original legislation. Jacks v. State, 219 Ark. 392, 242 S.W.2d 704; Wanmetco Services, Inc. v. Gaddy, 272 Ark. 452, 616 S.W.2d 466, Rayco Construction Co., Inc. v. Vorsanger, 397 F.Supp. 1105; Milnot Co. v. Douglas, 452 F.Supp. 505. See also Milnot v. Arkansas State Board of Health, 388 F.Supp. 901 and Dicks v. Naff, Mayor, 255 Ark. 357.

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The Honorable Robert L. McGinnis
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In the Rayco case the Court stated:

A state may validly differentiate between people or corporations on the basis of classifications providing that the state has legitimate and significant (in some contexts a "compelling") interest in the differentiation and provided that the classification is based on some reasonable and rational criteria or criteria; however, absent an appropriate state interest or absent rational and relevant standards of classification, state-imposed differentiation amounts to unconstitutional discrimination. [Emphasis supplied]

The exemption which H.B. 54 creates is the type of "classification" which these cases address.

Therefore unless the exemption can be justified because of differences in the operation of religious child care facilities as opposed to non-religious facilities this bill appears to discriminate, unlawfully, against not one but two classes of citizens: the children the Child Care Facility Review Board Act was intended to protect and the owners and operators of non-religious facilities.

Since there is no language in the bill indicating that children in these religious facilities are fed, supervised, etc. any differently from children in secular facilities and since there is no language in the bill indicating that children in the religious facilities are any less likely to be neglected, abused or left in hazardous circumstances than children in secular facilities there is no justification for denying to the children in these centers the protection of the state and forcing the owners of secular facilities to compete with unlicensed facilities who are operating the identical kind of business.

It is important to remember in this regard that the intent of the original act, as stated at Ark. Stat. Ann. §83-904(b), is the protection of children:

(B) In establishing requirements and standards for the granting, revoking, refusing, and suspending of a license for a Child Care Facility the Welfare Department [Child Care Facility Review Board] shall adopt such rules and regulations as will: promote the health, safety and welfare of children attending a Child Care Facility; promote safe, comfortable, and healthy physical facilities for the children who attend the Child Care Facility; insure adequate supervision of the children who attend the Child Care Facility, insure adequate supervision of the children by capable, qualified and healthy individuals; insure appropriate educational programs and activities within each Child Care Facility; and insure adequate and healthy food service where food service is offered by the Child Care Facility.

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With this in mind H.B. 54 demonstrates no rational, much less compelling state interest, in exempting facilities from licensure simply because they happen to receive no state or federal money and are associated with a religious organization.

The source of the facilities' funds and its association with a religious association simply does not appear to be connected in any way with whether or not these children deserve the same protection from abuse, neglect or hazardous circumstances as children in secular centers.

Likewise the source of the facilities' money and association with a religious organization does not appear to justify compelling a secular facility to spend the money and resources necessary to comply with the original act when the religious facilities operate the identical type of business enterprise.

Since there is no language in the original act which appears to authorize the Child Care Board to interfere with the religious beliefs of any church, this exemption seems irrelevant to any need to protect the First Amendment rights of religious groups.

However, if a religion's beliefs are manifested in practices which may threaten the safety and well being of children, then the state through its police power and the doctrine of *parens patriae* can and should lawfully discover and prevent such dangers. See Cude v. State, 237 Ark. 927, 377 S.W.2d 816.

In the Cude case the Arkansas Supreme Court overruled parents' religious objections to having children vaccinated, saying that the state's police power superceded the dangerous beliefs of parents which threaten the well being of the children. The Court quoting the United States Supreme Court in Prince v. Massachusetts, 321 U.S. 158, said:

The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death.

. . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Again however, it is important to note that the intent of the original legislation has nothing whatsoever to do with parents' religious rights or the rights of a religious association but simply with the

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protection of all children, religious or not, in facilities which are religious or secular.

Therefore any argument that this exemption is necessary to protect the First Amendment rights of the prospectively exempt facilities is without support from any language in H.B.54.

In fact the bill itself appears that it may violate the doctrine of church/state separation by awarding an unjustifiable benefit to religious organizations not enjoyed by private facilities which operate identical enterprises.

Without a justifiable secular legislative purpose which neither advances or inhibits religion, the bill is, in fact also suspect from the point of view of the First Amendment. Romer v. Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179

Again, it is difficult to see, from the bill itself, a secular and neutral legislative purpose for exemption of only the religious facilities. Rather it appears that this legislation is clearly intended to further the alleged religious interests of certain denominations since there is no rational justification for the exemption in view of the legislative purpose quoted above.

The courts, in reviewing a challenge to this bill, can look behind the legislation into the history of the bill, something that has been done recently in McLean v. Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982), and Epperson v. Arkansas, 363 U.S. 97, 89 S.Ct. 260, 21 L.Ed. 2d 228 (1968).

Since the burden is on those defending a discrimination to make out a claim for justification (Wengler v. Druggist Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 167) I can advise you that this bill presents no such justification and the state could therefore not carry that burden in a court action.

It is important to remember that:

1. Many children in the so-called religious centers are not members, nor are their parents, of the religious facility seeking exemption. So again the particular beliefs of the religious association are irrelevant to protecting the children at the facility. Circle H and Faith Christian homes recruit children from all over Arkansas regardless of the children's religion at the time of their arriving at these facilities. The Alamo foundation solicits new born babies from all over the nation totally disregarding any beliefs of the child.

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There is simply no rational justification for denying these children protection of state law because the institution they end up in, through no choice of their own, has a religious objection to licensure.

2. This exemption would not have protected Circle H Ranch because records at social services reflect it received well over \$100,000 in state and federal aid.

3. Many of these children come from broken homes, and have learning disabilities which require expert counseling and often special education which, as Judge Barrier found in the Circle H case, are not available at some of these facilities. These are children who need society's protection and assistance.

4. Health department inspections are inadequate to insure the safety of children because they do not have specific day care rules and regulations to address vital areas of the operation of a child care center such as playground safety, etc. The same is true with the Fire Marshal. Such problems were observed at the Alamo Foundation where an unfenced swimming pool and unfenced fishing pond were less than 100 feet from a playground serving 70 children.

5. Current criminal laws against child abuse are not adequate to protect children in these centers because: (1) These laws cannot operate without a report of abuse by a witness. At some facilities absolute loyalty is the rule and therefore it is unlikely that employees will file such a complaint; (2) Employees at other centers are not likely to report abuse because it may cost them their job; (3) Criminal statutes don't authorize closing the facility where abuse or neglect is practiced. They only allow prosecution of individuals. And if the only witnesses are children who are too young to testify, there is no case to take to a prosecutor although the abuse, unreported, is nonetheless occurring.

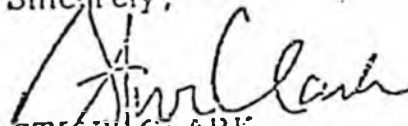
In conclusion, House Bill 54 is constitutionally suspect as being without rational justification and thus discriminates both against a large class of children and the owners and operators of secular facilities.

I am informed of the likely prospect of an immediate court challenge if the bill is enacted. In that eventuality, it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned.

The Honorable Joseph K. Mahony
The Honorable Robert L. McGinnis
January 24, 1983
Page Six

If I may be of assistance in providing additional information on this or other proposed legislation, please do not hesitate to contact this office.

Sincerely,


STEVE CLARK
Attorney General

SC:mgv

Give to Nancy ✓

Anchorage Community College A Unit of the University of Alaska System

September 23, 1983

RECEIVED

Ernestine Griffin, President
State Board of Education
Box 302
Sitka, AK 99835

Josephson,

Dear Ms. Griffin,

I am writing you in regard to the proposed preschool regulations which are soon to come before your board for action. I speak as one with a doctorate in Early Childhood Education. I teach at Anchorage Community College in Early Childhood. I am also president of the Anchorage Association for the Education of Young Children.

The proposed regulations need to be approved. They represent minimum standards for providing experiences which promote development in young children. You may have received much correspondence against the proposed staff:child ratio (60:115) and space requirements (60:119). Recent research supports the proposed changes.

The Children's Environment Project (Moore, Lane, Hill, Cohen, & McGinty, 1979) reviewed the literature on the relationship of space to quality experiences for preschool age children. The Project also conducted research of its own on the subject. It was found that in dense settings (30 square feet or less per child) there was a higher incidence of aggressive behavior and/or low degree of child involvement.

Furthermore, it was determined that space of 40 to 45 square feet per child "provides a much more flexible program, options, active and quiet pursuits happening simultaneously without disturbing each other, etc." (Moore et al., 1979).

The Children's Environment Project recommends a minimum of 42 square feet of usable floor space per child. The proposed space requirement of 35 square feet per child is less than what research indicates is necessary for providing quality experiences for children.

Staff ratio in young children's programs, and a related issue, group size, were studied extensively recently by Ruopp, Travers, Glantz, & Coelen (1979). The size of the group of children was found to have a direct relationship to the behavior of the children in that group. This is an issue in the proposed regulations since the ratio of staff to children effects the size of a group of children within that setting: the fewer the staff, the larger the group.

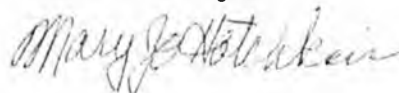
Ruopp et al. (1979) found that as group size increased, children's reflection/involvement and cooperation decreased while noninvolvement and aimless wandering increased. Furthermore, children's gain scores on two measures, the Preschool Inventory and the Peabody Picture Vocabulary Test, decreased as group size increased.

Ruopp et al. (1979) recommend a staff: child ratio of 1:5 for 3 year olds and a 1:8 (1:7.5) for 4 and 5 year olds. Thus, the proposed ratio of 1:10 is to be considered minimal for promoting quality experiences for young children.

At the very least, I urge you to support these regulations; better yet, I urge you to raise the standards in them to the levels recommended in the research I have cited.

I thank you in advance for approving these regulations.

Most sincerely,



Dr. Mary Jo Hotchkiss, Ed. D.

CC: Governor Sheffield
Josephson ✓
Fritz
Tischer
Gottstein
Kito

SCS CSHB 357 (Rules)

Section 1 - DOE will have general supervisory powers, excluding licensing over public and private pre-elementary schools, but not over the educational component of pre-elementary schools operated by a church or other non-profit religious organization. Authorizes DOE to require physical exams and immunizations. The fire marshall has independent authority over fire safety matters and the Department of Environmental Conservation has independent authority over sanitation.

Section 2 - Attendance at a public school is not required if 1) a child attends a private school which complies with regulations set by the Department of Education, 2) attendance is at a program operated by a church or other non profit religious organization exempt from federal taxation and does not receive direct state or federal funding. Nothing in this chapter authorizes DOE to license any private school.

Section 3 - A religious school which elects to comply with this chapter is exempt from other state laws relating to education except for laws relating to physical health, fire safety, sanitation, immunizations, and physical examinations.

Section 4 - Teachers shall file regular monthly attendance reports to the Commissioner of Education unless Section 5 applies.

Section 5 - Parents of a child enrolled in a religious school shall file a notice of enrollment with the Department of Education. The religious school shall notify the Department immediately if the child is no longer enrolled. A religious school that complies with this chapter shall maintain monthly attendance records, maintain a regular schedule, and make an annual report to the Commissioner.

Section 6 - A religious school that complies with this chapter shall administer a nationally standardized test selected by the chief administrative officer of the religious school from a list supplied by the Department of Education, to all students in grade one, three, six, and nine at least once a year. These tests shall measure achievement in grammar, reading, spelling, and mathematics. Religious schools shall maintain records of these examinations. A religious school that complies with this chapter shall maintain records of immunizations, physical exams, testing, and courses.
Definition of religious school.

Section 7 - Religious schools shall administer their own program at the elementary, secondary, and adult levels.

Section 8 - Repeals the statute which authorizes the state to grant diplomas to 8th grade graduates.

June 1

DOE, Rick, Paul, Pappy, Ficks

CSHB 357 - Regulation of Religious Schools.

Steve Hoke - DOE.

Dept. does not have a position - Policy issue for the legislature.

Change in House Rules pg 1, line 13 inclusion (pg. 2 line 12) from health, immunization and physical exam.

Daniel Clever - Harvester

Bill motivated after problems w/ HISS over health requirements for pre-elem. schools.

Parents are responsible for health of children - opposed to dictating size of room, teacher ratios etc.

Bill Brown - Glacier Valley Baptist Church
sparta minister & teacher

cannot support bill - but supports the intent.

Bill gives two options

- 1) apply for exemption - which says the state has the right to control
- 2) status quo still under supervision of DOE.

Sam Rotinger - Co-sponsor

Catholic position - unvoluntarily neutral to bill. Archbishop Hubley → OK.

Clara Jacobus

major author of bill - carefully worded to be like other states where law is working successfully.

Je language is broad explain opting in/out - benefits

Cathy Brown - Glacier Valley Baptist teacher

appeared to HHS 357

two keys than status quo.

pg 2 lines 10-14

17-21

23-29

} oppose

Lucy Miller - 25 yr teacher - Eagle Forum

supports bill. Superior Education in religious schools. Note for bill a recognition of the devotion of Paul Colson to Ed.

Barbara Tidwell - support

Mike Price - Pat Monroe - DHSS / FHS

administration has no opinion on bill impacts DHSS in exemption of pre-school life/health safety factors.

License & regulate pre-schools in state. young children need to be protected.

Under 47.35 req nurseries since 1962 Exempted educational programs in '75 - DOE attempted to regulate but stopped. Gov. audit in 1987 said DOE "neglecting responsibility." DOE worked w/ DHSS to draft regs.

Different concerns for pre-school children.
Regs like safety apply to all programs in
state.

Pat Bampton - support

Alex Birdall

DATE: 6/1/83 SPONSOR: Fritz

SUBJECT(S): CSHB 357 - Religious Schools

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness
CHOVER DANIEL ✓	^{CHURCH} HARVEST CHRISTIAN	9101 BRAYTON DR	407 344-0528		
BROWN Bill ✓	Glacier Valley Baptist Church	50 Box 2869, Tuncaux	(907) 289-2803		
Crown Kathy ✓	Valley Baptist Academy	P.O. Box 2869, Tuncaux	(907) 289-2803		
Muller, Sue ✓	Earle Towne	P.O. Box 376, N. Hwy	907 789 7479	✓	
Barbara Lyndal's ✓	Self	P.O. Box 465, Day	907-789-7339	✓	
Michael Rice ✓	DXSS	} together	465-3120	✓	
Pat Monroe ✓	DXSS FYS		465-3206	✓	
Pat Bravton ✓	Valley Chapel	8486 Thunder Mt. Rd.	789-0311	✓	
Steve Ash ✓	DOE	Peach F	2890	✓	
Alice Bergkall ✓	Valley Baptist Academy	5896 Lind street	586-1355	✓	
Charles W. McCain ✓	Valley Baptist Academy	8705 Agnes Ave	789-7348	✓	
SAM PESTING ✓	Pat R	Capital Bldg	465-3817		
Alvin Jacobus ✓					
BURTON CARNE ✓	Harvester Church Christians	9101 Brayton Drive Anchorage, Alaska 99507	344-0528	✓	

Fundamentalist Schools Vs. the Regulators

By Neal Devos

For fundamentalist Christian educators, "Big Brother" has already arrived. He has taken the form of intrusive state regulations governing the curricula of their schools and the qualifications of their teachers. He has revoked their tax-exempt status when their religious practices conflicted with federal policies. He has forced them to pay unemployment taxes although he exempts "established" churches from such payments. And he has limited their ability to dismiss teachers who violated the codes of moral and religious conduct established by their schools.

The conflict is receiving increasing national attention. Front-page coverage was given to the Bob Jones University lawsuit and Nebraska's jailing of fundamentalist minister Everett Sullivan for his continued operation of the nonlicensed Faith Baptist church school. Such attention is likely to continue.

Between 8,000 and 10,000 of these schools have been established since the mid-1960s with a current enrollment of more than one million. Since many fundamentalists refuse to abide by laws they believe are inconsistent with their mandate to serve God, when government refuses to accommodate the fundamentalists a showdown is set whereby government will either have to back down or send many fundamentalist ministers and parents to jail.

(Nebraska county prosecutor Dale Steitls had estimated that as many as 12 other Nebraska ministers may face jail for operating unlicensed schools. Similarly, Maine Association of Christian Schools director Ralph Yarnell contends that the ministers who run its member schools are willing to go to jail if state procedures aren't nullified.)

Stranglehold on Religious Liberty

The fundamentalists allege that state and federal bureaucracies have an unjustified stranglehold on their religious liberty. Government agencies, however, contend that the laws and regulations are necessary to ensure nondiscrimination and adequate education. The government's position is supported by civil rights groups (NAACP, American Civil Liberties Union) and mainstream private and public school bodies (National Association of Independent Schools, Catholic Conference, National Educators Association, National School Public Relations Association). This jumble of divergent interests makes for extremely complicated and controversial negotiations, legislation and litigation between the fundamentalists and government.

The controversy centers on efforts by state agencies to license private schools and to prescribe courses and teacher qualifications. The fundamentalists believe that

education is inherently religious and consequently refuse to comply with broad-based regulations which would make the state "lord over their schools." Additionally, they view many of the regulations as antithetical to quality education.

The fundamentalist objections shouldn't be discounted as the misguided paranoia of religious nuts. Fundamentalists have an important point, that the state has gone too far in trying to control the life style of the

the trends they deplore in the changing American social order, such as uncertainty concerning sources of authority, dissolution of standards, waning of the Judeo-Christian value system, loosening of system and constraint, scientism and government social engineering. Many of these criticisms of public schools strikingly resemble a number of studies by the College Entrance Examination Board and the American College Testing Program to ex-

plain the score decline on college entrance examinations.

plain the score decline on college entrance examinations. This doesn't mean that fundamentalists best know how to advance education. (On nationally recognized achievement tests, students in fundamentalist schools generally perform no better than their public school counterparts.) Yet it makes understandable the fundamentalists' exodus from the public schools to their own loose network of small schools.

'Kingdoms of God and Caesar'

The fundamentalists' claim, though, shouldn't be downgraded. Their schools are—for the most part—doing an adequate job. Additionally, education is an integral part of their life style. Finally, the fundamentalists do perceive state regulations of their schools as an intrusion into their religious practices. It makes sense as a matter of policy to allow the fundamentalists to direct the upbringing of their children. This wouldn't preclude the state from requiring the schools to meet core curriculum requirements and satisfy reasonable safety standards (although some fundamentalists refuse to abide by even that sort of regulation, claiming that there must be a total separation between "the kingdoms of God and Caesar"). The state could also, as many of the fundamentalists argue, ensure that all students receive an adequate education through standardized testing.

The tragedy of government refusal to accommodate the fundamentalists is that the education of thousands of children could be thrown into disarray. This is a result of the uncertainty which exists these children's education due to an apparently never-ending stream of conflicts between government and Christian educators. But, as fundamentalist leaders point out, our country needs to rethink its commitment to the principles of separation of church and state and to a government of limited powers.

Ours was designed to be a government of limited powers and it ought not interfere with the efforts of concerned parents to ensure that their children receive a good education and the proper religious upbringing. Ours is supposed to be a pluralistic society and it ought to acknowledge that people have radically different values and beliefs. And as ours pretends to be a sensible society, it ought to recognize that if something isn't broken you don't fix it.

Mr. Devos is a lawyer and a former research associate at the Vanderbilt Institute for Public Policy Studies.

Ours is supposed to be a pluralistic society and it ought to acknowledge that people have radically different values and beliefs.

family. Perhaps careful listening to the protests could cure some of the ills of public education.

The fundamentalists are dissatisfied with public schools for a number of very sensible reasons. The most significant is the perceived breakdown of the nuclear family. This is evidenced, fundamentalists say, by increased willingness of parents to have the state take over firmation of their children. This, they add, is unacceptable since parents shape the future through the upbringing of their children.

The fundamentalists are also fearful of what they consider a moral breakdown in public schools associated with lack of discipline, sexual permissiveness, and increased drug and alcohol use. This perceived breakdown is viewed as antithetical to the learning of both ethical and academic lessons. The fundamentalists attribute the alleged moral corruption and intellectual decay among youth in part to television.

Finally, they accuse the public schools of inculcating in students a system of values known as secular humanism. According to fundamentalist attorney John Whitehead, humanism signifies "the idea that men and women can begin from themselves without reference to the Bible, and by reasoning outward, derive the standards to judge all matters." The fundamentalists object to this concept for three reasons. First, they believe that God—as reflected in the Bible—is the proper source of values. Second, they assert that the humanistic value system is in constant flux and thus is incapable of serving as the basis for consistent moral judgment. Third, they think that public school students are denied access to important lessons from the Bible. This has resulted from Supreme Court decisions which prohibited organized prayer, Bible reading and the posting of the Ten Commandments to public schools.

As Prof. James Carper of Mississippi State University has noted, "To many evangelicals the public school exemplifies

the trends they deplore in the changing American social order, such as uncertainty concerning sources of authority, dissolution of standards, waning of the Judeo-Christian value system, loosening of system and constraint, scientism and government social engineering. Many of these criticisms of public schools strikingly resemble a number of studies by the College Entrance Examination Board and the American College Testing Program to ex-

plain the score decline on college entrance examinations. This doesn't mean that fundamentalists best know how to advance education. (On nationally recognized achievement tests, students in fundamentalist schools generally perform no better than their public school counterparts.) Yet it makes understandable the fundamentalists' exodus from the public schools to their own loose network of small schools.

The rise of Christian schools can't be entirely explained by mere dissatisfaction with public schools. Equally significant is the fundamentalists' belief that education is inherently religious. As described by pastor Levi Whisler of Ohio's Tabernacle Christian School: "... we feel that children need Bible guidance for their spiritual and moral foundations ... we feel that our students need the influence of a Godly teacher ... we draw lines of separation from the (secular) world." Corresponding to their belief of church-state separation is the regulation of their schools, the fundamentalists don't accept state aid. More traditional private school groups, like the Catholic Conference, which desire state aid, have lobbied against fundamentalist attempts to deregulate private schools in Pennsylvania, Colorado and Ohio. These groups fear that state legislatures will change their views as to the quality of private education, and in turn will be less receptive to aiding private schools.

The states are generally unwilling to give up their authority over nonpublic schools, believing that existing regulations make educational sense. The states also argue that they are not noticeably interfering with religious practices and that the fundamentalists' argument is philosophical and not religious. Nevertheless, Alabama and North Carolina have recently passed legislation which effectively deregulates fundamentalist schools. Idaho, Colorado and Vermont have also declined to adopt measures which would regulate these schools. On the other hand, Pennsylvania, Maine and Nebraska have refused to mod-



Official Business

Alaska State Legislature

House of Representatives

Committee on Rules

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-3764
465-3765

66
LETTER OF INTENT

HB 357 "An Act relating to the regulation of religious schools."

The House of Representatives recognizes that operating a church school is an integral part of the free expression of religion and that schools operated by religious bodies are quite different from other private schools. Therefore, the purpose in sending HB 357 to the floor and in urging its passage is to prevent possible church-state constitutional conflicts by protecting the fundamental rights of religious freedom of parents, children, and church schools in Alaska and, at the same time, to balance the state's interest in assuring that each child receives a good education. The House specifically intends to exempt pre-elementary and nursery programs operated by religious organizations from the general supervision of the Departments of Education and of Health and Social Services.

The House only intends to exclude from the purview of this bill those church schools that receive direct federal or state funds. This would not affect those schools that receive incidental benefits from government, such as fire or police protection, health care or other benefits to which all citizens are entitled.

Any church school that satisfies all the requirements of AS 14.45 would be exempt from any additional provision of law relating to education except those requirements of law relating to fire, health, and safety. While each church school would be subject to reasonable fire, health, and safety regulation, the House intends to specifically limit health regulation to that regulation that is reasonably related to the state's interest in preventing and curing physical diseases. For example, the House does not intend for the state to regulate minimum space requirements (except as it directly relates to the fire code), hours of attendance, or reasonable methods of discipline.

In summary, the Rules Committee Substitute for HB 357 balances the state's interest in ensuring that each child receives a good education with the constitutional right to religious freedom.

Not approved