

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2295 HESS SB 354

2295

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

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

AMENDMENT #1

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

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

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

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

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

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

Additional reasons for rejecting Amendment #1

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

SUGGESTED SOLUTION

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

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

A second less-desirable amendment could read--

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

AMENDMENT #2

Sec. 5 14.45.100
Page 5 lines 22-25

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

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

AMENDMENT #3

Sec. 5 14.45.110
Page 5 line 29

"of compulsory school age"

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

AMENDMENT #4

Sec. 4 14.45.120
Page 6 line 19

"two, four, six and ten"

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

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

AMENDMENT #5 and 6

Sec.5 14.45.130 (Para. b)

Page 7 Lines 14-15

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

One amendment adds three words
the other deletes three words

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

This position paper has been prepared
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THE DEPARTMENT OF EDUCATION NEEDS TO
IMPROVE MANAGEMENT OF PRESCHOOL PROGRAMS

FEBRUARY 1982

STATE OF ALASKA
OFFICE OF THE GOVERNOR
DIVISION OF INTERNAL AUDIT



SUMMARY

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

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

BETTER MANAGEMENT OF PRESCHOOL PROGRAMS IS NEEDED

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

STANDARDS FOR PRESCHOOLS SHOULD BE IMPROVED

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

RECOMMENDATIONS

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

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

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

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

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

DEPARTMENT COMMENTS

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

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INTRODUCTION

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

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

DEPARTMENT OF EDUCATION RESPONSIBILITIES

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

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

This regulation also requires that preschools have:

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

DEPARTMENT OF HEALTH AND SOCIAL SERVICE RESPONSIBILITIES

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

OTHER STATE INVOLVEMENT IN PRESCHOOL AND DAYCARE PROGRAMS

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

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

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

SCOPE OF THE REVIEW

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

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

BETTER MANAGEMENT OF PRESCHOOL PROGRAMS IS NEEDED

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

THE DEPARTMENT OF EDUCATION-MAKES LITTLE EFFORT TO MANAGE PRESCHOOLS

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

FEW PROGRAMS ARE CERTIFIED

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

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

FEW PROGRAMS ARE MONITORED

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

LIABILITY EXISTS FOR NONPERFORMANCE
OF STATUTORY RESPONSIBILITY

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

- the preschool is, in fact, an education institution; and
- the State, through the appropriate agency, has determined the preschool to be in compliance with appropriate laws and regulations.

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

1. Lowering respect for Alaska statutes in general.
2. Enforcement problems for this Department. Programs quickly call themselves pre-elementary schools when they learn that is a means of escaping regulations.
3. Risk to children in unregulated pre-elementary schools.
4. A large early childhood population subject to immunization regulations but not receiving the immunizations.

In response, the Department of Law noted that:

"This office understands that the Department of Education does not now investigate facilities applying for certification and does not supervise the physical examination of immunization requirements. Nor is the department involved in monitoring of other health and safety codes.

Even assuming that there are no certifiable pre-elementary schools in Alaska, the department's records should reflect that applications have been submitted and that investigations have taken place sufficient to determine that the Department of Education finds that no facility is a pre-elementary school or a day care facility with an education component."

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

PRESCHOOLS ARE NOT DEFINED

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

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

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

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

RESPONSIBILITY FOR REGULATION IS NOT CLEAR

Because primarily educational has not been defined, neither the regulatory Departments, the facilities themselves, nor the public has a positive definition to use in deciding whether or not a program is a preschool or daycare program. As a result, any facility may choose to be classified as a preschool, and avoid the requirement to comply with daycare standards. For example, 3 of the 28 certified preschools provide daycare services but do not have to comply with daycare standards because they chose to be certified as preschools.

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

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

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

STANDARDS FOR PRESCHOOLS
SHOULD BE IMPROVED

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

PRESCHOOL STANDARDS IN
ALASKA ARE INADEQUATE

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

Standards are Needed to Assure
Quality Preschool Programs

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

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

Educational Standards Have
Not Been Developed

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

Teacher Certification

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

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

- should have study in the areas of physical and biological sciences, mathematics and philosophy, language and literature, the social and behavioral sciences, and the fine arts.
- should have a minimum of twenty-four semester hours of professional preparation in the field of early childhood education,
- should have supervisory experience with young children, and
- should be required to take refresher courses and to keep active affiliation with professional organizations.

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

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

Space

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

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

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

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

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

Preschool Standards are Lower Than Daycare Standards

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

COMPARISON OF DAYCARE AND PRESCHOOL STANDARDS

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

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

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

COOPERATION IN DEVELOPING PRESCHOOL STANDARDS HAS NOT OCCURRED

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

THE VALUE OF ALASKA'S PRESCHOOL
CERTIFICATION PROCESS IS QUESTIONABLE

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

- Many of the early childhood educators we interviewed said that because of the Department's inadequate standards, the preschool certificates issued by the Department do not assure a quality preschool program. Certification is, in fact, misleading to parent consumers.
- We interviewed instructors of two early childhood training programs and both teach their students that the Department's standards are not an acceptable standard to assure a quality preschool program.
- We visited one two-hour a day educationally oriented program that chose to be licensed as a day care center rather than a preschool because they thought parents would have no assurance of a quality preschool program if it only complied with the the Department's preschool standards.
- The legislature recently mandated that eligibility for a child care grant program is dependent on compliance with day care licensing standards. Those preschools certified by the Department of Education are not eligible for the grants unless they also have a daycare license.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

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

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

RECOMMENDATIONS

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

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

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

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

DEPARTMENT COMMENTS

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

Department of Education

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

- Developing a tentative agreement with the Department of Health and Social Services and the Department of Community and Regional Affairs for coordination of early childhood programs.
- Introducing a request for statutory change to require all child care programs be licensed by the Department of Health and Social Services for base level standards.
- Development of standards for a voluntary education certification process in addition to the mandatory base level licensing.
- Establishing on site reviews for evaluation of the educational component of certified preschools. (See Appendix I)

Department of Health and Social Services

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

MEMORANDUM


State of Alaska

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

DATE: February 2, 1982

FILE NO:

TELEPHONE NO: 465-2800

FROM: 
Marshall L. Lind, Commissioner
Department of Education

SUBJECT: Response to Draft
Report

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

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

RECEIVED
FEB 5 1982

Office of the Governor
Division of Internal Audit

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

FEBRUARY 1982

STATE OF ALASKA
DEPARTMENT OF EDUCATION

INTRODUCTION:

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

ACTIONS TAKEN:

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

ACTIONS PLANNED:

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

PROPOSED STEP I:

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

CONDITIONS ADDRESSED:

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

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

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

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

PROPOSED STEP II:

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

CONDITIONS ADDRESSED:

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

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

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

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

CONCLUSION:

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

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

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

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February 8, 1982

John O'Meara, Director
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RECEIVED
FEB 8 1982

Dear Mr. O'Meara:

Office of the Governor
Division of Internal Audit

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

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

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

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

February 8, 1982

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

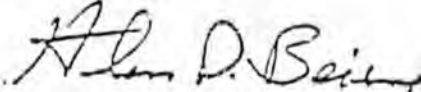
The Department is aware that some programs not now regulated may be fearful that Department of Health & Social Services regulation would result in closure of needed programs. The Department, should it receive the authority, fully intends to implement carefully and in as a supportive manner as possible.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

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

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

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

Sincerely,



Helen D. Beirne
Commissioner

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7-5-83

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

versus

Court of Appeals No. 69050

Ingham County Circuit Court
No. 80-26205-AZ

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

Defendants-Appellants.

AMICUS CURIAE BRIEF
OF CATHOLIC LEAGUE FOR RELIGIOUS & CIVIL RIGHTS

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STATEMENT OF QUESTIONS INVOLVED

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

STATEMENT OF FACTS

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

ARGUMENT

I.

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

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

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

[S]ince parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children. Their role as educators is so decisive that scarcely anything can compensate for their failure in it. For it devolves on parents to create a family atmosphere so animated with love and reverence for God and others that a well-rounded personal and social development will be fostered among the children. Hence, the family is the first school of those social virtues which every society needs.

SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON CHRISTIAN EDUCATION, GRAVISSIMUM EDUCATIONIS (1965), no. 3.

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

The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.

POPE JOHN PAUL II, APOSTOLIC EXHORTATION, THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD, FAMILIARIS CONSORTIO (1981) (hereinafter "FAMILIARIS CONSORTIO"), at no. 36 (emphasis in original).

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

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

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

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

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

II.

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

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

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

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

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

¹ Proverbs 22:6.

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

III.

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

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

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

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

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

Since the educative mission of the Catholic school is so wide, the teacher is in an excellent position to guide the pupil to a deepening of his faith and to enrich and enlighten his human knowledge with the data of the faith. While there are many occasions in teaching when pupils can be stimulated by insights of faith, a Christian education acknowledges the valid contribution which can be made by academic subjects towards the development of a mature Christian. The teacher can form the mind and heart of his pupils and guide them to develop a total commitment to Christ, with their whole personality enriched by human culture.

SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE CATHOLIC SCHOOL (1977), at no. 40.

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

The school considers human knowledge as a truth to be discovered. In the measure in which subjects are taught by someone who knowingly and without restraint seeks the truth, they are to that extent Christian. Discovery and awareness of truth leads man to the discovery of Truth itself. A teacher who is full of Christian wisdom, well prepared in his own subject, does more than convey the sense of what he is teaching to his pupils. Over and above what he says, he guides his pupils beyond his mere words to the heart of total Truth.

The cultural heritage of mankind includes other values apart from the specific ambient of truth. When the Christian teacher helps a pupil to grasp, appreciate and assimilate these values, he is guiding him towards eternal realities. This movement towards the Uncreated Source of all knowledge highlights the importance of teaching for the growth of faith.

Id. at nos. 41, 42.

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

The achievement of this specific aim of the Catholic school depends not so much on the subject matter or methodology as on the people who work there. The extent to which the Christian message is transmitted through education depends to a very great extent on the teachers. The integration of culture and faith is mediated by the other integration of faith and life in the person of the teacher. The nobility of the task to which teachers are called demands that, in imitation of Christ, the only Teacher, they reveal the Christian message not only by word but also by every gesture of their behaviour. That is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.

Id. at no. 43.

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

More specifically, the Sacred Congregation directs:

The Catholic school should teach its pupils to discern in the voice of the universe the Creator Whom it reveals and, in the conquests of science, to know God and man better. In the daily life of the school, the pupil should learn that he is called to be a living witness to God's love for men by the way he acts, and that he is part of that salvation history which has Christ, the Saviour of the world, as its goal.

Id. at no. 45.

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

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

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

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

IV.

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

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

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

The specific mission of the school, then, is a critical, systematic transmission of culture in the light of faith and the bringing forth of the power of Christian virtue by the integration of culture with faith and of faith with living. Consequently, the Catholic school is aware of the importance of the Gospel-teaching as transmitted through the Catholic Church. It is, indeed, the fundamental element in the educative process as it helps the pupil towards his conscious choice of living a responsible and coherent way of life.

SACRED CONGREGATION FOR CATHOLIC EDUCATION, THE CATHOLIC SCHOOL (1977), at no. 49.

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

Without entering into the whole problem of teaching religion in schools, it must be emphasized that, while such teaching is not merely confined to "religious classes" within the school curriculum, it must, nevertheless, also be imparted explicitly and in a systematic manner to prevent a distortion in the child's mind between general and religious culture. The fundamental difference between religious and other forms of education is that its aim is not simply intellectual assent to religious truths but also a total commitment of one's whole being to the Person of Christ.

Id. at no. 50.

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

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

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

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

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

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

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

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

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-502 (1979).

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

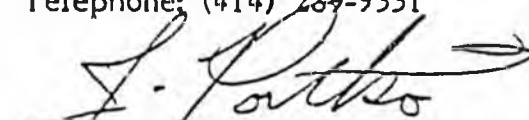
RELIEF

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

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



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ATTORNEYS FOR CATHOLIC LEAGUE
FOR RELIGIOUS AND CIVIL RIGHTS

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SEP 21 1980

DEPUTY CLERK

.....

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

CIVIL NO. 81-0180-B

Plaintiffs;¹ .
 Defendants in .
 Counterclaim .

vs.

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

Defendants;
Counterclaimants

.....

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CYR, C.J.

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

On the stipulations of the parties and on the exhibits² and the testimony received during the eight-day trial the Court makes the findings of fact and conclusions of law contemplated by Fed. R. Civ. P. 52(a).

I. History of Present Dispute

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

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

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

On May 15, 1979, MACS called a general meeting of its member schools to discuss the "right position of Christian Schools in Maine" with respect to state approval. Defendants' Exhibit 1. At that meeting MACS members⁵ voted to pay \$1,200 to have two lawyers and an educator address them the following month and "to give . . . counsel with regard to philosophy, strategy etc.," id. Meanwhile, MACS members unanimously voted to take no official position regarding state approval. Schools choosing "to buck state approval in the meantime would be doing so without any backing from MACS." Id.

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

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

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

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

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

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

1. receive the approval of the Department of Public Safety and the Department of Human Services prior to opening;
2. permit Department officials to conduct on-site observation of the schools in operation;
3. teach a "bona fide curriculum" meeting the requirements of Maine law; and
4. employ teachers qualified for state certification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. the state will impose its "child-centered" teaching methodology upon church-school students in contravention of the "subject-centered . . . methodology" of the Christian schools;
2. the state will impose a secular humanist philosophy upon the church schools;
3. the state will mandate sex education courses and other programs and approaches offensive to Christian values;
4. the state will ban the types of student discipline required by the Bible; and
5. the state will prescribe textbooks of poor quality.

The scriptural bases for opposing state licensure were stated as follows:

The responsibility for training a child is first laid on the parents (Pro. 22:6 and Eph. 6:4). Human government is ordained by God to suppress those who work violence and evil in society (Rom. 13:3-4). The mission of the church is clearly to preach and teach. The home, church and state must maintain their proper roles.

. . . .

Christians are certainly commanded to obey laws of their nation (I Pet. 2:13). Advocates of civil disobedience find little encouragement in scripture. The only

scriptural justification for a Christian to disobey his government would be in the case where the law of Caesar conflicts with the law of God. Yet, one might point out that Paul faced jail and punishment by the state in most of his ministry. Again, however, his offence was only preaching and teaching, and he obeyed God rather than Caesar.

At the September 21, 1979 meeting with Attorney Craze, separate letters were drafted in behalf of 19 MACS-member schools¹⁰ for delivery to the Commissioner, each letter advising in substance that after much contemplation the church-school authorities had concluded that their biblical convictions compelled them to reject state regulation of their schools and teachers, which are integral and inseparable parts of the religious ministry of their churches.

On September 28, 1979, Department officials met with MACS representatives and Attorney Gibbs, and the 19 letters were presented to the Commissioner. In anticipation of a legislative resolution of the problem in 1980 the Commissioner assured MACS that the new church schools could continue to operate during the 1979-80 school year without fear of state action.

On October 11, 1979, MACS advised all of its members of the identity of the 19 MACS-member schools which had already submitted letters to the Commissioner, and urged five other MACS-member schools to submit letters.¹¹

During November and early December, 1979, six more churches operating Christian schools wrote the Commissioner, rejecting state approval. See Defendants' Exhibits 15a - 15f.

In 1980, MACS drafted and sponsored two bills for presentation to the 109th Maine Legislature. Both bills provided that church schools which declare their religious convictions against state approval would be exempt from state approval requirements. The legislature rejected both bills in March 1980.

After the defeat of these bills, MACS formally prohibited its members from accepting or retaining school approval.

The Department wrote the unapproved church schools requesting the information needed to determine their eligibility for approval.

On May 29, 1980, MACS' new attorney, William Ball, Esquire, wrote the Commissioner requesting information concerning the Maine compulsory education statutes and regulations. Attorney Ball asked the Commissioner to explain the statutory basis for regulations requiring private schools, as a prerequisite to approval, to submit a statement of (1) educational philosophy, goals and objectives, and a plan for accomplishing the same; (2) the "methods and procedures" to be utilized to measure attainment of school goals; (3) financial position and policies; and (4) the program of instruction. Attorney Ball asked if the Commissioner interpreted the state regulations as requiring that private schools request an inspection of their facilities, curricula and staff qualifications prior to commencement of operations. Attorney Ball inquired whether the Department regulation prohibiting the operation of unapproved schools was directed only at public schools and, if not, what the statutory basis was for such a regulation, pointing out that though Maine statutes do provide for penalties

against parents who enroll their children in a school not approved for attendance purposes, there were no statutes "directed at schools" and no statutes forbidding the operation of unapproved private schools.

During the 1980-81 school year the dispute between the church schools and the defendants remained at a standoff. The Department attempted to obtain compliance, clarify the approval application form, and determine whether any particular requirement burdened any school. MACS failed to respond to any of defendants' requests for substantive comments on how the approval regulations could be made less offensive to the religious beliefs of its constituency.

In September, 1980 the Commissioner advised the appropriate public school superintendents that nine Christian schools had opened without state approval. "In order to prevent the students from becoming victims [of the] approval controversy" (Defendants' Exhibit 35), the Commissioner recommended that the superintendents forward to those unapproved church schools, on request, copies of the necessary student records in the possession of the public schools, but retain the original student records.

On October 14, 1980 the Commissioner instructed all public school superintendents to indicate separately in their 1980-81 enrollment reports those students residing within their school administrative districts who were attending unapproved schools. The Commissioner concluded his letter by stating - "[u]ntil you hear further from this office, you should not take any legal steps to enforce the truancy

laws against students attending these unapproved schools." See Defendants' Exhibit 36.

On October 9, 1981 the Commissioner formally advised nine unapproved church schools¹² of the Department's intention to "commence a legal action" in state court unless certain information was furnished by October 20, 1981. The Commissioner insisted that "a private school may provide education to children of compulsory school age during hours of the day when such children would otherwise be attending public schools only if it is approved by the Commissioner." The Commissioner stated that approval must be obtained in accordance with the rules adopted by the Department, copies of which had been sent to the schools on September 25, 1981. Enclosing an application form, the Commissioner informed the church schools that the minimum information required to obtain Department approval to operate consisted of evidence that the school

1. has been inspected by the Department of Human Services for compliance with state health and sanitation standards;
2. has been inspected by the Fire Marshal for compliance with the Life Safety code;
3. offers a course of study meeting the minimum curriculum requirements;
4. has an instructional staff which is either certified or qualified for certification; and
5. maintains and safeguards adequate attendance, health and academic records.

The Commissioner allowed that the required information could be provided by authorizing Department representatives to visit the schools, observe their operations and inspect their records.

The original complaint in this action was filed on October 16, 1981.¹³ The complaint was amended on October 28, 1981 by adding, as plaintiffs: Bangor Christian, Grace Baptist Church Schools, five churches and the five affiliated unapproved church schools which had received the Commissioner's letter of October 9, 1981.

On October 30, 1981, defendants agreed to refrain from undertaking any enforcement action against the five church schools added as plaintiffs two days earlier.

On November 20, 1981, defendants withdrew their earlier motion that this Court abstain from hearing this case.

On December 4, 1981, defendants filed their answer and a counterclaim against the five plaintiff church schools which had received letters from the Commissioner, as well as four nonplaintiff church schools which had received letters. Plaintiffs joined the latter four church schools as plaintiffs on December 28, 1981.

Prior to trial the parties agreed that although the provisions of Title 20-A of the Maine Revised Statutes Annotated were not to become effective until July 1, 1983, plaintiffs' claims and defendants' counterclaim were to be adjudicated as if those provisions were in effect at the time of trial, since Title 20-A was merely a recodification of pertinent provisions of Title 20.¹⁴

II. Counterclaim

The counterclaim presents the ripest controversy and its resolution controls the context in which the Court must determine the ripeness and substance of the claims asserted by the plaintiffs.

The counterclaim alleges that each plaintiff church school: (1) is operating with compulsory-school-age children in attendance, and without state approval; (2) has failed or refused in the past and will refuse in the future to respond to Department requests for information needed to determine its approvability; and (3) if unapprovable, is threatening the health, physical safety and welfare of the children in attendance.

Defendants demand that the Court (1) declare that the failure or refusal to complete and submit the 'Basic School Approval' application or to provide the information requested thereon in some other manner is violative of Maine law; and (2) enjoin the church schools from operating with compulsory-school-age children in attendance during normal public school hours until the church schools submit or make available to the Commissioner the information necessary to demonstrate compliance with state school-approval requirements.

Plaintiffs admit that the plaintiff church schools are unapproved and operating with compulsory-school-age children in attendance, but deny that they have failed or refused to respond to requests for information relating to school health, sanitation and fire safety.¹⁵

Plaintiffs affirmatively assert that defendants have an adequate remedy at law and that several of plaintiffs' constitutional claims, including their constitutional claim that various state regulations are ultra vires, bar relief under the counterclaim.

Consideration of the counterclaim begins with an examination of the relationship between the Maine statutes governing school attendance, Chapter 211 of Part 3 of Title 20-A, as amended by P.L. 1983 c. 435, 1983 Me. Legis. Serv. 2583-93, and the statutes relating to private schools, Chapter 117 of Part 2 of Title 20-A.

Compulsory Attendance and Private Schools

The core requirement of the compulsory attendance section (§5001) of Chapter 211 of the Maine education statutes is that persons age seven or older must attend a public school during its regular annual session until they reach age 17. 20-A M.R.S.A. §5001(1), as amended by P.L. 1983 c. 485 §21, 1983 Me. Legis. Serv. at 2590-91. Exemption from the public-school attendance requirement is accorded students who obtain "equivalent instruction in a private school . . . and if the equivalent instruction is approved . . ." 20-A M.R.S.A. §5001(2)(D)(1) (emphasis added), provided that the appropriate local public school officials receive a certificate reflecting the name and residence of the student seeking exemption and the name of the private school the student is attending, signed by the person or persons in charge of the private school.¹⁶ 20-A M.R.S.A. §5001(2)(D)(2).

Local public school officials make the initial determination as to whether a student is receiving equivalent instruction in a private school. If local public school officials deny the exemption because the private school instruction is not considered "equivalent," an appeal may be taken to the Commissioner. Id. §5001(2)(D)(2).

In order to come within the relevant [paragraph (D)(1)] statutory exception to the compulsory public-school education requirement, a child must not only receive equivalent instruction, but the instruction must be "approved by the Commissioner."¹⁷ An "approved private school" is defined in Title 20-A, section 1(2), as "a private school approved for attendance purposes under chapter 117," 20-A M.R.S.A. §1(2) (1983); a reference to section 2901, where it is provided that -

[a] private school may operate as an approved private school for meeting the requirement of compulsory school attendance under section 5001 if it:

1. Hygiene, health, safety. Meets the standards for hygiene, health and safety under Titles 22 and 25; and

2. Is either:

A. Currently accredited by the New England Association of Colleges and Secondary Schools; or

B. Meets the department's requirements for approval for attendance purposes under section 2902.¹⁸

20-A M.R.S.A. §2001 (1983).

Under a delegation of authority from the Maine Legislature, see 20-A M.R.S.A. §405(3)(E), the Board of Education (Board) has promulgated regulations expressly made applicable to "[p]rivate schools approved for attendance purposes by the department . . ." by section 2902 of Title 20-A.¹⁹

Informed by the statutory definition of the term "approved private school" appearing in sections 2901 and 2902, the Board promulgated a new regulation during the course of the trial of the present action.

A private elementary or secondary school shall not operate for purposes of meeting the statutory compulsory school attendance requirements unless it has been approved by the Commissioner of Educational and Cultural Services prior to commencing operation with students present.

05-071 CMR 125, section 1-A, subsection (A)(1) (as amended February 10, 1983) (Defendants' Exhibits 72 & 100-102) (emphasis added).

The Board regulations further provide that:

Nine months preceding the day on which the school plans to begin operations, it shall file with the Commissioner a notice of intent to operate a school for purposes of meeting the compulsory school attendance requirements.

Id., subsection (A)(2) (emphasis added).

The Board regulations relating to private-school health and safety requirements provide that:

A private school may not operate unless it complies with the health and safety requirements of Maine law applicable to schools generally, including the standards for hygiene, health, and safety under Titles 22 and 25 of the Maine Revised Statutes Annotated.²⁰

Id., subsection (D)(1) (emphasis added).

Subsection I(4) of the Board regulations provides:

J

Whenever the Commissioner determines that a private school is operating with compulsory school-age children in attendance and (a) does not meet the requirements for approval, or (b) has failed or refused to provide information for approval, he may institute proceedings in a court of competent jurisdiction to seek injunctive relief to prevent the non-public school from operating until such time as it meets the requirements for approval or provides information sufficient to demonstrate that it meets the requirements for approval.

Id., subsection (I)(4).

Defendants rely upon Title 20-A, the Board regulations and the equity powers of the Court in support of their requests for declaratory and injunctive relief.

A. Application of the Erie Doctrine

Although the counterclaim invokes the Court's ancillary, rather than its diversity, jurisdiction, the choice of law is governed by the Erie doctrine, see Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. . . . Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. . . . Likewise, the Erie doctrine is inapplicable to claims or issues created and governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship.

19 Wright, Miller & Cooper, Federal Practice and Procedure:

Jurisdiction §4515, at 275 (1982), quoting Maternally Yours, Inc. v.

Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956)

[emphasis in original; elipse by Wright, Miller & Cooper]. Maine law

is the source of the rights asserted in the counterclaim.

According to the great weight of authority,²¹ absent a contrary federal constitutional or statutory provision, see Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674 (1949) [availability of declaratory relief in diversity case is controlled by 28 U.S.C. §2201], federal rule, see Hanna v. Plumer, 380 U.S. 460 (1965), or some overriding federal policy, see Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 533-40 (1958) [invoking strong federal policy favoring jury trial], federal courts should afford whatever equitable remedy would be available in state court for the enforcement of a right created by state law. See System Operations, Inc. v. Scientific Games Devel. Corp., 555 F.2d 1131, 1143 (3d Cir. 1977); Franke v. Wiltschek, 209 F.2d 493, 494-95 (2d Cir. 1953); Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952); 2 Moore, Federal Practice ¶2.09, at 2-58 (1983); 19 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4513, at 214.

Since in this instance the standards governing the appropriateness of equitable relief are essentially similar under Maine law and federal law,²² no important federal policy and no federal statute or rule will be contravened as a result of the choice of Maine law.

B. Relief Under Statutory and Regulatory Provisions

Defendants apparently contend that section 2901 empowers the Court to enjoin the operation of the plaintiff church schools during normal

public-school hours, regardless of whether injunctive relief would be appropriate under the Court's inherent equity powers. The Maine Law Court recognizes, see Town of Shapleigh v. Shikles, 427 A.2d 460, 464 (Me. 1981), that where "a statute provides for injunctive relief upon the showing of a violation, the party seeking such relief need not make a showing of irreparable harm in the normal equity sense," UV Industries, Inc. v. Posner, 466 F. Supp. 1251, 1255 (D. Me. 1979). But since the "historic injunctive process has been one of great flexibility in administering practical equity, . . . [such a provision] should not be lightly implied by the court in construing legislation." Town of Shapleigh v. Shikles, 427 A.2d at 464. Cf. Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co., ___ U.S. ___, 52 U.S.L.W. 4007, 4009 (November 1, 1983) ["the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose"].

Sections 2901 and 2902 neither impose nor delegate the power to impose direct sanctions against unapproved private schools, nor do the compulsory attendance provisions of Chapter 211 purport to empower direct action against unapproved private schools.²³ The plain legislative design of the Maine Education Law is to ensure that each child attends public school or obtains an equivalent education. One means²⁴ of obtaining an equivalent education is to attend an approved private school, that is, a private school which has demonstrated that it is in compliance with sections 2901 and 2902.²⁵

Administrative Interpretation of Approval Requirements

The unmistakable import of the statutory school-approval scheme notwithstanding, the defendants have insisted from the outset²⁶ that it is implicit in the language of section 2901, which provides that a private school "may operate as an approved private school for meeting the requirements of compulsory school attendance. . . ," that an unapproved private school may not operate at all during normal public school hours with compulsory-school-age children in attendance. See Defendants' Memorandum Regarding Ultra Vires Issue, at 6.

Although courts do "not lightly disregard the interpretation given a statute by those charged with its administration, an administrative construction is not conclusive." Soucy v. Board of Trustees, 456 A.2d 1279, 1281 (Me. 1983). "[S]uch deference must yield to the fundamental approach of determining the legislative intent, particularly as it is manifest in the language of the statute." Central Maine Power Co. v. Maine Public Utilities Commission, 458 A.2d 739, 741 (Me. 1983), quoting Central Maine Power Co. v. Maine Public Utilities Commission, 436 A.2d 880, 885 (Me. 1981). An administrative agency construction, even one put forth by those who participated in drafting the statute, may be rejected upon consideration of the plain language of the statute, "the context in which it must be read," Stewart v. Inhabitants of Durham, 451 A.2d 308, 310 (Me. 1982), or the fact that a different construction will avoid "constitutional difficulties,"²⁷ id. [construction of grandfather clause by town selectmen conflicted with

plain meaning and with overall purpose of mobile home ordinance and gave rise to "serious constitutional questions"]. See also Clardy v. Town of Livermore, 403 A.2d 779, 782 (1979) [ordinance construed by court contrary to interpretation of town officials since it was "fairly open to an interpretation making decision (of the constitutional question) unnecessary"]; Farmington Dowel Products Co., Inc. v. Forster Manufacturing Co., Inc., 153 Me. 265, 272 (1957) [Law Court avoids constitutional question by concluding that a ten-word phrase "crept into the law by some inadvertence. . ."].

The plain language of section 2901 is entirely consistent with its long legislative history,²⁸ leaving no room for an administrative interpretation at odds with both.

Language of Statute

If the legislature had meant to ban the operation of unapproved private schools, "it would have said so in clear and unmistakable language. It is not for [the Court] to read into the statute an intent which is obviously not there," Squires v. Inhabitants of Augusta, 155 Me. 151, 167 (1959). Especially in view of the fact that the present action was commenced months before the 110th Legislature completed its debate on the recodification of the Education Laws,²⁹ i.e., Title 20-A, it would not have been difficult to draft section 2901 so as to provide that "no private school may operate with

compulsory-school-age children in attendance unless it meets the private-school approval requirements."³⁰

The defendants essentially invite the Court to ignore all language in the opening clause of section 2901 following the phrase "[a] private school may operate. . . ." ³¹ "Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979). But cf. Farmington Dowel Products Co., Inc. v. Forster Manufacturing Co., Inc., supra. All of the language rendered mere surplusage under defendants' interpretation becomes imbued with both "meaning and force" by construing section 2901 as a description of the criteria prescribed for private schools which may be considered adequate alternatives to public schools for compulsory attendance purposes.

The Statutory Scheme

The Maine statutory scheme of compulsory education is an historically enlightened legislative response to the important parental and public interests inherent in the education of the young; one not lightly to be disregarded by courts, see Squires v. Inhabitants of Augusta, 155 Me. at 167, by municipalities, see id., or by administrators, cf. Central Maine Power Co. v. Public Utilities Commission, 458 A.2d at 741; Maine School Administrative District No. 15 v. Reynolds, 413 A.2d 523, 529-31 (Me. 1980). See Squires v.

Inhabitants of Augusta, 155 Me. at 159 ["The State educational policy cannot and must not be interfered with by any subordinate governing body."] In order to determine the legislative intent in relation to a particular section of a comprehensive statute, courts should consider the statutory scheme in its entirety and "interpret[] [the] statute . . . so that all of its provisions are read in harmony and are effectuated." Seven Islands Land Company v. Maine Land Use Regulation Commission, 450 A.2d 475, 480 (Me. 1982). Yet defendants' construction of section 2901 ill serves, indeed it dramatically alters, the long-standing legislative scheme underlying compulsory education in Maine.³²

Compulsory-school-age children who fail to establish their entitlement to an exemption from the requirement of public school attendance are considered "habitual truants" if "[a]bsent from school without excuse for the equivalent of 10 full days, or for at least 1/2 day on 7 consecutive days, within any 6-month period." 20-A M.R.S.A. §5051(1). Any person who has control over an habitual truant and bears primary responsibility for that truancy is guilty of a "civil violation" and "shall be punished by a forfeiture of not more than \$200," 20-A M.R.S.A. §5053(4)(A)(1), payable "to the treasurer of the school administrative unit in which the offense was committed for the support of its public schools." 20-A M.R.S.A. §5053(4)(B).

The Maine Legislature has prescribed detailed procedural safeguards and placed primary reliance upon local public school officials for the conciliation of truancy disputes and for the enforcement of

the truancy laws. Local public school officials are directed, under the Commissioner's guidance, to promulgate reasonable rules for the enforcement of the truancy laws. 20-A M.R.S.A. §5003.

It is the statutory duty of the public school principal to report an habitual truant to the public school superintendent, whose statutory duty it is to attempt to resolve the problem informally and, if unsuccessful, to refer the matter to the local school board, together "with the principal's report and any other useful information." 20-A M.R.S.A. §5051(2)(A)-(B). It is the duty of the school board to hear the matter after giving seven days' written notice to the parent or guardian of the alleged truant, stating the date, time and purpose of the hearing, the necessity that parents and child attend, and the right to inspect the child's attendance records and the principal's report. 20-A M.R.S.A. 5051(2)(C).

After considering the facts and discussing the matter with the child and with the parent or guardian, the local board is required either (1) to direct the child to attend school as required by statute and inform the parent or guardian of the legal responsibility to assure the child's attendance, or (2) to waive the compulsory attendance requirement, provided the child is at least 14 years old. 20-A M.R.S.A. §5051(2)(D).

A decision adverse to the parent or guardian may be appealed to the Commissioner, who is required to appoint "a fair hearing officer" to hear the appeal and report on the testimony presented, recommending

a disposition to the Commissioner, who is required to affirm, modify or reverse the decision of the local school board.³³ 20-A M.R.S.A. §5051(2)(E).

Attendance officers elected yearly by the school board are required to investigate alleged habitual truancies and report to the school board. Upon the written direction of the school board or the superintendent, attendance officers are required to file a complaint in Maine district court seeking imposition of the forfeitures prescribed by section 5053. 20-A M.R.S.A. §5052(2).

Defendants' interpretation of the education laws would arrogate to the Commissioner the powers and responsibilities entrusted by the legislature to local public school authorities, see 20-A M.R.S.A. §2 (1981), and eliminate entirely the sensitive administrative safeguards of notice, hearing and conciliation which are prerequisite to the commencement of any judicial proceeding for the enforcement of the truancy laws.

The 110th Legislature recodified, without substantive change,³⁴ the various long-standing statutory provisions prescribing truancy sanctions against parents, see 20-A M.R.S.A. §§2901, 2902, 5001(1), (2)(D), & 5051-53, notwithstanding the fact that plaintiffs' present counsel pointed out to the Commissioner as early as May 1980 that there did not appear to be any statutory basis for prohibiting the operation of unapproved schools.

Under its scheme for the governance of compulsory education the 110th Legislature has mandated that local public school officials

make every reasonable effort at conciliation with the parents of alleged truants prior to the commencement of administrative action. Next, the legislature has prescribed several levels of administrative proceedings in advance of any recourse to judicial action. Nowhere in this elaborate statutory scheme is there the slightest indication that the legislature meant to permit the circumvention of these procedural requirements merely because the Commissioner or any other defendant may consider the closing of private schools more appropriate than truancy-law enforcement against parents.

Inviting Unnecessary Constitutional Issues

Defendants' construction is not only at odds with the legislative scheme, it gratuitously raises grave constitutional problems. See United States v. Lee, 455 U.S. 252, 257-58 (1982) [limitations on religious liberty must be "essential to accomplish an overriding governmental interest"]; Johnson v. Robison, 415 U.S. 361, 384-86 (1974) [distinguishing between direct and indirect burdens on religion]; Braunfeld v. Brown, 366 U.S. 599, 605-07 (1961) [plurality opinion] [regulation of secular activity, so as indirectly to make religious practice more expensive, "wholly different" from legislative attempts to make religious practice unlawful]; Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) [statute seriously (though indirectly) impairing value of property of private schools, held unconstitutional]. See also Southeastern Promotions, Ltd. v. Conrad,

420 U.S. 546, 558-59 (1975) ["presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties"]; Kunz v. New York, 340 U.S. 290, 293-95 (1951) [ordinance giving police commissioner unbridled discretion to grant or refuse permits to speak on religious matters in public streets was invalid prior restraint on exercise of First Amendment rights]; Martin v. City of Struthers, 319 U.S. 141, 146-49 (1943) [ordinance forbidding knocking on doors or ringing doorbells in order to distribute handbills or circulars was invalid as applied to Jehovah's Witness seeking to advertise religious meeting, despite state claim of nuisance]. See generally Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 400 (1983).

Legislative Acquiescence

Struggling against the clear language, history and legislative scheme of the compulsory education statutes and disregarding the serious constitutional difficulties raised by their efforts to close church-affiliated schools, defendants contend that their construction of section 2901 is binding on the Court because the 109th Legislature acquiesced in their construction.

Legislative acquiescence offers a precarious perch from which to construe a statute even in the best of circumstances. Legislative acquiescence is "significant" in assessing the intent of a Maine legislature, if the administrative interpretation is reasonable, has

been called to the attention of a legislature subsequent to the enacting legislature and if it is reasonably inferable that the administrative interpretation was recognized by the later legislature as a valid construction. See In re Spring Valley Development, 300 A.2d 736, 743-45 (Me. 1973) [after attention of 105th Legislature had been specifically directed to administrative interpretation of bill enacted by 104th, actions of 105th became "significant" in assessing intent of 104th]. See also Androscoggin County Savings Bank v. Campbell, 282 A.2d 858, 865 (Me. 1971) [ambiguous statutory amendments in 1969 not to be construed as contrary either to 1917 Attorney General's opinion or to interpretation given by banking commissioners since 1917].

MACS sponsored two bills before the 109th Legislature (L.D. 1817 and L.D. 1980) to exempt church-sponsored schools from the school approval requirements. Since each bill stated that it was designed to "make approval optional for church-sponsored schools," and would have exempted these schools from approval and their students from compliance with the compulsory public-school attendance law, it is fair to infer either that someone involved in drafting these bills knew of the Commissioner's interpretation or that the drafter thought that approval was or might be considered a condition precedent to the lawful operation of a private school. But both the trial record and the legislative record make clear that these bills were sponsored, and, at least initially, probably drafted, by MACS, which was well

aware of the Commissioner's consistent contention that an unapproved private school cannot operate at all with compulsory-school-age children in attendance, see, e.g., pp. 13-15 supra. See 1980 Me. Leg. Rec. 387 (House, March 10, 1980) [Senator Trotzky stating, "This bill was brought in by (MACS)"]].

Much of the floor debate centered on the right and duty of the state to influence or control sectarian schools, see id., at 344-50 (House, March 10, 1980); id., at 386-87 (Senate, March 11, 1980), but it does not follow that the legislature was aware that the Commissioner considered Department approval to be a precondition for lawful operation.³⁵ Certainly, subjecting the parents of children attending church schools to truancy actions (the legislatively-contemplated response to nonapproval, which has only since been disavowed by the Commissioner) would have a significant affect on the schools, thereby affording the state substantial de facto control over the church schools. Furthermore, there is not the slightest indication in the record of this case or in the legislative record from which it reasonably could be inferred that the 109th Legislature recognized the Commissioner's interpretation as valid.

In the context of the present case there is no ambiguity requiring resort to "legislative" acquiescence, no pertinent administrative interpretation was called to the attention of the 109th Legislature and its reasons for rejecting L.D. 1817 and L.D. 1980 were unrelated to whether the Commissioner is or ever has been empowered by statute to close unapproved private schools.

The Court is therefore satisfied that neither section 2901 nor any other statutory provision prohibits private schools from operating merely because they are unapproved or refuse to seek or accept approval. A fortiori, no statutory provision requires the Court to fashion injunctive remedies against the operation of unapproved private schools without due regard for the public and private interests involved.

The Regulatory Scheme

Subsection I(4) of the regulations purports to authorize the Commissioner to "seek" injunctions against the operation of unapproved private schools. The Board regulations neither expressly prohibit nor purport to empower injunctive relief against the operation of unapproved private schools; any such regulation would be invalid.

A "legislative" rule³⁶ is valid only if the legislature has authorized its promulgation. Anheuser-Busch, Inc. v. Walton, 135 Me. 57 (1937). See Maine School Admin. Dist. No. 15 v. Reynolds, 413 A.2d at 529; State v. Dube, 409 A.2d 1102, 1104 (Me. 1979); Frank v. Assessors of Skowhegan, 329 A.2d 167, 170 (Me. 1974). Thus a legislative rule is void if it extends, modifies or conflicts with the enabling statute. Anheuser-Busch, Inc. v. Walton, 135 Me. at 66-68; 1 Cooper, State Administrative Law 254 (1965). See Frank v. Assessors of Skowhegan, 329 A.2d at 170. The relevant enabling statute, see 20-A M.R.S.A. §405(3)(E), merely directs the Board to "[a]dopt or

amend rules on requirements for approval and accreditation of elementary and secondary schools." 20-A M.R.S.A. §405(3)(E). The statutory directive to adopt rules governing "approval" and "accreditation" is designed to ensure greater definition of the criteria for exemption from compulsory public school attendance available to students attending approved private schools, and forms a comfortable fit within the legislative scheme of the compulsory education laws, by focusing enforcement efforts upon the individual student and parent.

The defendants apparently assert that the Board is empowered to authorize the Commissioner to bypass the elaborate truancy-law enforcement scheme put in place by the legislature by proceeding directly to court for injunctive relief against the operation of unapproved private schools. Although the defendants may consider the closing of unapproved private schools in these circumstances a more efficient and expeditious means of securing compliance with the compulsory education laws on the part of private school students and their parents,³⁷ it is not for the defendants, but for the legislature, if and when it chooses, to do so, and the legislature has not chosen to do so.

In its recent recodification of the education laws the 110th Legislature manifested no intention to redirect enforcement sanctions from the parents of students attending unapproved private schools to

the unapproved private schools themselves. See pp. 26-30 supra. As the Law Court has held in an analogous context:

[The Commission's] power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature. What the [Commission] has attempted to do in this instance constitutes a flagrant usurpation of a prerogative which belongs to the legislature, and is subversive of those principles which are the foundation of orderly government. The regulations in question are invalid. . . .

Anheuser-Busch, Inc. v. Walton, 135 Me. at 67-68 [involving rules and regulations of State Liquor Commission].

Similarly, to the extent that the board regulations attempt to institute a scheme whereby private schools can operate only if approved, the Board has exceeded its power and its regulations are invalid.³⁸

C. Relief Under the Inherent Equity Powers of the Court

Requests for injunctive relief are addressed "to the conscience of the chancellor. . . ." Town of Shapleigh v. Shikles, 427 A.2d at 465, who is guided by the balance between the needs of the party requesting injunctive relief and the hardship which injunctive relief would visit upon the party enjoined, Town of Shapleigh v. Shikles, 427 A.2d at 464; Natale v. Kennebunkport Board of Zoning Appeals, 363 A.2d 1372, 1377 n.9 (Me. 1976), and by the public interest, see Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982);³⁹ Note, Developments In The Law - Injunctions, 78 Harv. L. Rev. 994, 1001

(1965). The Law Court "has always been conservative" in its approach to the appropriateness of injunctive relief, Haskell v. Thurston, 80 Me. 129, 132 (1888), which is "extraordinary [relief] only to be granted with the utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case." Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 79 (Me. 1980). Thus, the need for injunctive relief is per se insufficient, unless the moving party "show[s] plainly that [his] right is clear," Haskell v. Thurston, 80 Me. at 132, and that absent injunctive relief the violation of that right will cause irreparable injury, Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d at 79.

Defendants' Need

(i) The Right Violated

The contention that the operation of unapproved private schools contravenes section 2901 must fail for the reasons previously discussed. The other relevant respect in which the plaintiff church schools are alleged to have acted unlawfully is by "inducing habitual truancy."

The defendants assert that "the record evidence . . . demonstrates beyond any question that . . . [the ten church schools and the pastors and administrators in charge of those schools] induce their students to attend their unapproved schools." Defendants' Memorandum Regarding Ultra Vires Issue, at 10. On the basis of the entire record in this

case there appear to be but two plausible forms which any such "inducement" of habitual truancy might take: first, that the very operation of an unapproved church school with compulsory-school-age children in attendance constitutes an inducement of habitual truancy; and second, that the pastors or administrators induce students to attend their church schools by communicating their religious belief that the Bible commands Christians to establish schools in order to instill biblical principles and that Christ is the sole sovereign in such matters. See Plaintiffs' Proposed Findings, ¶¶ 11, 13, 17, 21-25, 27, 31, 63-64, and transcript citations therein.

Title 20-A M.R.S.A. §5053(1)(B) provides that it shall be a "civil violation" to induce a student to violate section 5051, subsection 1 (defining habitual truancy). See State v. McDonough, Doc. No. Pen-83-252 slip op., at 8 n.5 (Me. December 8, 1983) [offense of being primarily responsible for the habitual truancy of a student under one's control is a civil violation]. "A person guilty of" inducing habitual truancy "shall be punished by a forfeiture of not less than \$500," 20-A M.R.S.A. §5053(4)(A)(2), payable "to the treasurer of the school administrative unit in which the offense was committed for the support of its public schools," id. §5053(4)(3). (Emphasis added.)

Under Maine law the operation of an unapproved church school attended by compulsory-school-age children does not constitute an inducement of habitual truancy. The Maine Supreme Judicial Court authoritatively defines the term "induce" as follows:

Webster's New International Dictionary, 2d Ed., defines 'induce' as 'to bring on or about; to effect; cause.' Black's Law Dictionary, 4th Ed., defines 'induce' as 'to bring on or about, to effect, cause to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on.' The term induce signifies a successful persuasion; that the act has been effective and the desired result obtained. State v. Stratford, 55 Idaho 65, 37 P.2d 681 (1934); Hautau v. Kearney & Trecker Corporation, 179 F. Supp. 490 (D.C. 1959); Vol. 21 Words and Phrases, Permanent Ed., p. 481.

State v. Miller, 252 A.2d 321, 324-35 (Me. 1969) [inducing one to take indecent liberties means that persuasion has resulted in the doing of the indecent act]. Other courts similarly hold that to "induce" requires some form of persuasion. International Brotherhood of Electrical Workers v. National Labor Relations Board, 341 U.S. 694, 701-04 & n.7 (1951) ["induce" in N.L.R.A. means to lead on; to influence; to prevail on; to wove by persuasion or influence]; United States v. Burkley, 591 F.2d 903, 917 (D.C. Cir. 1978) [relative to entrapment defense, inducement refers to government persuasion, harassment or other pressure on defendant to commit the crime]; Fromberg, Inc. v. Thornhill, 315 F.2d 407, 411 (5th Cir. 1963) [under statute forbidding active inducement of patent infringement, inducement "has connotations of active steps knowingly taken . . . as distinguished from accidental or inadvertent]; In the Matter of Kearney Chemicals, Inc., 468 F. Supp. 1107, 1111 (D. Del. 1979) [in tort case for inducing breach of contract, "induce" refers to causing one by persuasion or intimidation to choose one course of conduct over another].

These judicial definitions conform to the meaning commonly given the term "induce," which involves some form of persuasion or influence as an essential element.

The fact that "inducing" habitual truancy carries a substantially more stringent penalty (forfeiture of not less than \$500) than does the offense of being primarily responsible for the truancy of a child under one's control (forfeiture of not more than \$200) makes clear that the legislature considers inducing habitual truancy to be a more serious matter than "being responsible" for truancy. Indeed, the Statement of Fact accompanying the 1981 bill, which reduced the penalties for these offenses, stated, "This bill . . . would change the penalty section for a parent responsible for truancy to a civil violation punishable by either a \$200 or a \$500⁴⁰ forfeiture, depending on the nature of the offense." 110th Me. Leg., H.P. 1177, L.D. 1401, [emphasis added], enacted as amended P.L. 1981 c. 391 §1, 1981 Laws of Maine at 620. An interpretation removing the element of persuasion from the ordinary meaning of "induce" would disregard the clear legislative directive that the penalty for "inducing" habitual truancy should apply only to conduct more severe than merely "being responsible" for truancy.

In recognition of the judicial "obligation to avoid constitutional decisions when other grounds are available," Morris v. Travisono, 707 F.2d 28, 33 (1st Cir. 1983), the Court concludes that mere operation of these unapproved church schools with compulsory-school-age children

in attendance does not constitute an inducement of habitual truancy.⁴¹ Indeed, since defendants allege that the plaintiffs "operate schools for compulsory school age children . . . and . . . induce their students to attend," Defendants' Memorandum Regarding Ultra Vires Issue, at 10, it is not entirely clear that defendants contend that the mere operation of an unapproved school constitutes an "inducing." And, even assuming the contrary, under the equities of this case injunctive relief is inappropriate.

Irreparable Injury

There can be no irreparable injury where adequate relief is available at law. Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d at 79; 11 Wright and Miller, Federal Practice and Procedure §2944, at 392 (1973). "If the legal remedy available to the plaintiff would be as effective as . . . [injunctive] relief, there is no need for the court to invoke its equity jurisdiction."⁴² Id. at 396.

An available legal remedy generally is considered inadequate if it can be secured only through a multiplicity of actions, as when the conduct is likely to be of a recurring nature. Id. at 397-98. But even if the operation of unapproved schools does constitute an inducement of habitual truancy, there is no reason to suppose that prosecutions under section 5053(1)(B) would be inadequate or need be multiplicitous. It does not appear that the authorized penalty, i.e., a forfeiture of not less than \$500, is inadequate to prevent recurring

violations. Cf. City of Tupelo v. Walton, 237 Miss. 892, 116 So.2d 808 (1960) [owner enjoined from operating store in violation of Sunday closing law where authorized fine was insignificant, and owner had 75 prior convictions and statute authorized injunction]; State v Preuss, 217 Minn. 100, 13 N.W.2d 774 (1944) [25 prior convictions].

There are two principal reasons advanced in explanation of the customary judicial reluctance to enjoin the commission of a crime, see, e.g., United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983); Dommer v. Crawford, 638 F.2d 1031, 1047 (7th Cir. 1980); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969); 11 Wright & Miller, Federal Practice and Procedure §2942, at 386 (1973); Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. at 1013. The first reason, i.e., "concern for rights [of the alleged offender] to the safeguards of criminal procedure," United States v. Zenon, 711 F.2d at 479, has been criticized, with some justification, as illogical,⁴³ and, in any event, may be inapposite here.⁴⁴ But the second justification: to prevent frustration of the legislatively-prescribed sanction and circumvention of prosecutorial discretion, 11 Wright & Miller, Federal Practice and Procedure §2942, at 386 (1973); Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. at 1016, relates to the adequacy of the available legal remedy. The complex enforcement scheme crafted by the legislature and the great latitude left to "prosecutors" under that scheme, see pp. 28-29 supra, speak forcefully in favor of a finding that the sanction selected by the