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

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

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

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

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

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

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

117. *Id.* at 79.

118. *Id.* at 78.

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

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

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

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

#### B. State Law

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

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

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

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

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

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

124. *Id.* at 460.

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

126. *Id.* at 848.

127. *Id.* at 847.

128. See N.C. Const. art. 1, § 13.

129. *Id.*

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

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136. *Id.*

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

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

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

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

132. See KY. CONST. § 5.

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

*Id.* (emphasis added).

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

134. See note 14 *supra*.

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

136. *Id.*

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

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

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

Article IX calls for the creation of a uniform system of public schools<sup>140</sup> under the supervision and regulatory authority of the State Board of Education and the Superintendent of Public Instruction.<sup>141</sup> This constitutional authority to make regulations is limited to the public schools.<sup>142</sup> No mention is made of providing for a system of private

137. *Id.*

138. *Id.*

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

140. *Id.* § 2.

141. *Id.* § 4.

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

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

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

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

The court must view every statute in light of constitutional intent.<sup>147</sup> The North Carolina Constitution contains numerous provisions relating to religious liberty and education, evincing a commitment to both freedom of conscience<sup>148</sup> and universal compulsory education.<sup>149</sup> The State is thus limited by state, as well as federal, constitutional safeguards when it seeks to impose a minimum-requirement scheme on private religious schools.

### III. ANALYSIS

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

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

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

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

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

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

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

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

148. See note 128 *supra*.

149. See note 143 *supra*.

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

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

#### A. Minimum Requirements Under the North Carolina Statute

##### 1. Compulsory attendance

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

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

151. See note 14 *supra*.

152. See notes 9-11 *supra*.

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

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

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

156. *Id.* § 115-257.3.

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

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

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

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

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

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

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

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

162. N.C. CONST. art. IX, § 3.

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

train and teach their children in one of their homes, with a regular and systematic course of instruction based on religious belief, then such an undertaking would appear to constitute a "school" within the meaning of the compulsory attendance law. It would then be subject to, and protected by, the provisions of article 32A. The new North Carolina law minimizes state interference with religious liberty and conscience.<sup>164</sup> The State's interest in basic education is ensured through a required regular course of systematic instruction over a nine-month period. Mandatory standardized testing results are available for government inspection to ensure that the child's interest in an adequate secular education is being met. The form of the particular school need not be similar to that of the public schools, as *Yoder* clearly spells out.<sup>165</sup> Thus the potential for burdens on the right of free religious exercise<sup>166</sup> of private church schools under *Yoder* is minimized under the new statute. No detailed reports are required to be submitted to the State; thus entanglement problems are unlikely.

### 2. Fire, health, and safety inspections

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

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

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

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

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

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

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

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

168. *Id.*

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

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

### 3. Mandatory testing

At present, North Carolina is one of only two states that require their private religious schools to conduct mandatory tests.<sup>172</sup> Private religious schools are required under the North Carolina statute to administer both a standardized test and a high school competency test. In allowing the school's chief administrator to select the nationally standardized test or equivalent measurement that must be administered to the children, the school is given greater "control" over the content of the test.<sup>173</sup> Thus the possibility for free-exercise infringement<sup>174</sup> or interference with conscience is greatly reduced. Private Christian schools have objected to the imposition of "secular humanistic" values through state testing programs involving state-selected tests.<sup>175</sup>

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

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

170. *Id.*

171. See text accompanying note 30 *supra*.

172. New York is the other state requiring testing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

187. See notes 116-18 *supra*.

188. See note 46 *supra*.

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

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

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

Parents of Christian school students also believe they have a biblical mandate<sup>192</sup> and a duty in conscience, which are part of their free religious

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

191. See, e.g., *NLRB v. Catholic Bishop*, 99 S. Ct. 1313 (1979), (NLRB's assertion of jurisdiction over church-operated schools would significantly risk infringement of the free-exercise clause and also exceed the jurisdiction of the Board); *Surinac v. Pesquera de Busquets*, 604 F.2d 73, 71 (1st Cir. 1979) ("The [private Catholic schools] are an integral part of the Catholic Church and as such 'involve substantial religious activity and purpose.'"); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1350, 1357 (M.D. Pa. 1978); *Hinton v. Kentucky State Bd. of Educ.*, No. 8314, slip op. at 2 (Franklin County, Ky., Cir. Ct. Oct. 4, 1978) ("The Plaintiff pastors, parents and churches have established private religious schools as part of their respective churches. . . . The schools are a ministry of the respective churches."), *aff'd in part, rev'd in part sub nom. Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 48 U.S.L.W. 3731 (U.S. May 13, 1980).

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

Christian education is not a new idea.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

201. See note 191 *supra*.

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

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

204. *Id.* at 365.

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

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

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

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

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

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

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

208. See note 199 *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

213. See note 74 *supra*.

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

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

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

#### CONCLUSION

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

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

J. ERIC EVENSON II

## COMMUNITY CARE FACILITY LICENSING

### PURPOSE

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

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

### THE STATUTE

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

### REGULATIONS

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

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

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

### THE LICENSING PROCESS

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

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

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

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

### FAIR TREATMENT

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

STATE OF ALASKA  
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 14, 1983

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

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

FROM: Keith E. Levy *KEL*  
Legislative Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

KBL:ljb  
20/002



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

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

May 13, 1983

MEMORANDUM

TO: Representative Sam Pestinger

FROM: Leslie Longenbaugh *L*  
Research Staff

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

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

Maryland

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

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

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

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<sup>1</sup> Annotated Code of Maryland, Education § 2-206 (e)(2).

<sup>2</sup> ACN § 2-206 (3)(4).

<sup>3</sup> ACN § 2-205.

Representative Pestinger

May 13, 1983

Page 2

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

### North Carolina

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

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

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

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

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

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<sup>4</sup> General Statutes of North Carolina, § 115C-547 through § 115C-554.

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

Nonpublic schools that are operated for profit must obtain a license from the state annually. The state board of education is charged with promulgating and enforcing regulations and standards governing approval and licensure. By law, the reports solicited must include detailed information regarding curricula, costs, and instructional space. In addition, the schools must post a bond of \$1,000.<sup>5</sup>

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

### Tennessee

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

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

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<sup>5</sup> GSNC §115C-570.

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

<sup>7</sup> Tennessee Code Annotated, 49-105 § 19.

<sup>8</sup> TCA 49-5201.

Representative Pestinger

May 13, 1983

Page 4

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

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

#### Case Law

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

\* \* \*

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

LL

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

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<sup>9</sup> Donald Wood, Tennessee Department of Education.

# Alaska State Legislature



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

BOX 142  
EAGLE RIVER, ALASKA  
99577

## Representative Randy Phillips

HOUSE DISTRICT 15

### MEMORANDUM

TO: Senator Joe Josephson  
Chairman, Senate HESS Committee

FROM: Representative Randy Phillips

DATE: May 25, 1983

RE: CS HB 357 (RLS)

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

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

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

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

RECEIVED

MAY 25 1983

Josephson,

# NEA - ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

Jean Krauss, President

## JUNEAU OFFICE

147 S. FRANKLIN STREET  
JUNEAU, ALASKA 99801  
PHONE: 459-1111

## ANCHORAGE REGIONAL OFFICE

1400 WEST 12TH  
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## FAIRBANKS REGIONAL OFFICE

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FAIRBANKS, ALASKA 99701  
PHONE: 452-1111

Don Cheng  
Past President  
Box 1064  
Kenai, Alaska 99511

May 12, 1983

Gayle Pierce  
President Elect  
SR Box 51377  
Fairbanks, Alaska 99701

TO: House HESS Committee

FROM: NEA-Alaska

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

RE: HB 357

Bob McInerney  
Region I Director  
Box 1015  
Sitka, Alaska 99585

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

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

Our opposition is premised both on constitutional and educational grounds.

Griffin Wood  
Region III Director  
Box 1  
Garden Valley, Alaska 99576

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

Frank Parker  
Region III Director  
Box 1000  
Kenai, Alaska 99511

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

Jean Robb  
Region IV Director  
Box 100  
Ketchikan, Alaska 99901

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

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

Cheryl Smith  
Region V Director  
Box 100  
Fairbanks, Alaska 99701

Pat Abney  
Region VI Director  
Box 481 SRA  
Anchorage, Alaska 99507

Les Wilson  
Region VI Director  
8410 Pioneer Drive  
Anchorage, Alaska 99504

Lari Snavs  
Region VI Director  
SRA Box 391B  
Anchorage, Alaska 99511

Peg Stout  
Region VI Director  
6208 E. 34th Avenue  
Anchorage, Alaska 99504

Frank Morris  
Director at Large  
Box 100  
Haines, Alaska 99827

Section 14.45.030 as amended denies the State the power to receive and examine reports about the educational programs offered in religious schools;

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

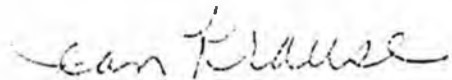
Section 14.30.010 (b)(1)(D) as amended denies the State the authority to ensure the presence of competent and capable staff who meet established criteria to teach in the State of Alaska.

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

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

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

Respectfully submitted:



Jean Krause  
President

JK:jc

# State Regulation of Private Education

by Patricia M. Lines

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



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

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

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

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

## Nontraditional Schooling

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

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

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

This issue is unlikely to go away. In fact, the number of families choosing nontraditional educational options seems to be increasing. The Census Bureau estimates that enrollments in non-Catholic private schools increased from 615,548 in 1965 to 1,433,000 in 1975.<sup>4</sup> These figures probably cover only established, accredited schools, however.<sup>5</sup> Families choosing unaccredited schools neither seek nor want state approval, and they probably do not want to be counted by the Census Bureau. Many of the unau-

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

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

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

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

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

### Trends in State Regulation

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

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

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

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

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

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

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

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

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

### Supreme Court Guidance

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

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

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

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

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

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

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

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

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

### Current Judicial Activity

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

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

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

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

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

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

Home instruction is in a somewhat dif-

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

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

### Implications for Public Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Department of Health, Education, and Welfare, *Statistics of Public Elementary and Secondary Day Schools* (Washington, D.C.: National Center for Education Statistics, 1976), p. 6.

5. Census Bureau officials are unable to estimate the number of children enrolled in unapproved educational alternatives, according to a 10 February 1982 memorandum to the director from Paul M. Siegel, chief of the Education and Social Stratification Branch (copy on file at the Education Commission of the States).

6. Bruce S. Cooper and Donald H. McLaughlin, "The Latest Word on Private School Growth," paper presented at the annual convention of the American Educational Research Association, New York, March 1982. By contrast, public school enrollments have declined from approximately 45.9 million in 1970 to 42.6 million in 1978, according to *Statistics of Public Schools, Fall 1970* (Washington, D.C.: National Center for Education Statistics, 1971); and *Statistics of Public Elementary and Secondary Day Schools, Fall 1978* (Washington, D.C.: NCES, 1979).

7. Virginia Davis Nordin and William Lloyd Turner, "More Than Segregation Academies: The Growing Protestant Fundamentalist Schools," *Phi Delta Kappan*, February 1980, pp. 391-94. See also William Hazard, *The Flight from the Public Schools: Myth or Reality?*, a paper prepared for the Education Commission of the States, presented at the Special Advanced Leadership Programs Services Seminar for Legislators, Atlanta, 31 July 1980.

8. See *In re Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979); and *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

9. Weaver, Negri, and Wallace, pp. 253-54.

10. Connecticut General Statutes, Sec. 10-184 (1981).

11. See, for example, Delaware Code Annotated, Tit. 14, Sec. 2703 (1981); Idaho Code, Sec. 33-202 (1981); New Jersey Statutes Annotated, Secs. 18A:38-25 (N.J. 1968); and South Dakota Compiled Laws Annotated, Sec. 13-27-3 (Supp. 1981). See also Table B in Patricia Lines, "Private Education Alternatives and State Regulation," Education Commission of the States, Pub. No. LEC-82-3, March 1982.

12. Tennessee Statutes Annotated, Sec. 49, §201-§204 (1970).

13. North Carolina General Statutes, Sec. 155C-547 *et seq.* (Cum. Supp. 1981); Sec. 115C-555 *et seq.*

(Cum. Supp. 1981); and Sec. 115C-378 (Cum. Supp. 1981).

14. Washington Revised Code, Secs. 28A.02.201 *et seq.* and 28A.27.010 (1981).

15. See Table B of Lines, "Private Education Alternatives. . . ."

16. See, for example, Michigan Attorney General, Opinion No. 5579, 27 September 1979.

17. 268 U.S. 510 (1925), 534-35.

18. 262 U.S. 390 (1923).

19. 273 U.S. 784 (1927), 298.

20. 99 S.Ct. 1313 (1979).

21. 101 S.Ct. 2142 (1981).

22. 406 U.S. 205 (1972).

23. See, for example, *Meyerkeh v. State*, 173 Neb. 889, 115 N.W.2d 585 (1962); *Parr v. State*, 117 Ohio St. 23, 157 N.E. 553 (1927); *Stephens v. Bongart*, 15 N.J. Misc. 89, 189 A. 131 (1937); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *State v. Williams*, 56 S.D. 370, 228 N.W. 470 (1929); *State v. Freudenberg*, 166 Wis. 35, 163 N.W. 184 (1917); and *State v. Bailey*, 61 N.E. 730 (Ind. 1901).

24. See, for example, *United States v. Seeger*, 380 U.S. 163 (1965), in which the Court adopted a broad interpretation of the selective service law to avoid favoritism to individuals with more traditional theistic beliefs — a favoritism that would clearly violate the establishment clause.

25. See, for example, *Nagle v. Olin*, 64 Ohio St.2d 3-1, 415 N.E.2d 279 (1980), which dealt with a non-Amish parent sending a child to an unapproved Amish school; and *State v. Nobel*, Nos. S 791-0114-A and S 791-0115-A (Mich. Dist. Ct., Allegan County, 9 January 1980), which dealt with a mother who was teaching a child at home but who refused for religious reasons to obtain a teacher's certificate, although she met the requirements.

26. 107 Neb. 807, 507 N.W.2d 571 (1981).

27. 102 S.Ct. 75 (1981). Members of the congregation of Faith Baptist Church subsequently brought suit in federal court, seeking an injunction against the state to permit continuation of the school. The court dismissed the suit, relying primarily on the Supreme Court's decision to dismiss the appeal in *Prettyman v. Nebraska*, Civ. No. 82-0-154, D. Neb., 16 April 1982.

28. For a discussion of applicable cases, see Lines, "Private Education Alternatives. . . ."

29. *Ibid.* □



"Use my mind? At home?"

## NOTES

### Preliminary Findings

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

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

##### A. Primary and Secondary Schools

- 1) Five states exempt religious schools from some requirement(s) to which other private schools are subject.\*
  - a. Maryland
  - b. Nevada
  - c. Pennsylvania
  - d. Tennessee
  - e. Washington
  
- 2) Eight states do not require accreditation, approval, or licensure of any nonpublic school.\*
  - a. California
  - b. Delaware
  - c. Florida
  - d. Massachusetts
  - e. Minnesota
  - f. New Mexico
  - g. North Carolina
  - h. Wisconsin
  
- 3) One state, South Dakota, has removed all state standards from all nonpublic schools. Students in the nonpublic schools must take competency tests periodically to ensure that they are receiving adequate instruction.\*\*
  
- 4) Twenty-one states have voluntary, rather than mandatory, reporting by all nonpublic schools.\*

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

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

a. Colorado

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

b. Montana

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

#### B. Pre-schools

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

a. Arkansas; enacted 1981

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

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

b. Illinois

c. Virginia

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

a. Arizona

b. California

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

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

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

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\*\*\*\*Floyd Haberkorn  
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Washington, D. C.  
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# CHRISTIAN SCHOOL COMMENT

Vol. 13

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No. 8

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

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

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

### LEGAL/LEGISLATIVE SERVICES

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

### CONVENTIONS AND CONFERENCES

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

### ACCREDITATION AND CERTIFICATION

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

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

### STUDENT ACTIVITIES

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

### PROFESSIONAL COUNSEL

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

### PROFESSIONAL BOOKS

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

### REDUCED INSURANCE RATES

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

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

# .ecs ISSUEgram

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## 12. Compulsory Schooling and Nontraditional Education

### The Issue

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

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

## The Choice Before State Education Policy Makers

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

### How Many Children are in Unapproved Education Options?

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

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

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

### Education In An Unapproved Setting

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

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

### State Education Requirements

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

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

## Court Challenges

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

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

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

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

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

### Policy Alternatives

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

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

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

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

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

### Policy Questions

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

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

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

### Policy Implications

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

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

### Resources

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THE PRECEDING DOCUMENT(S) MAY NOT FILM  
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COMMENTS ON  
HOUSE BILL #357  
and  
SENATE BILL #307

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

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

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

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

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

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

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

ARTICLE VII. HEALTH, EDUCATION, AND WELFARE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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4/18/83  
PEG:hm

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SB 261 AND HB 357

Summary of the Legislation

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

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

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

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

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

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

### Constitutional Requirements

The changes set out in SB 261 and HB 357, as amended, are required to correct existing Alaskan laws which run afoul of the constitutional mandate requiring the states to avoid excessive entanglement in religious activities. The state's right to impose minimum requirements on private religious schools is very limited, because these religious activities are protected by the First Amendment of the United States Constitution and its identical counterpart in the Alaska Constitution, Art. I, sec. 4.<sup>1</sup>

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

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

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

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

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

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

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

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

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

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

Eventhough SB 261 and HB 357, as amended, would create two classes of private schools and treat them differently, these bills would not violate the Equal Protection clause of the Fourteenth Amendment. According to established legal principles<sup>5</sup>, the equal protection guarantee of the Fourteenth Amendment does not take from the state legislatures all power to classify persons or objects. The state may classify persons for the purpose of legislation. Classification is an inherent right and power of the legislature.

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

<sup>4</sup> Ibid.

<sup>5</sup> 16A Am Jur 2d, Constitutional Law, §746, et. seq.

<sup>6</sup> In addition, it must noted that the motivations for operating

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

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

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

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

\* Section 1. AS 14.07.020 (8) is amended to read:

(8) in cooperation with the Department of Health and Social Services, exercise general supervision over public and private pre-elementary schools and over the educational component of nurseries as defined in AS 47.35.080 (4) excluding pre-elementary schools and nurseries operated by a church or other nonprofit religious organization that is exempt from federal taxation provided the program does not receive state or federal funding; pre-elementary schools in this paragraph means schools for children ages three through five years when the schools' primary function is educational;

\* Section 2. AS 14.30.010 (b)(1) is amended to read:

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

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

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

(C) except as provided in (D) of this paragraph, attendance at a private school in which the average student proficiency is not less than the average proficiency found in the public schools in the area as measured by national achievement tests; the department with assistance from representatives of the private schools shall promulgate regulations defining the subject areas to be tested and the minimum average scores to be achieved; or

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

\* Section 3. AS 14.45.015 is added to read:

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

\* Section 4. AS 14.45.020 is repealed.

\* Section 5. AS 14.45.025 is added to read:

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

\* Section 6. AS 14.45.030. is amended to read:

Sec. 14.45.030. ATTENDANCE AND ANNUAL REPORTS REQUIRED.

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

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

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

\* Section 7. AS 14.45.035 is added to read:

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

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

(1) administer the state's program of education at the elementary, secondary, and adult levels, including, but not limited to, programs of vocational education and training, vocational rehabilitation, library services, correspondence courses, adult basic education, and fire-service training, but not including degree programs of postsecondary education or an educational program operated by a church or other nonprofit religious organization that is exempt from federal taxation if the program does not receive state or federal funding and if that school has elected to comply with the requirements of AS 14.45;

CHAPTER 60.  
PRE-ELEMENTARY (EARLY  
CHILDHOOD) SCHOOL

## Section

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

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

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

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

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

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

4 AAC 60.050. DURATION OF APPROVAL.

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

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

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

4 AAC 60.060. DISPLAY OF CERTIFICATE.

The certificate of approval must be displayed in a prominent place in the pre-elementary school.

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

4 AAC 60.090. RECORDS. The

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

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

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

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

4 AAC 60.100. PHYSICAL EXAMINATION FOR CHILDREN. (a) Not more than three months before first entering school, each child must have a tuberculosis skin test which meets the requirements of 7 AAC 27.213.

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

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

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

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

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

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

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

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

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

4 AAC 60.127. RECOGNITION OF SPECIAL NEEDS. At the age of three years, an exceptional child may receive special assistance as a part of the local school district's annual plan of services for special education. Any pre-elementary school which provides services for an exceptional child and receives state funds for providing those services must adhere to state guidelines for special education programs. (Eff. 4/20/73, Reg. 45; am 5/20/77, Reg. 62)

Authority: AS 14.07.020(8)  
AS 14.07.060  
AS 14.30.180

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

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

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

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

(b) A pre-elementary school must have

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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

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

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

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

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

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

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

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

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

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

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

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

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

Authority: AS 14.07.020(8)  
AS 14.07.060

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## Court Challenges

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

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

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

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

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

### Policy Alternatives

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

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

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

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

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

### Policy Questions

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

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

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

### Policy Implications

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

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

### Resources

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Segregation Academies: The Growing Protestant  
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Los Angeles," Phi Delta Kappan, Dec. 1980.

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

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

1 I. Introductory statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25

2

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

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