ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2404 SHESS HB 357 - HB 418

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With this in mind H.B. 54 demonstrates no rational, much less compelling state interest, in exempting facilities from licensure simply because they happen to receive no state or federal money and are associated with a religious organization.

The source of the facilities' funds and its association with a religious association simply does not appear to be connected in any way with whether or not these children deserve the same protection from abuse, neglect or hazardous circumstances as children in secular centers.

Likewise the source of the facilities' money and association with a religious organization does not appear to justify compelling a secular facility to spend the money and resources necessary to comply with the original act when the religious facilities operate the identical type of business enterprise.

Since there is no language in the original act which appears to authorize the Child Care Board to interfere with the religious beliefs of any church, this exemption seems irrelevant to any need to protect the First Amendment rights of religious groups.

However, if a religion's beliefs are manifested in practices which may threaten the safety and well being of children, then the state through its police power and the doctrine of parens patriae can and should lawfully discover and prevent such dangers. See Cude v. State, 237 Ark. 927, 377 S.W.2d 816.

In the Cude case the Arkansas Supreme Court overruled parents' religious objections to having children vaccinated, saying that the state's police power superceded the dangerous beliefs of parents which threaten the well being of the children. The Court quoting the United States Supreme Court in Prince v. Massachusetts, 321 U.S. 158, said:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death.
>
> . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Again however, it is important to note that the intent of the original legislation has nothing whatsoever to do with parents' religious rights or the rights of a religious association but simply with the

protection of all children, religious or not, in facilities which are religious or secular.

Therefore any argument that this exemption is necessary to protect the First Amendment rights of the prospectively exempt facilities is without support from any language in H.B.54.

In fact the bill itself appears that it may violate the doctrine of church/state separation by awarding an unjustifiable benefit to religious organizations not enjoyed by private facilities which operate identical enterprises.

Without a justifiable secular legislative purpose which neither advances or inhibits religion, the bill is, in fact also suspect from the point of view of the First Amendment. Roemer v. Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179

Again, it is difficult to see, from the bill itself, a secular and neutral legislative purpose for exemption of only the religious facilities. Rather it appears that this legislation is clearly intended to further the alleged religious interests of certain denominations since there is no rational justification for the exemption in view of the legislative purpose quoted above.

The courts, in reviewing a challenge to this bill, can look behind the legislation into the history of the bill, something that has been done recently in McLean v. Board of Education,529 F.Supp. 1255 (E.D. Ark. 1982) and Epperson v. Arkansas, 363 U.S. 97, 89 S.Ct. 260, 21 L.Ed. 2d 228 (1968).

Since the burden is on those defending a discrimination to make out a claim for justification (Wengler v. Druggist Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107) I can advise you that this bill presents no such justification and the state could therefore not carry that burden in a court action.

It is important to remember that:

1. Many children in the so-called religious centers are not members, nor are their parents, of the religious facility seeking exemption. So again the particular beliefs of the religious association are irrelevent to protecting the children at the facility. Circle H and Faith Christian homes recruit children from all over Arkansas regardless of the children's religion at the time of their arriving at these facilities. The Alamo foundation solicits new born babies from all over the nation totally disregarding any beliefs of the child.

There is simply no rational justification for denying these children protection of state law because the institution they end up in, through no choice of their own, has a religious objection to licensure.

2. This exemption would not have protected Circle H Ranch because records at social services reflect it received well over $100,000 in state and federal aid.

3. Many of these children come from broken homes, and have learning disabilities which require expert counseling and often special education which, as Judge Barrier found in the Circle H case, are not available at some of these facilities. These are children who need society's protection and assistance.

4. Health department inspections are inadequate to insure the safety of children because they do not have specific day care rules and regulations to address vital areas of the operation of a child care center such as playground safety, etc. The same is true with the Fire Marshal. Such problems were observed at the Alamo Foundation where an unfenced swimming pool and unfenced fishing pond were less than 100 feet from a playground serving 70 children.

5. Current criminal laws against child abuse are not adequate to protect children in these centers because: (1) These laws cannot operate without a report of abuse by a witness. At some facilities absolute loyalty is the rule and therefore it is unlikely that employees will file such a complaint; (2) Employees at other centers are not likely to report abuse because it may cost them their job; (3) Criminal statutes don't authorize closing the facility where abuse or neglect is practiced. They only allow prosecution of individuals. And if the only witnesses are children who are too young to testify, there is no case to take to a prosecutor although the abuse, unreported, is nonetheless occuring.

In conclusion, House Bill 54 is constitutionally suspect as being without rational justification and thus discriminates both against a large class of children and the owners and operators of secular facilities.

I am informed of the likely prospect of an immediate court challenge if the bill is enacted. In that eventuality, it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned.

If I may be of assistance in providing additional information on this or other proposed legislation, please do not hesitate to contact this office.

Sincerely,

STEVE CLARK
Attorney General

SC:mgv

Minister Promises to Close School, Is Freed

LOUISVILLE, Neb.—A fundamentalist preacher was freed from jail yesterday after promising to temporarily close his nonaccredited Faith Christian School in Louisville.

During a brief hearing before Cass County District Judge Raymond Case, the Rev. Everett Sileven pledged that he would shut down the school until the end of November or the end of the special session of the Nebraska Legislature scheduled to start start Nov. 5, whichever comes first.

The legislative session was called to deal solely with state budget problems, but supporters of the school will try to convince senators to take up the issue. If the matter is not resolved by that time, Sileven said he would return to jail.

The national secretary of the Moral Majority, Greg Dixon of Indianapolis, attributed Sileven's release to teachers from around the country who have been in Cass County all week to support the school.

Several times during the five-year-old dispute over the pastor's refusal to use state-certified teachers, Sileven has promised to close the school, only to reopen it later.

Minister Again Freed in School Case

Washington Post 9/1/82

PLATTSMOUTH, Neb.—The Rev. Everett Sileven, head of the Faith Christian School, was released from jail yesterday for the fourth time and prayed that officials who jailed him for four months for operating an illegal church school be converted, killed or restrained from interfering with his ministry.

Sileven, pastor of Faith Baptist Church in Louisville, who had been sentenced for refusing to use state-certified teachers, said on the jailhouse steps:

"Well, it's good to be out . . . . I do ask in the authoritative name of Jesus, the supreme law of the universe, that God Almighty bind the officials of the state of Nebraska and Cass County from further interference with the ministry of God at Faith Baptist Church and the saints of God of Nebraska by either converting them or restraining them or removing them or killing them."

He declined further comment. The Associated Press called his home for elaboration on his condemnation of officials, but the wife of his associate pastor said Sileven had no more to say. Sileven was sentenced to jail nearly a year ago.

He was freed three times last year when he temporarily closed the school, only to reopen it again and he returned to jail.

The school's legal battle has spanned five years.

The U.S. Supreme Court refused to hear the case.

AROUND THE NATION

License Issue's 'Other Side' Seen

Ark. Gazette 1/24/83

According to a report in the January 27 issue of the *Arkansas Baptist Newsmagazine*, a Southern Baptist newspaper in the state, "both local churches and state denominational leaders appear to be squarely on the other side" from those who believe that licensing of religious-affiliated child care facilities is a violation of the principle of separation of church and state.

Johnny Biggs, director of Child Care Services for the Baptist State Convention, said his agency has "not found state licensing to be an infringement of our religious liberty."

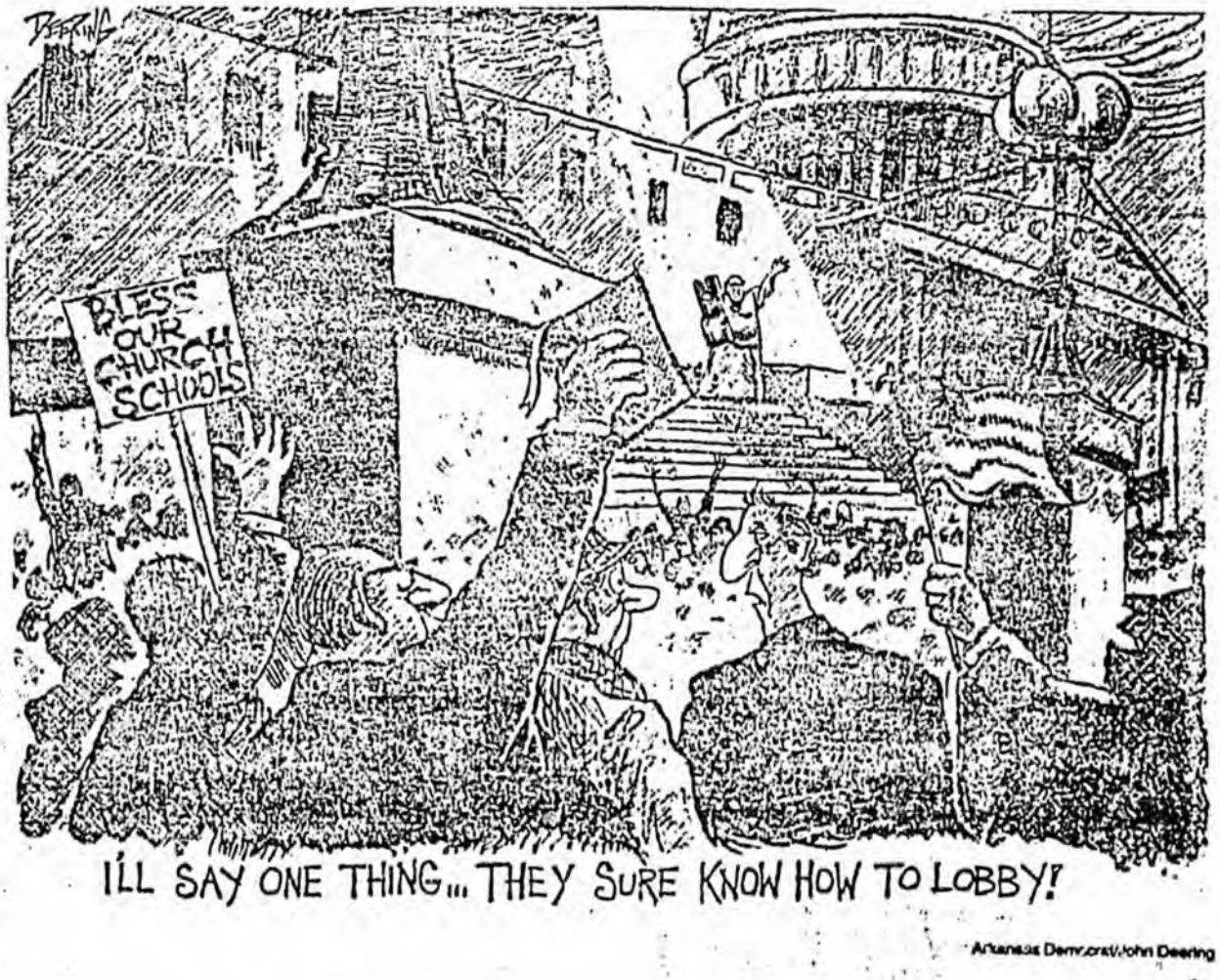
The article said that none of the church-sponsored child care facilities that have applied for exemption are associated with a Southern Baptist church or child care center.

Marilyn Hall, director of the child development center at Park Hill Baptist Church in North Little Rock, called licensing "just for the protection of the child."

"They [state officials] in no way tell us what to teach," Hall said. "They don't even talk about curriculum. They give us good guidelines to work from as far as establishing the proper ratio of teachers to children, amount of room per child and in making nutritious meals."

Cult Activity Observed

WALLA WALLA, Wash. (AP) — University of Washington sociologist Rodney Stark says religious cults appear stronger where traditional religions are weakest. He says that ratio shows up on the West Coast where church membership is lowest but where cult activity is high.



Voices page airs views

ARKANSAS GAZETTE, Saturday, January 29, 1983

JOHN S. HORNMAN Gazette Staff

Church, State, Children

NOT SINCE THE creation-science bill has Arkansas seen so much excitement over a religious issue — or a supposed religious issue — as that

generated by the question of state licensing of religious-affiliated child care facilities.

At a "religious freedom" rally Wednesday, the rotunda of the State Capitol was packed to overflowing with an excited crowd of folk from Christian schools throughout the state. They had come in response to pleas from fundamentalist ministers and Moral Majority leaders to defend the principle of separation of church and state.

The separation principle is worthy of such gatherings, and more. But there's a problem with Wednesday's rally, as with much of the other uproar relating to House Bill 54 and Senate Bill 96: The matters at hand are not, in essence, church-state separation issues. They are matters relating to the state's responsibility to care for its citizens.

Indeed, judging from the crowd at Wednesday's rally, most of the participants were from institutions that are not even affected by the proposed measures. They were, by all indications, from Christian schools for older youth.

One can understand how those who censing are a minority. That fact would be irrelevant if the issue were truly one of church-state separation. Matters of principle are not determined by popular vote.

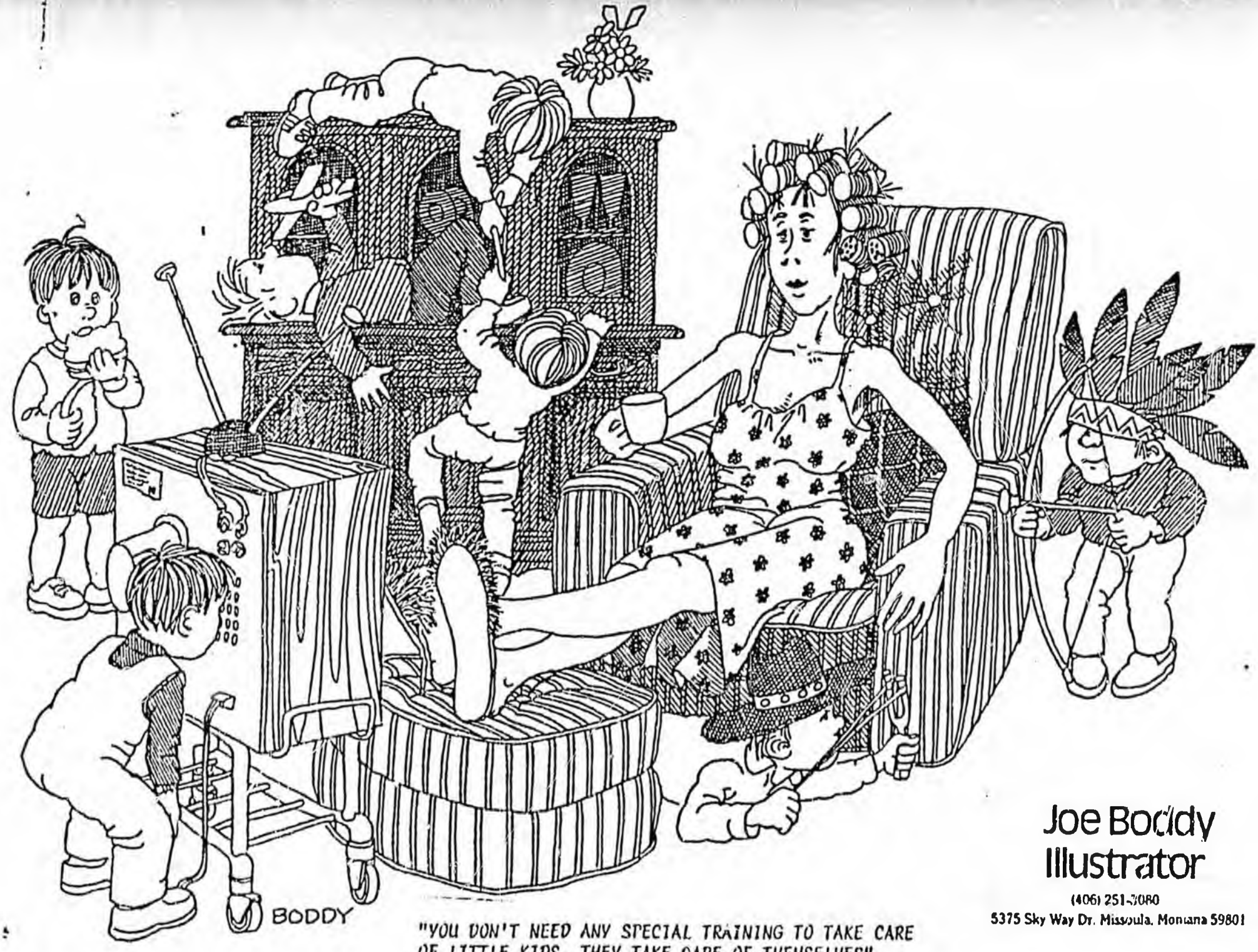
But it is important to know that the large majority of religious-affiliated child care agencies are on record favoring license by the state.

The National Association of Homes for Children, a principal professional organization, long has opposed "action by any state body that would exempt any residential group care agency from minimum licensing standards." More than half of that organization's 460 agencies, in every state in the union, are religious-affiliated.

The issue could conceivably be different — though there remains some question even here — if church groups were operating such facilities solely for their own congregations. But these are churches that have entered the public arena. They are dealing with citizens for whom the state quite properly has a responsibility.

It long has been established in law that the state has responsibility to guard against abuse of any of its citizens — including abuse of children by their parents.

Rather than to try to circumvent, or seek exemption from sharing in the protection of children, religious groups should be the first to support such a benevolent concern.



"YOU DON'T NEED ANY SPECIAL TRAINING TO TAKE CARE OF LITTLE KIDS, THEY TAKE CARE OF THEMSELVES"

Joe Boddy
Illustrator
(406) 251-3080
5375 Sky Way Dr. Missoula, Montana 59801

BANGOR BAPTIST CHURCH, et al., Plaintiffs,

v.

STATE OF MAINE, DEPARTMENT OF EDUCATIONAL AND CULTURAL SERVICES, and Harold Raynolds, Jr., Commissioner, Defendants.

Civ. A. No. 81-0180-B.

United States District Court, D. Maine.

Oct. 26, 1982.

Action was brought by fundamentalist Christian churches, teachers, pastors, parents and association of fundamentalist

schools against Maine Department of Educational and Cultural Services alleging that Maine compulsory education laws violate the First, Ninth and Fourteenth Amendments. On defendants' motion to dismiss, the District Court, Cyr, J., held that: (1) Maine statute requiring every child between seven and 17 to attend public school unless receiving "equivalent instruction" in a private school, provided that equivalent instruction was approved by commissioner, was not overbroad; (2) regulatory requirement of "equivalent instruction" was not facially vague; (3) regulatory requirements of information concerning school philosophy and financial information and teacher certification and pupil-teacher ratios in elementary schools were not ultra vires; but (4) summary judgment was inappropriate on fundamentalist Christians' free exercise and establishment laws claims.

Motion granted in part and denied in part.

1. Federal Civil Procedure ⇐2544

Defendants had to satisfy district court that there were no material facts in dispute and that they were entitled to judgment as matter of law in light of all disputed facts and any reasonable inferences from those facts, viewed in light most favorable to plaintiffs; summary judgment had to be denied if there remained the slightest doubt as to any material fact.

2. Constitutional Law ⇐84

Test in determining whether regulation of religiously motivated conduct violates the free exercise clause contemplates determination whether challenge is motivated by and rooted in legitimate and sincerely held religious belief, whether and to what extent state regulation burdens free exercise rights and whether any such burden is justified by sufficiently compelling state interest. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84

Governmental regulation which significantly burdens free exercise of religion cannot withstand constitutional challenge unless it represents the least restrictive means of achieving compelling state interest but exemption of religious activity from regulation is not constitutionally required where it would unduly interfere with fulfillment of compelling governmental interest. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐84

Although at least some state regulation may be imposed upon private schools attended by students of compulsory school age, Christian fundamentalists were entitled to present evidence at trial that Maine's compulsory education laws and regulations burdened their religiously motivated activities and state defendants would bear burden of proving that any governmental regulation which did burden free exercise of religion represented least restrictive means of achieving compelling state interest. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐42(1)

The constitutional rights of others may be asserted by one whose compliance with a legal duty would deny others their constitutional rights.

6. Courts ⇐107

Federal Courts ⇐480

Summary disposition of appeal by United States Supreme Court results in judgment on merits even though there has been no briefing, oral argument or written opinion but rationale of affirmance may not be gleaned solely from opinion below and summary action, which has precedential value in virtually indistinguishable cases and in cases involving but slightly different facts and issues, should not be understood as breaking new ground.

7. Courts ⇐107

Federal Courts ⇐513

Supreme Court's summary dismissal of appeal from Nebraska decision which upheld judgment enjoining operation of elementary and secondary Christian schools for failure to comply with school approval requirements similar to those imposed in Maine did not entitle state defendants to

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8. Constitutional Law ⇐

Where Maine's comp
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9. Constitutional Law ⇐

Once it appears that
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10. Constitutional Law ⇐

Overbreadth doctrine
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11. Schools ⇐160

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subd. 3, 1281, 1286; U.S.C.
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12. Constitutional Law ⇐

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summary judgment in Christian fundamentalists' action challenging provisions of Maine compulsory education laws since it had not been shown that Supreme Court accepted reasoning of Nebraska court. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84

Where Maine's compulsory education regulatory scheme imposed some burden on fundamentalist Christians' religious practices, state defendants had to show that no excessive entanglement would result from imposition of educational scheme upon fundamentalist Christians and their private schools and it was no answer that they should submit requested information, in whatever form, and await litigation "down the line" if and when specific disputes arose. 20 M.R.S.A. § 1281; U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⇐82(4)

Once it appears that statutory challenge implicates constitutionally protected conduct, court will require greater degree of statutory specificity than in nonconstitutional context.

10. Constitutional Law ⇐82(4)

Overbreadth doctrine is predicated on belief that persons whose conduct is constitutionally protected may refrain from exercising their rights for fear that to do so would constitute violation of law, thus insulating statute from constitutional challenge, but before statute may be invalidated on its face for overbreadth, overbreadth must be substantial.

11. Schools ⇐160

Maine's compulsory education laws and regulations are not unconstitutionally overbroad. 20 M.R.S.A. §§ 102, subd. 7, 911, subd. 3, 1281, 1286; U.S.C.A. Const.Amend. 14.

12. Constitutional Law ⇐251.4, 253.2(1)

A challenge predicated on unconstitutional vagueness implicates dual principles of due process, requiring fair notice of line between lawful and unlawful conduct and sufficiently explicit legislative limitations on discretion of law enforcement officials to avoid arbitrary and discriminatory enforcement. U.S.C.A. Const.Amends. 5, 14.

13. Constitutional Law ⇐82(4)

A statute may neither forbid nor require doing of act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

14. Constitutional Law ⇐82(4)

A statute is unconstitutionally vague on its face if it is expressed in such general terms that no standard of conduct is specified at all but facial vagueness challenge can succeed only when statute cannot validly be applied to any conduct.

15. Schools ⇐8

Maine's requirement that students not attending public schools receive "equivalent instruction" was not unconstitutionally vague on its face since term "equivalent" was not so vague that persons of common intelligence would necessarily have to guess at its meaning and differ as to its application and since term was capable of objective measurements and had core meaning that could reasonably be understood. 20 M.R.S.A. § 911, subds. 3, 3, pars. A, B; U.S.C.A. Const.Amend. 14.

16. Schools ⇐164

Since Maine statute which authorizes Commissioner of Educational and Cultural Services to prescribe courses of study and to withdraw school approval "for cause" had potential of affecting First Amendment rights of Christian fundamentalists', vagueness doctrine demanded narrowly drawn, definite and reasonable standards for guidance of administering officials. 20 M.R.S.A. § 102, subd. 7.

17. Administrative Law and Procedure ⇐749

Presumption that administrative rules are valid when statute specifically delegates to administrative agency power to make rules is rebuttable on showing that challenged regulation is unreasonable exercise of delegated power.

[515]

18. Schools ⇐7, 8

Maine Department of Educational and Cultural Services' regulations requiring submission of statement of educational philosophy, goals and course of study of private school, requiring statement of private school's financial position and policies, and requiring that all teachers hold valid teaching certificate and that all schools maintain pupil-teacher ratio of not more than 30 to 1 represented reasonable exercise of power delegated to State Board of Education and thus were not ultra vires. 20 M.R.S.A. §§ 21, 51, 51, subd. 3, par. B, 102, subd. 7, 1281, subd. 4, 1286; 5 M.R.S.A. § 8051 et seq.

19. Federal Civil Procedure ⇐2481

Maine Board of Education's regulatory requirement of school approval prior to commencement of operations of private school may have transformed truancy scheme selected by legislature for enforcement of compulsory educational laws into unauthorized administrative system for licensing of private schools, and thus state defendants' contention that administrative convenience warranted licensing and closing of private schools provided insufficient basis for summary judgment on fundamentalist Christians' constitutional claim that regulatory prohibition against operation of unapproved schools was ultra vires. 20 M.R.S.A. §§ 911, subds. 5, 6–A, 6–A, pars. A-D, 7, 8, 914.

Kevin M. Cuddy, Bangor, Me., William B. Ball, Philip J. Murren, Kathleen A. O'Malley, Harrisburg, Pa., for plaintiffs.

Ellen E. George, William R. Stokes, Asst. Attys. Gen., Augusta, Me., for defendants.

MEMORANDUM DECISION

CYR, District Judge.

The Court is presented with a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, which is accompanied by matters outside the pleadings, not excluded by the Court, and is to be treated as a motion for summary judgment. Fed.R.Civ.P. 12(b). *Medina v. Rudman*, 545 F.2d 244, 247 (1st Cir.1976). The parties have supplemented the record, both before and after oral argument, with affidavits and memoranda of law.

The plaintiffs include fundamentalist Christian churches, teachers, pastors, parents and an association of fundamentalist Christian schools. The defendants are the Maine Department of Educational and Cultural Services [Department] and the Commissioner of Educational and Cultural Services [Commissioner].

The amended complaint, which seeks declaratory and injunctive relief, as well as costs and counsel fees, alleges that certain provisions of the Maine Compulsory Education Law,[1] 20 M.R.S.A. §§ 102.7, 911.3, 1281 & 1286, are violative of the First, Ninth,

1. On April 15, 1982 the Maine Legislature repealed the education laws codified in title 20, Maine Revised Statutes Annotated, and enacted title 20–A, effective July 1, 1983. *See* 1982 Me.Legis.Serv. No. 4, Laws 1982, c. 693.

Part 2, chapter 117, subchapter I of the new education laws sets out the approval requirements and procedures applicable to private schools. The five sections of the subchapter read as follows:

§ 2901. Requirement for basic school approval

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

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

2. Is either:

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

B. Meets the department's requirements for approval for attendance purposes under section 2902.

§ 2902. State requirements

Private schools approved for attendance purposes by the department shall:

1. *Immunization.* Comply with the immunization provisions under section 6351;

2. *Language of instruction.* Use English as the language of instruction except as specified under section 4602;

3. *Courses required by statute.* Provide instruction in history as specified under section 4601, subsection 1 and English as specified in section 4601, subsection 2;

4. *Commissioner's basic curriculum.* Provide instruction in the basic curriculum es-

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and Fourteenth Amendments to the Constitution of the United States.

The fundamental statutory provision brought under constitutional challenge by the plaintiffs is 20 M.R.S.A. § 911, which requires every child between the ages of 7 and 17[2] to attend a public school, unless receiving "equivalent instruction in a private school ... [provided] the equivalent instruction is approved by the commissioner."

Title 20, Maine Revised Statutes Annotated, section 102.7, which directs the defendant commissioner, *inter alia*, to "...

> tablished by rule by the commissioner under section 4601, subsection 4;
>
> 5. *Certified teachers.* Employ only certified teachers;
>
> 6. *Secondary schools.* For private secondary schools:
>
> A. Meet the requirements of a minimum school year under section 4801;
>
> B. Provide a school day of sufficient length to allow for the operation of its approved education program;
>
> C. Have a student-teacher ratio of not more than 30 to one;
>
> D. Include not less than 2 consecutive grades from 9 to 12; and
>
> E. Maintain adequate, safety (sic) protected records; and
>
> 7. *State board rules.* Meet the requirements applicable to the approval of private schools for attendance purposes established by the state board pursuant to section 405, subsection 3, paragraph E.
>
> *§ 2903. Governing body requirements*
>
> Nothing in this subchapter shall restrict the authority of the governing body of a private school to require additional subjects to be taught in their school.
>
> *§ 2904. Removal of basic approval*
>
> 1. *Commissioner may remove basic approval.* Notwithstanding any other provision of law, the commissioner may remove basic approval from any private school for failure to meet applicable approval requirements.
>
> 2. *Procedural requirements.* Whenever a school fails to meet these requirements the commissioner shall:
>
> A. Give due notice; and
>
> B. Hold a hearing.
>
> 3. *Hearing.* The hearing on removal of basic approval shall be in accordance with the applicable provisions of the Maine Administrative Procedure Act, Title 5, chapter 375 and rules of the state board adopted pursuant to section 405, subsection 3, paragraph E.
>
> *§ 2905. Nonrenewal of basic approval*
>
> The decision of the commissioner on nonrenewal of basic approval of any school applying for renewal shall be in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375 and rules adopted by the State Board of Education under section 405, subsection 3, paragraph E.

The provisions regarding course requirements referred to in § 2902 are as follows:

> *§ 4601. Basic curriculum*
>
> 1. *Required courses in American and Maine history.* The following courses shall be required.
>
> A. American history and civil government, including the Constitution of the United States, the Declaration of Independence, the importance of voting and the privileges and responsibilities of citizenship, shall be taught in and [be] required for graduation from all elementary and secondary schools both public and private.
>
> B. A course in the history [of Maine], including the Consutution of Maine, Maine geography and the natural and industrial resources of Maine[,] shall be taught in at least one grade from grade 7 to grade 12, in all schools, both public and private.
>
> 2. *English.* Four years of English shall be required for graduation from a secondary school.
>
> ....
>
> 4. *Courses prescribed by the commissioner.* The commissioner shall prescribe by rule the basic curriculum to be taught in public schools.

The minimum school year requirements referred to in § 2902(6)(A) are as follows:

> *§ 4801. School days*
>
> The following provisions shall apply to school days.
>
> 1. *Number.* A school administrative unit shall make provision for the maintenance of all of its schools for at least 180 days a year. At least 175 days shall be used for instruction. In meeting the requirement of a 180-day school year, no more than 5 days may be used for in-service education of teachers, administrative meetings, parent-teacher conferences, records' days and similar activities.
>
> A. The commissioner may reduce or waive the minimum number of days required on application from a school board. The application must be supported in writing with a statement of the reasons for the request.

Section 405(3)(E) of the new law, referred to in § 2902(7), reposes in the State Board of Education [Board] the power and duty to "[a]dopt or amend rules on requirements for approval and accreditation of elementary and secondary schools."

2. Exceptions to this requirement are found in 20 M.R.S.A. § 911.1.A.

prescribe the studies to be taught in the public schools and in the private schools approved for attendance . . ."[3] and permits the Commissioner to "remove basic approval from any school for cause," is also assertedly unconstitutional.

Plaintiffs further challenge various requirements for the approval of private *secondary* schools imposed pursuant to 20 M.R.S.A. § 1281 (Supp.1981), which mandates that "[t]he secondary schools of this State shall be evaluated for basic approval . . ." and establishes ten basic requirements.[4] The specific requirements for state approval of *private* secondary schools to which plaintiffs object are: (1) that each school maintain "a course of study approved by the defendant commissioner;"[5] (2) that

3. 20 M.R.S.A. § 102.7 (Supp.1981). Section 102.7 further provides:

> American history and civil government, including the Constitution of the United States and the Declaration of Independence, the importance of voting and the privileges and responsibilities of citizenship, shall be taught in all schools of elementary and secondary grades, both public and private, and American history and civil government shall be required for graduation from all elementary schools, both public and private . . .; [a] course in history, geography and the natural and industrial resources of Maine shall be taught in at least one grade from 7 to 12, in all school systems, both public and private.
>
> The officers in charge of a private school founded after September 3, 1965 shall furnish the commissioner with a copy of the course of study arranged by said officers.
>
> . . . .
>
> Notwithstanding any other section of law, the commissioner may remove basic approval from any school for cause. Whenever a school fails to meet requirements, the commissioner shall give due notice and shall hold a hearing. If the school fails to comply and does not take necessary remedial action, the commissioner may remove basic approval.

20 M.R.S.A. § 102.7 (Supp.1981).

4. *§ 1281. Requirements*

> The secondary schools of this State shall be evaluated for basic approval and may be evaluated for accreditation. No school shall be given basic approval for attendance, tuition or subsidy purpose (sic) within this Title unless it meets the following requirements:
>
> 1. *Course of study approved.* It maintains a course of study approved by the commissioner. [20 M.R.S.A. § 1281(1) (1964)].
>
> 2. *Length of school day.* It has a school day of sufficient length to allow the operation of its educational program as approved by the commissioner.
>
> 3. *Minimum school year.* It has a minimum school year of 180 school days, of which not less than 175 shall be actual school days and no more than 5 may be devoted to in-service education of teachers, administrative meetings, parent-teacher conferences, record days and other such teacher work activities. The State Board of Education shall have the right to reduce or waive the minimum number of days required upon application from any school committee, board of directors or board of trustees of any academy in the State, such application to be supported in writing with a statement of the reasons for such request.
>
> 4. *Certified teachers.* It employs only certified teachers.
>
> 5. *Pupil-teacher ratio.* It has a pupil-teacher ratio of not more than 30 to one. [20 M.R.S.A. § 1281(5) (1964)].
>
> 6. *Hygienic facilities and equipment.* It has safe and hygienic facilities, adequate equipment and supplies, all of which comply with the regulations established by the Department of Human Services and the Department of Educational and Cultural Services.
>
> 7. *Consecutive grades.* It is organized to include not less than 2 consecutive grades from 9 to 12.
>
> 8. *Requirements for graduation.* The requirements for graduation shall include American history and 4 years of English in a planned program approved by the Commissioner of Education. Notwithstanding the foregoing, a student who has satisfactorily completed the freshman year in a degree-granting institution may receive a secondary school diploma from the school he last attended.
>
> 9. *Records.* It has adequate, safely protected records. [20 M.R.S.A. § 1281(9) (1964)].
>
> 10. *Size.* Any public school enrolling fewer than 100 pupils may be approved by the State Board of Education on an emergency or continuing basis only after the school committee or board of directors have (sic) presented in detail reasons for such emergency or continuing approval. Any such school which is adjudged by the board to be geographically isolated shall receive the board's approval for a 6-year period subject to the right of the board to terminate its approval, on the ground of size, only if the school receives at least 5-years' notice of such termination, and subject also to the satisfactory meeting in every case of the other requirements of this section.

20 M.R.S.A. § 1281 (Supp.1981).

5. The amended complaint also alleges that 20 M.R.S.A. § 1286 interferes with "the religious mission of the [plaintiff] churches." The challenge to § 1286 does not, however, pose any additional or different issues not raised by the challenge to § 1281.1.

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each school employ "only certified teachers;"[6] and (3) that each school have "a pupil-teacher ratio of not more than 30 to one."[7]

Plaintiffs contend that the Commissioner has sought to impose these statutory requirements and various regulations promulgated in furtherance thereof upon plaintiffs' church-schools. Plaintiffs assert that they have refused to comply for reasons of religious conviction, insofar as the statutes and regulations require greater burdens than plaintiffs acknowledge to be the lawful province of the defendants to impose. Plaintiffs insist that compliance would substantially limit and interfere with their religious mission and permit state surveillance of church-schools, review of their church-school programs and other excessive entanglements.

The amended complaint pleads constitutional violations in five counts: (1) violation of the Free Exercise Clause of the First Amendment and denial of parental rights guaranteed by the Ninth Amendment; (2) violation of the Establishment Clause of the First Amendment; (3) violation of the Due Process Clause of the Fourteenth Amendment, in that the challenged statutes and regulations promulgated thereunder are "impermissibly vague, overbroad, *ultra vires* and improperly delegate legislative authority to administrative personnel;" (4) violation of the First, Ninth, and Fourteenth Amendments, by depriving plaintiffs of parental, property, and enterprise rights; and (5) violation of the First, Ninth, and Fourteenth Amendments, by denying plaintiffs their rights "in education to express, transmit, or receive ideas."

The defendants deny most of the material allegations of the amended complaint for the reason that they are without sufficient knowledge or information upon which to form a belief as to the truth of the matters asserted. Defendants invoke the ancillary jurisdiction of the Court by way of counterclaim against nine church-school plaintiffs and against persons, known and unknown to defendants, charged with the direction of the church-school defendants-in-counterclaim, for declaratory and injunctive relief aimed at the implementation of the compulsory education laws of the State of Maine. The second claim for relief asserted in defendants' counterclaim seeks a judicial declaration that certain church-school plaintiffs cannot qualify for initial school approval absent prior compliance with state health, sanitation, fire, and safety requirements. Plaintiffs admit that the nine church-school defendants-in-counterclaim are operating private schools without the approval of the Commissioner and that they have refused to provide the information required by the Commissioner, except information relating to state fire, safety, health and sanitation standards.[8] By way of affirmative defense to the counterclaims, the defendants-in-counterclaim reassert each of the constitutional claims alleged in their amended complaint and further allege that the plaintiffs-in-counterclaim will suffer no irreparable harm and have an adequate remedy at law.

I

FACTS

Title 20 M.R.S.A. § 911.1.A mandates that "[e]very child between his 7th and 17th birthdays shall attend a public day school during the time it is in session." However, "[a] child shall be excused from attending a public day school if he obtains equivalent instruction in a private school ... if the equivalent instruction is approved by the

6. The amended complaint alleges that "... plaintiff Churches employ teachers in their schools who, while proficient instructors ..., do not hold Maine State teaching certificates."

7. The amended complaint challenges the requirement of 20 M.R.S.A. § 1281.10 as to school size. But that subsection is applicable to public schools only.

8. At oral argument on the pending motion for summary judgment, counsel represented that plaintiffs do not challenge and will comply (or have complied) with the requirements relating to fire, safety, health, and sanitation. In so doing, however, plaintiffs concede no right on the part of the Department or the Commissioner to condition prior approval of their church-schools upon compliance with these standards.

commissioner." 20 M.R.S.A. § 911(3)(A). For purposes of exercising his statutory responsibility under this provision, the Commissioner is guided by: (1) the regulations of the State Board of Education,[9] issued pursuant to 20 M.R.S.A. § 51(3)(B), establishing requirements for approval of elementary and secondary schools; (2) the regulations of the Board, issued under 20 M.R.S.A. § 59, regarding certification of teachers; (3) the studies required to be taught, as prescribed in 20 M.R.S.A. § 102(7); (4) the rules issued by the Commissioner regarding such studies; (5) the requirements for approval of secondary schools, established by 20 M.R.S.A. § 1281; and (6) various provisions of title 22 M.R.S.A. and of the rules and regulations of the Department of Human Services, prescribing state health and sanitation standards applicable to schools, and of the Life Safety Code, containing fire safety standards issued by the Department of Public Safety pursuant to title 25 M.R.S.A.

The Department issues regulations, codified at 05–071 CMR 127, sections 1 and 2, prescribing the minimum instructional requirements for public schools and for private schools approved for attendance purposes under 20 M.R.S.A. § 911(3).

The qualification and procedural requirements for teacher certification are set forth in the regulations of the Department, codified at 05–071 CMR 115. The regulations governing school evaluation procedures and prescribing standards for obtaining school approval are codified at 05–071 CMR 125, as modified by an "Addendum" issued in September, 1981 which further explains the procedures for obtaining private sectarian school approval. These three sets of regulations are at the heart of plaintiffs' constitutional challenges and for that reason are summarized in the Appendix.

II

LAW

[1] Defendants insist that there is no genuine issue as to any material fact respecting any of plaintiffs' claims for relief and that defendants are entitled to judgment as a matter of law. Plaintiffs have not moved for summary judgment on any of their claims for relief or on either of defendants' counterclaims. Defendants assert that their supporting affidavits have not been met by the plaintiffs with opposing affidavits setting forth specific facts raising any genuine issue for trial. See Fed.R.Civ.P. 56(e). For their part, plaintiffs point out that the pending motion may not be used as a vehicle for turning an adversary proceeding into a trial by affidavit, see *Thyssen Plastik Anger KG v. Induplas, Inc.*, 576 F.2d 400, 402 (1st Cir.1978); *Redman v. Warrener*, 516 F.2d 766, 768 (1st Cir.1975), and that the parties are entitled to try the material facts in genuine dispute, see *Associated Press v. United States*, 326 U.S. 1, 6, 65 S.Ct. 1416, 1418, 89 L.Ed. 2013 (1945).

Defendants must satisfy the Court that there are no material facts in dispute, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Ramsay v. Cooper*, 553 F.2d 237, 240 n. 8 (1st Cir.1977), and that defendants are entitled to judgment as a matter of law in light of all undisputed facts and any reasonable inferences which may be drawn from those facts, viewed in the light most favorable to the plaintiffs, see *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 829 (1st Cir.1982). Summary judgment must be denied where there remains the *slightest doubt* as to any material fact. *United States v. Del Monte De Puerto Rico, Inc.*, 586 F.2d 870, 872 (1st Cir. 1978); *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948). There are numerous material facts in genuine dispute and, with but few exceptions, it is far from clear that defendants are entitled to judgment as a matter of law in light of the undisputed facts

9. The State Board of Education is organized within the Department of Education and Cultural Services. 20 M.R.S.A. § 1-A.

A. *Free Exercise—Parental Rights—Right to Receive and Express Ideas—Counts I, IV and V*

Counts I, IV and V present interrelated constitutional claims. Count I alleges that the compulsory education laws impose prior restraints upon plaintiffs' federal and state constitutional rights to the free exercise of their religion and deny the parent-plaintiffs' Ninth Amendment rights to determine the religious education of their children. It is alleged that enforcement of the compulsory education laws and regulations would deprive the church-plaintiffs "of their liberty to freely carry out their religious mission in the form of Christian education" and "chill, if not destroy," the evangelical ministry of the pastor-plaintiffs "in the religious mission of the schools in their charge." The school principal- and teacher-plaintiffs assert that they would "be denied entirely the right to carry out a calling to the religious ministry of educating young Christians." Plaintiffs contend that no compelling state interest justifies the burden placed on their religious freedoms and that if any such interest exists it can be achieved through less restrictive means.

Count IV alleges that these state-imposed requirements would deprive plaintiffs of their parental rights and their property and enterprise rights under the First, Ninth and Fourteenth Amendments, and under Article 1, sections 1 and 6-A of the Constitution of the State of Maine.

Count V claims deprivations of plaintiffs' rights "in education to express, transmit or receive ideas," as guaranteed by the First, Ninth and Fourteenth Amendments, and by Article 1, sections 3 and 4 of the Constitution of the State of Maine.

1. *Exemption From Government Regulation.*

In 1878 the United States Supreme Court upheld the polygamy conviction of a Mormon, declaring that *religious belief* alone, not *religiously-motivated conduct*, is protected by the First Amendment and that polygamy laws serve an important secular purpose by preserving monogamous marriage and preventing the exploitation of women. *See Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878). More recently, the Court accorded broadened constitutional protection to certain religiously-motivated conduct on the part of religious groups. *See Murdock v. Pennsylvania*, 319 U.S. 105, 109, 63 S.Ct. 870, 873, 87 L.Ed. 1292 (1943) [first amendment right in spreading beliefs, by distributing pamphlets without a license, outweighs legitimate secular purpose in generating revenue from persons using public streets]; *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) [first amendment right to solicit contributions and play religious recordings in public streets cannot be conditioned upon licensing determination by state as to whether a cause is religious, since state interest in preventing fraud and preserving peace can be achieved by less drastic means]. In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court took a significant step beyond earlier case law,[10] by holding that only a compelling state interest could justify burdening the free exercise of religion and that the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims. *Id.* at 403, 407, 83 S.Ct. at 1793, 1795.[11] In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), after a careful consideration of the religious and state interests involved, the Court concluded that Amish

10. *See* L. Tribe, *American Constitutional Law* § 14-10, at 851 (1978); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L.J. 350, 354 (1980); Pfeffer, *The Supremacy of Free Exercise*, 61 Geo.L.J. 1115, 1139 (1973).

11. *Sherbert v. Verner*, *supra*, involved a Seventh-Day Adventist who was fired by her employer for refusing to work on her Sabbath and was denied unemployment compensation. The Supreme Court held that the denial of unemployment compensation placed a burden on the exercise of plaintiff's religion, disproportionate to any state interest in avoiding "fraudulent claims of unscrupulous claimants feigning religious objections to Saturday work." 374 U.S. at 407, 83 S.Ct. at 1795.

parents need not comply with compulsory education laws requiring their children to attend school beyond the eighth grade. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court stated:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion."

Id. at 718, 101 S.Ct. at 1432, *quoting Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *See also United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) [state may limit religious liberty on sufficient showing that regulation is essential to overriding governmental interest].

[2, 3] The test presently applied in determining whether regulation of religiously-motivated conduct violates the free exercise clause contemplates a three-part determination:

1. whether the challenge is motivated by, and rooted in, a legitimate and sincerely-held religious belief;

2. whether and to what extent state regulation burdens free exercise rights; *and*

3. whether any such burden is justified by a sufficiently compelling state interest.

Wisconsin v. Yoder, 406 U.S. at 215, 92 S.Ct. at 1533. Governmental regulation which significantly burdens the free exercise of religion cannot withstand constitutional challenge unless it represents the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). But exemption of religious activity from regulation is not constitutionally required where it would "unduly interfere with fulfillment of the [compelling] governmental interest." *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

For purposes of the pending motion, the defendants concede that plaintiffs' constitutional claims are motivated by, and rooted in, legitimate and sincerely-held religious beliefs, contending instead that plaintiffs' religiously-motivated activities are but minimally burdened by the compulsory education laws. Defendants argue that the Commissioner possesses the requisite administrative power and willingness to accommodate plaintiffs' religious beliefs and that the Court should determine, as a matter of law, that Maine's scheme of compulsory education is reasonable and that it serves compelling state interests warranting whatever minimal burdens may be imposed on plaintiffs' religious activities.

The important interests competing for judicial protection in the context of constitutional challenges brought under the free exercise clause are rarely susceptible to the requisite balancing on motion for summary judgment. *See Minkus v. Metropolitan Sanitary Dist.*, 600 F.2d 80, 84 (7th Cir. 1979) [challenge to state refusal to conduct civil service testing on date other than Sabbath raised substantial factual issues as to whether accommodation could be made by the state without undue hardship, requiring reversal of summary judgment in favor of defendant]. *See also Attorney General v. Bailey*, 386 Mass. 367, 436 N.E.2d 139, 150 (1982); 10 Wright & Miller, *Federal Practice and Procedure* § 2732, at 614 n. 67 (1973). Courts normally permit the parties to present a complete factual record to facilitate the requisite balancing of competing interests in considering first amendment claims. *See Developmental Disabilities Advocacy Center Inc. v. Tuttle*, 689 F.2d 281 at 288–289 (1st Cir. 1982).[12]

12. In *Kennedy v. Meacham*, 540 F.2d 1057, 1061 (10th Cir.1976), the Sixth Circuit decided that the dismissal of a complaint brought by prison inmates alleging unconstitutional restrictions on the free exercise of their satanic religion was improper, since the state neither established that no religion was involved nor that any burdens on its free exercise were war-

[4] Although it is late in our constitutional history to mount a successful free exercise claim to exemption from all governmental regulation, see *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878), and it seems clear that at least some state regulation may be imposed upon private schools attended by students of compulsory school age, see *Board of Education v. Allen*, 392 U.S. 236, 245–47, 88 S.Ct. 1923, 1927–1928, 20 L.Ed.2d 1060 (1968); *Everson v. Board of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1947); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 631, 63 S.Ct. 1178, 1181, 87 L.Ed. 1628 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), these plaintiffs are entitled to present evidence at trial that Maine's compulsory education laws and regulations burden their religiously-motivated activities. The defendants bear the burden of proving that any governmental regulation which does burden the free exercise of plaintiffs' religion represents the least restrictive means of achieving some compelling state interest.

2. *The "Faith Baptist" Case.*

[5] In support of their motion for summary judgment, defendants place great reliance on the dismissal by the United States Supreme Court of the appeal in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed sub nom. Faith Baptist Church v. Douglas*, 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed.2d 72 (1981). In *Faith Baptist* the Nebraska Supreme Court, on *de novo* consideration, upheld a judgment enjoining the operation of elementary and secondary Christian schools for failure to comply with school approval requirements similar to those involved here. The *Faith Baptist* defendants, a church and certain of its officers and employees, claimed that enforcement of the Nebraska school approval requirements would violate their right to the free exercise of their religion and to hear, raise, and educate their children.[13] There the Christian schools utilized a Bible-oriented curriculum supplied by Accelerated Christian Education, consisting of a series of booklets containing instructional information and self-test questions considered appropriate for each instructional level. The curriculum permitted students to work at their own speed, under the supervision of teachers who administer tests and assist students having difficulty. The defendants refused to furnish reports of the names and addresses of students enrolled in their school as required by statute. The defend-

ranted by a compelling state interest in the regulation of prison affairs.

We do not say that a hearing is required in every instance. A well-developed showing by affidavits, exhibits, regulations and the responses to them might demonstrate, without factual dispute, such limited actions by defendants and such a justification for them as to obviate the need for an evidentiary hearing. In such a case the defendants would, of course, have to carry the heavy burden of justifying a summary judgment. See *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993 [994], 8 L.Ed.2d 176; *Webb v. Allstate Life Insurance Co.*, 536 F.2d 336, 340 (10th Cir.); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir.).

Id. at 1061 n. 3. *See also Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir.1972) [dismissal of inmate complaint alleging interference with free exercise of religion, held improper absent showing that state interest in prison discipline outweighed free exercise rights].

13. The constitutional rights of others may be asserted by one whose compliance with a legal duty would deny others their constitutional rights. *See Craig v. Boren*, 429 U.S. 190, 195, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976); *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

ants refused to seek state approval of their curriculum, despite assurances of approval, and refused to employ only state accredited teachers and to seek approval to operate their schools. The defendants maintained that the operation of their schools was an extension of their church ministry and that the state had no authority to approve or accredit their schools, asserting that the basic philosophy of the public education system ran contrary to their belief in biblical Christianity and that the state was therefore "not capable of judging the philosophy of the defendants' school," *id.* 301 N.W.2d at 574. Finally, the defendants in *Faith Baptist* refused to submit to school inspection as required by Nebraska law "because the State has no right to inspect God's property."

Nebraska law provides penal sanctions for "violations of the various statutory provisions relating to compulsory education and operation of private, denominational and parochial schools." *Id.* 301 N.W.2d at 575. The Nebraska Supreme Court held that injunctive relief, as opposed to criminal prosecution, was appropriate to prevent a continuing and flagrant course of violations of Nebraska criminal law. *Id.*

The defendants in the present action claim that the summary dismissal of the *Faith Baptist* appeal is dispositive of plaintiffs' First and Ninth Amendment claims, since the Nebraska Supreme Court had rejected essentially these same claims. On the weight of the summary affirmance by the United States Supreme Court, these defendants seek summary judgment under Counts I, IV and V. *See* Defendants' Supplementary Memorandum, dated April 7, 1982, at 29.

[6] "It is ... often difficult to understand the proper reach of Supreme Court summary affirmances and dismissals for want of a substantial federal question...." *Preston v. Seay*, 684 F.2d 172, 173 (1st Cir. 1982) (*per curiam*). The summary disposition of an appeal results in a judgment on the merits even though there has been no briefing, oral argument or written opinion. However, "[b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (*per curiam*). *See also Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976). A summary disposition has precedential value in cases virtually indistinguishable from the case summarily disposed of, *see Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), and in cases involving but slightly different facts and issues from those in the case summarily disposed of, *see Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (*per curiam*). "Summary actions, however, ... should not be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. at 176, 97 S.Ct. at 2240. Mr. Justice Brennan, concurring in *Mandel v. Bradley*, announced two clear standards by which courts should determine the precedential significance of a summary disposition:

> After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is possible.

Id. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). *See also* Comment, *The Precedential Weight of Summary Dispositions of Appeals*, 29 Me.L.Rev. 325, 353 n. 104 (1978).

The issues before the Supreme Court in the *Faith Baptist* case were:

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taining to state approval of church schools and teacher certification deprive appellants, on their face and as applied, of free exercise of religion in violation of [the] First Amendment?

(2) Do Nebraska educational statutes and rules promulgated thereunder pertaining to state approval of church schools and teacher certification violate, on their face and as applied, individual appellants' fundamental rights to bear, raise and educate their children as guaranteed by [the] Ninth and Fourteenth Amendments?

See 49 U.S.L.W. 3940 (June 16, 1981), Subject Matter Summary of Cases Recently Filed.

[7] Although it is far from clear that the constitutional questions with which the United States Supreme Court was presented in the *Faith Baptist* appeal are the same as those in the present action,[14] even assuming that to be the case it is doubtful that the summary affirmance rested upon a decision of either of the broad constitutional questions there posed. It simply cannot be determined that the judgment of the United States Supreme Court "rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." *Mandel v. Bradley*, 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). The defendants in *Faith Baptist* refused even to provide the state with the names and addresses of students enrolled in their schools. The Nebraska court enjoined the operation of the school "because there had been *no* compliance with the school laws of the State of Nebraska." *State v. Faith Baptist Church*, 301 N.W.2d at 573. (Emphasis added.) The United States Supreme Court was not of necessity required to rule on the broad constitutional issues there presented in order to reach its judgment and it has not in any event been made to appear that the Court accepted the reasoning of the Nebraska court.

B. *Excessive Entanglement (Count II)*

[8] Count II of the complaint asserts that the *imposition* of the Maine compulsory education laws and regulations would violate the Establishment Clause by: (1) imposing state-chosen values on religious entities; (2) involving the state in purely religious matters; and (3) fostering an excessive governmental entanglement with religion.

The mode of analysis for Establishment Clause questions is defined by the three-part test that a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive governmental entan-

14. A simple comparison of the Maine and Nebraska regulatory schemes demonstrates that the constitutional questions raised in *Faith Baptist* cannot with certainty be considered the same as the constitutional issues here presented.

The Nebraska regulations prescribed a required curriculum, necessary materials and equipment, the length of the school day and year, health and safety requirements, the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and the requirement that all professional staff members hold a valid Nebraska certificate or permit which, "[g]enerally speaking," meant that teachers must hold a baccalaureate degree. *See State v. Faith Baptist Church*, 301 N.W.2d at 573, 575. Nebraska law also required inspection and approval of schools before operation. *See id.* at 574. The Nebraska curriculum requirements were "very minimal in nature," *Id.* at 579, and the state did not prescribe a course of study, *id.* at 580.

The Maine statutes and regulations require, *inter alia*, submission to the state of: (1) a statement of school educational philosophy, goals, and objectives and a plan for their implementation; (2) a description of grading methods and procedures; (3) a statement of the school's financial position and policies; and (4) a statement of the school's tuition refund policy. Schools are required to maintain a pupil-teacher ratio not exceeding 30 to 1 and a physical environment "acceptable to the Department of Educational and Cultural Services." Private schools must provide parents with a statement of Maine's school-entrance age requirements. The Maine regulations contain elaborate curriculum requirements and permit withdrawal of approval of a course of study "for cause." Teacher certification regulations in Maine require a baccalaureate degree, with two years of liberal education, appropriate subject matter concentration, professional knowledge, and supervised teaching experience. *See* 05-071 CMR Ch. 115, Introduction.

glement with religion. See *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 748 [96 S.Ct. 2337, 2345, 49 L.Ed.2d 179] (1976); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772–73 [93 S.Ct. 2955, 2965–2966, 37 L.Ed.2d 948] (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612, 613 [91 S.Ct. 2105, 2111, 29 L.Ed.2d 745] (1971).

Wolman v. Walter, 433 U.S. 229, 235–36, 97 S.Ct. 2593, 2598–2599, 53 L.Ed.2d 714 (1977). Plaintiffs do not argue that the compulsory education laws and regulations have no secular legislative purpose or that their *primary effect* either advances or inhibits religion, but that those laws and regulations "foster an excessive governmental entanglement with religion." *Id.*

Defendants demand summary judgment under Count II on the grounds that the Commissioner is prepared to accept the requested information in any form plaintiffs wish to submit it, and even to arrange school visitations by the Department should plaintiffs desire, thereby obviating, defendants believe, any possibility of excessive entanglement.

An unconstitutional entanglement generally involves "the government's continuing monitoring or potential for regulating the religious activity under scrutiny." *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir.1979). "[I]n determining whether there is excessive entanglement, the question is 'whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.'" *Id. quoting Walz v. Tax Commissioner*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).

The decision by the First Circuit in *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir.1979), outlines the appropriate judicial approach to the present entanglement challenge. *Surinach* found free-exercise and establishment clause violations where the Puerto Rico Consumer Affairs Department, pursuant to legislative directive, subpoenaed church-school records relating to operating costs, financial sources, school services, supplies and equipment, personnel salaries, scholarships, and related matters. [526]

The First Circuit began its analysis by rejecting the distinction drawn by the district court between the *gathering* of the information and the regulatory purpose (restraint of inflationary trends) for which the information was sought. Observing that the gathering of information from the schools was not an end in itself, but rather a first step in a process which might lead to the imposition of ceilings on educational costs at the religious schools, Chief Judge Coffin said that the schools were not obliged to show, as a condition to relief, that the precise scenario of price regulation would in fact unfold. *Id.* at 75.

> To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems. In *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir.1977), *aff'd on statutory grounds*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), the court of appeals held that the exercise of jurisdiction by the NLRB over schools operated by the Roman Catholic Church violated the separation between church and state. Reasoning from the cases which have found various forms of aid to sectarian schools to be unconstitutional, it expressly rejected the Board's contention that any constitutional problems should be litigated 'down the line' if and when disputes arose between the Board and schools subject to its jurisdiction:
>
> The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only, but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists.
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The court in *Surinach* found that the effect of the governmental demand for information "constitutes a palpable threat of state interference with the internal policies and beliefs of [the] church related schools." *Id.* at 77. The court expressed concern that the information could eventually be used to "interfere seriously" with the church canons requiring church-schools to maintain academic excellence, *id.*, and that, if it were administratively determined that church-school costs were to be contained, the schools would likely have to cut back on their curricula and facilities, thus affecting their religious objective of offering the highest quality education possible, *id.* Moreover, the court feared that the regulatory process might require a determination as to which school costs were necessary and reasonable, giving rise to a possible conflict between religious and secular values. *Id.* at 77–78 (*e.g.*, state could determine student-teacher ratio in religious schools unusually low).

The First Circuit took little comfort from the fact that the Commonwealth had not yet made determinations in conflict with religious doctrine or yet concluded that cost controls were necessary. *Id.* at 78. The court observed that these first steps on the road to regulation could chill the recruitment, allocation and expenditure of funds, *id.*, and that the regulatory scheme authorized continuing governmental involvement in church affairs which could "intrude upon decisions of religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the schools," *id.* at 79.

Surinach held that the Commonwealth had not met its burden of showing a compelling state interest justifying the imposition of its regulations on the religious schools, nor its burden of showing that its secular interests could not be served by less intrusive means. *Id.* at 79–80. The court cogently observed that the Commonwealth had not even argued that it "would be unable to fulfill its wide ranging duties if any portion of one segment of the economy were to be excluded from its investigation and subsequent regulation," *id.* at 80.

The defendants contend that the imposition of the challenged regulations would place no burden on plaintiffs' religious practices. On the contrary, the burdens clearly appear, though their extent remains subject to proof at trial. For example, the defendants admit that their schools are not operating in compliance with the requirement of Maine law that only certified teachers be employed, *see* 20 M.R.S.A. § 1281 (Supp. 1981), which constitutes cause to close schools pursuant to Board regulation, *see* 05–071 CMR 125, at 4. Other regulatory requirements under challenge may give rise to excessive governmental entanglements with religion; for example, the informational requirements pertaining to school finances, tuition policies, and educational philosophy; and departmental inspection and approval of the physical facilities and environment of church-schools.

Once it is recognized that the regulatory scheme imposes *some* burden on plaintiffs' religious practices, it is clear that defendants have yet to meet their burden of showing that no excessive entanglement would result from the imposition of the scheme upon plaintiffs. It is no answer that plaintiffs should be required to submit the requested information (in whatever form) and await litigation "down the line" if and when specific disputes arise. *See Surinach v. Pesquera de Busquets*, 604 F.2d at 75–76; *see also Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458–59, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493–99, 94 S.Ct. 669, 674–677, 38 L.Ed.2d 674 (1974). The defendants must show that the regulatory scheme to be imposed on plaintiffs represents the least restrictive means of achieving some compelling state interest and that the information required of plaintiffs would serve a specific and sufficiently compelling state interest to warrant burdening their

religious practices. *See Surinach v. Pesquera de Busquets*, 604 F.2d at 79–80. These are matters of proof.

The Commissioner asserts on affidavit that certain of the information required by the form of application for initial approval, see Exhibit 7, attached to Affidavit of Commissioner Raynolds, October 19, 1981, need not be provided by the plaintiff-schools and that it is the policy of the Department to waive, on request, any regulatory requirement "to accommodate ... religious ... schools," provided "the basic requirements of the compulsory education laws deemed necessary for the benefit and protection of the children of this state will not be unduly compromised." The Commissioner avers that the requirement that the school physical environment be "acceptable to the Department," see 05–071 CMR, at 5, has not been and will not be imposed. The Commissioner further proposes relaxation of the teacher certification requirement, stating that church-school teachers need not obtain certification "if this is against their religious convictions," but need only "demonstrate qualification for certification." See Second Supplemental Affidavit of Commissioner Raynolds, at 11. With respect to the request for information regarding school financial position and policies, the Commissioner asserts that church-schools need only identify their religious affiliation, *id.* at 13, and that church-schools need not provide information regarding school tuition policies. Finally, the Commissioner states that private schools ineligible for public tuition funds, which neither wish to obtain five-year approval status nor seek indirect public aid, through textbook loans, medical services, remedial service or standardized testing, need not provide, with their initial application, information regarding their educational philosophy, goals and objectives.

The present action appears to have been precipitated by letters of the Commissioner, dated October 9, 1981, informing certain of these plaintiff-schools that they may not provide education to children of compulsory school age during hours of the day when such children would otherwise be attending public schools, absent approval by the Commissioner, and further advising that approval must be obtained in accordance with the rules adopted by the Department, copies of which had been previously provided.[15] The Commissioner further stated, "I ask you once again to submit the necessary information by completing the school approval application, by submitting the required information in some other format or by making arrangements for a visit by representatives of the Department." Finally, the Commissioner advised that legal action would be commenced against the schools after October 20, 1981, should the schools fail to comply.

The Commissioner did not expressly state that only those portions of the application form which deal with the five topics specified in the letter need be completed in order to qualify a school for approval. Previously the schools had been provided with copies of the rules governing approval and with copies of the application form. The October 9 letter again requested "the information necessary for [departmental] review and approval" pursuant to the application previously provided and the application form enclosed.[16] The addendum to the general

15. The letter states that the *minimum* information required for approval is evidence that the school:

1. has been inspected by the Department of Human Services for compliance with state health and sanitation standards;

2. has been inspected by the Fire Marshal for compliance with the Life Safety Code;

3. offers a course of study meeting the minimum curriculum requirements;

4. has an instructional staff which is either certified or qualified for certification; and

5. maintains and safeguards adequate attendance, health and academic records.

The Commissioner directed that such information be supplied pursuant to the application form enclosed with the October 9, 1981 letter. The Commissioner offered to accommodate any concerns about completing the application and to expedite reviews by making Department representatives available to visit the schools, observe operations, and inspect records "as an alternative to the completion of the forms."

16. The Attorney General of the State of Maine advised plaintiffs' counsel on October 8, 1981,

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rules, which prescribes procedural exceptions for private school approval, does not indicate that private sectarian schools need only submit information concerning the five areas identified in the Commissioner's letter.[17] Furthermore, the letter does not propose to obviate departmental review as a condition of approval, but describes the "minimum information" required for approval as consisting of certain "evidence." The Court does not consider that it has been made to appear on the present record that mere compliance with the demand for such "evidence," regardless of its probativeness, would result in school approval.

"A defendant cannot ordinarily moot a plaintiff's claim by voluntarily ceasing allegedly unlawful conduct." L. Tribe, *American Constitutional Law* § 3–14 at 66. *See DeFunis v. Odegaard*, 416 U.S. 312, 318, 94 S.Ct. 1704, 1706, 40 L.Ed.2d 164 (1974); *Sanchez-Mariani v. Ellingwood*, 691 F.2d 592 at 595–596 (1st Cir. 1982). The affidavits of the Commissioner, however well intentioned, do not moot plaintiffs' claims. In order to moot plaintiffs' claims in these respects, at least defendants must establish that they will not again seek the information sought at the time of the institution of the suit. *See United States v. Phosphate Export Association*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).

Defendants are not entitled to summary judgment under Count II.

C. *Due Process (Count III)*

[9] Count III alleges that the compulsory education laws "are impermissibly vague and overbroad and delegate legislative authority to administrative personnel wholly without statutory standards," in violation of the due process clause. Plaintiffs further claim that many of the regulations of the Department are *ultra vires* and that enforcement of the compulsory education laws would deprive plaintiffs of the use of the "educational enterprise to which they have devoted money and contributed personal services to help create and maintain."

1. *Vagueness/Overbreadth.*[18]

In a facial challenge to the overbreadth and vagueness of a law, a court's first

in response to their request for an interpretation of the school approval laws, that their concerns could "be answered by the enclosed materials: the school-approval regulations (with explanatory addendum for sectarian schools), the new minimum curriculum rule, and the application for school approval." *See* Exhibit E attached to Plaintiffs' Supplemental Memorandum, filed March 24, 1982.

17. A copy of the addendum is to be attached when copies of the general rules (05–071 CMR 125) are supplied to private sectarian schools. *See* Supplemental Affidavit of Commissioner Raynolds, filed April 8, 1982.

The addendum prescribes exemptions from: (1) the certification requirement, for teachers of religion and ministers who are headmasters; (2) the requirement of vision and hearing tests; (3) the minimum instructional time requirement for kindergarten; and (4) the maximum daily teaching schedule requirement. The addendum does not exempt sectarian schools from employing teachers who can "demonstrate qualifications for certification;" the requirement of information as to school financial position and policies, tuition policies, educational philosophy, goals and objectives; or from the requirement that the school physical environment must be "acceptable to the Department."

The application form itself does not exempt sectarian schools from these requirements, but purports to relax the requirement that information be provided as to school financial policies, by permitting sectarian schools merely to identify the religious affiliate from which it derives financial support.

18. While related, these two doctrines derive from somewhat different policies and look to different effects. Overbreadth analysis looks to whether a law 'sweeps within its ambit [protected] activities' as well as unprotected ones, *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940), while a vagueness inquiry focuses on whether a law states its proscriptions in terms sufficiently indefinite that persons of reasonable intelligence 'must necessarily guess at its meaning'. *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973), *quoting Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See Grayned v. City of Rockford*, 408 U.S. 104, 108–114, 92 S.Ct. 2294, 2298–2302, 33 L.Ed.2d 222 (1972); *Landry v. Daley*, 280 F.Supp. 938, 951–52 (N.D. Ill.1968) (three-judge court).
Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115, 1122 n. 9 (1st Cir., 1981).

task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Village of Hoffman Estates v. Flipside, 455 U.S. 489, ——— n. 6, 102 S.Ct. 1186, 1191 n. 6, 71 L.Ed.2d 362 (1982). Once it is made to appear that the statutory challenge implicates constitutionally protected conduct, the Court will require a greater degree of statutory specificity than in nonconstitutional contexts. 455 U.S. at ——, 102 S.Ct. at 1193.

a. *Overbreadth.*

[10] "The Supreme Court has emphasized that overbreadth facial challenges to the constitutionality of a state law should prevail only in rare circumstances." *New England Accessories Trade v. City of Nashua*, 679 F.2d 1, 4 (1st Cir.1982). "[T]he overbreadth doctrine is 'strong medicine' and [courts] have employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, —— U.S. ——, ——, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982). The doctrine is predicated on the belief that persons whose conduct is constitutionally protected may refrain from exercising their rights for fear that to do so would constitute a violation of law, thus insulating the statute from constitutional challenge. *See New York v. Ferber*, —— U.S. at ——, 102 S.Ct. at 3359–3361, *citing Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). But before a statute may be invalidated on its face for overbreadth, even one which arguably touches such traditional forms of free expression as books and films, the overbreadth must be "substantial," that is, susceptible to "a substantial number of impermissible applications . . .," *id.* —— U.S. at ——, 102 S.Ct. at 3362.

[11] It is conceivable that some of these regulations may inhibit the free exercise of constitutional rights, but the Court is not persuaded that the regulations reach "a substantial amount of constitutionally protected conduct," *see Village of Hoffman Estates v. Flipside*, 102 S.Ct. at 1191, n. 6, or that this is one of those rare occasions when the plaintiffs are entitled to mount an overbreadth challenge on the ground that the Maine compulsory education laws and regulations could be unconstitutionally applied to others. *See New York v. Ferber*, —— U.S. at ——, 102 S.Ct. at 3359–3361 ["arguably impermissible applications" of statute forbidding distribution of material depicting a sexual performance by child, outweighed by its legitimate reach]. The arguably impermissible applications of the challenged compulsory education laws are relatively insignificant. Any actual overbreadth may "be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied," *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16, 93 S.Ct. 2908, 2917–2918, 37 L.Ed.2d 830 (1973). *See also New England Accessories Trade v. City of Nashua*, 679 F.2d at 5.

Summary judgment must be granted for the defendants on plaintiffs' claim of unconstitutional overbreadth.

b. *Vagueness.*

[12–14] A challenge predicated on unconstitutional vagueness implicates dual principles of due process, requiring: (1) fair notice of the line between lawful and unlawful conduct; and (2) sufficiently explicit legislative limitations on the discretion of law enforcement officials to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 2298–2299, 33 L.Ed.2d 222 (1972);[19] *Papachristou v. City of Jackson-*

19. In *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 2298–2299, 33 L.Ed.2d 222 (1972), the Supreme Court articu-

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ville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *United States v. Professional Air Traffic Controllers*, 678 F.2d 1, 3 (1st Cir.1982). A statute may neither forbid nor require the doing of an act in terms so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *see also Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967). A statute is unconstitutionally vague *on its face* if it is expressed in such general terms that "no standard of conduct is specified at all." *Brache v. County of Westchester*, 658 F.2d 47, 50–51 (2d Cir. 1981), *quoting Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). A facial vagueness challenge can only succeed when the statute "cannot validly be applied to any conduct." *Id.* at 50.

> [W]hile legislatures "ordinarily may delegate power under broad standards ..., [the] area of permissible indefiniteness narrows ... when the regulation ... potentially affects fundamental rights," like those protected by the first amendment. And where a law authorizes a system of prior licensing, the Supreme Court has consistently required the statutory delegation to provide "narrowly drawn, reasonable and definite standards for the [administering] officials to follow...."

L. Tribe, *American Constitutional Law* § 12:35 at 732–33 (1978) (footnotes omitted). In *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1123–24 (1st Cir. 1981), the First Circuit upheld three sections of a public amusement licensing statute which permitted denial of a license whenever issuance would (1) unreasonably increase pedestrian traffic; (2) increase the incidence of disruptive conduct; or (3) unreasonably increase the level of noise. These standards, while not identifying the dispositive levels of noise, traffic, or disruption, "describe[d] a behavioral effect of at least potential objective specificity," and apprised applicants of factors which would determine the licensing decision, *id.* at 1123. Nevertheless, the court found invalid on its face a city ordinance authorizing the denial of a license where the operation of the public amusement would "significantly harm[ ] the legitimate protectible interests of .. affected citizens of the city," *id.* The "public interest" standard was deemed defective because it "comprise[d] purely subjective evaluations of wholly unrestricted factors, and thus vest[ed] the denial of a license in the essentially unbridled discretion of a municipal administrator," *id.* at 1123, thereby imposing an unconstitutional standard "where a license is necessary for the exercise of [constitutionally] protected activity," *id.* at 1124. *See also City of Biddeford v. Biddeford Teachers Association*, Me., 304 A.2d 387, 400 (1973) [statutory standards must guide agency in following legislative policy and prevent administrative arbitrariness].

[15] Plaintiffs challenge the requirement of 20 M.R.S.A. § 911.3 that students not attending public schools receive "equivalent instruction," by asking whether "equivalent" means measure-for-measure instructional equality; whether instructional equivalence is to be determined by reference to local public schools or to public schools in general; and whether overall instructional equivalence is to be determined

lated the constitutional bases of the vagueness doctrine:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(Footnotes omitted.)

by according due weight to any respect in which private school instruction is found to be superior to public school instruction.

Section 911.3(A) excuses children between the ages of 7 and 17 from the requirement that they attend a public day school, if the child "obtains equivalent instruction in a private school or in any other manner arranged for by the school committee or the board of directors and if the equivalent instruction is approved by the commissioner." Section 911.3(B) provides:

> If any request to be excused is denied by a local school committee or board of directors, an appeal may be filed with the commissioner. The commissioner shall review the request to be excused to determine whether the local school committee or board of directors has been correct in its finding that no equivalent instruction is available. If the commissioner finds that equivalent instruction is available to the child, he shall approve the request to be excused.

20 M.R.S.A. § 911.3(B). Section 911.3 contemplates that exemption from the requirement of public school attendance is to be sought first through the local school committee or board of directors, which is to determine whether the proffered private instruction is equivalent to the public school instruction "available to the child." The local board determination is subject to review by the Commissioner.[20] Unless excused from public school attendance, a child may be considered an habitual truant after an absence of ten full days. 20 M.R.S.A. § 914.

A person having control of an habitual truant and primary responsibility for the truancy is subject to a civil forfeiture of $200. 20 M.R.S.A. § 911.8.

Although the Maine compulsory education scheme carries civil rather than *criminal* sanctions, clearly defined statutory standards are still required. *Flipside v. Village of Hoffman Estates*, 639 F.2d 373, 377–78 (7th Cir. 1981) [licensing laws ar[illegible] laws imposing civil sanctions must also provide minimum level of clarity]. But the term "equivalent," as used in section 911.3, is not so vague that persons of common intelligence would necessarily have to "guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). The term is not of such generality that "no standard of conduct is specified at all." *See Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). The term "equivalent instruction" is capable of objective measurement, *cf. Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d at 1123, and has "a core meaning that can reasonably be understood," *cf. Brache v. County of Westchester*, 658 F.2d at 51.

Although federal courts have no "power to construe and narrow state laws" in resolving a vagueness challenge, *Grayned v. City of Rockford*, 408 U.S. at 110, 92 S.Ct. at 2299, it appears highly likely that "equivalent instruction" would be interpreted as requiring private school instruction equal to that mandated by Maine law for public schools generally. *Knox v. O'Brien*, 7 N.J. Super. 608, 72 A.2d 389, 391 (1950) ["equal in worth or value, force, power, effect, import and the like"], *quoting In re Bonsall's Estate*, 288 Pa. 39, 135 A. 724, 725 (Sup.Ct. 1927); *Stephens v. Bongart*, 15 N.J.Misc. 80, 189 A. 131, 134 (1937) [instruction equal in value and effect to that given in a public school].

In *Scoma v. Chicago Board of Education*, 391 F.Supp. 452, 462–63 (N.D.Ill.1974), the court rejected a facial vagueness challenge to a statute exempting from compulsory public school attendance any child attending a private school teaching "the branches of education taught to children of corresponding age and grade in the public schools." The court held that the statutory reference to public schools "should cause no difficulty for citizens who desire to obey the statute." *Id.* at 463. *See also Webster's*

20. Although local authorities may exempt a child from the public-school attendance requirement, the Commissioner must also determine that the private school instruction is "equivalent." *See* 20 M.R.S.A. §§ 911.1(A), 911.3(A) & 914.

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Whatever vagueness may inhere in the term "equivalent" appears "not unduly necessary to embrace all of its legitimately intended objectives without creating an encyclopedic and unwieldy" statute. *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d at 1123. It must be presumed that Maine courts "will give [the term] a limiting construction that will preserve its facial constitutionality," *id., citing Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975). *See also* Me. Atty. Gen. Report 1963–64, at 160, 162 [correspondence course unapproved by district directors and Commissioner is not the equivalent of school attendance].

Defendants are entitled to summary judgment on plaintiffs' facial vagueness challenge to the term "equivalent".

[16] The vagueness challenge to the statutory and regulatory provisions authorizing the Commissioner to prescribe courses of study and to withdraw school approval "for cause" is more meritorious. 20 M.R.S.A. § 102.7; 05–071 CMR 125, §§ 1(D)(3) & 2(b)(2). The *Commissioner* is authorized to "prescribe the course of study" and to deny approval to schools which do not offer a course of study prescribed by the Commissioner. 20 M.R.S.A. § 102.7. Private schools founded after September 3, 1965 must furnish the Commissioner with a copy of their course of study. 20 M.R.S.A. § 102.7. Approval may be denied secondary schools unless their graduation requirements include American history, four years of English "and other courses approved by the Commissioner." *See* 05–071 CMR 125, at 3. Other provisions of law notwithstanding, the statute itself authorizes the Commissioner to withdraw approval "for cause." 20 M.R.S.A. § 102.7. Neither the compulsory education statutes nor the regulations define "cause," except that it is provided by Board regulation that "cause" includes, "but is not limited to, the failure ... to provide the minimum course of study ... and the failure ... to file a course of study, or notice of changes in the course of study or related reports as required by the Commissioner." 05–071 CMR 127, at 10. *See Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 854 (E.D.Va. 1980) [due process requires administrators to structure and confine their discretionary powers by means of safeguards, standards, principles, and rules]. A school which is denied approval may request a board of review, appointed in part by the Commissioner, but the recommendations of the board of review are subject to the final approval of the Commissioner. "If the school fails to comply [with requirements] and does not take necessary remedial action, the commissioner may remove basic approval." 20 M.R.S.A. § 102.7.

Even private organizations which accredit educational institutions have been required to maintain reasonable standards and to apply them with an even hand. *See Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 655–659 (D.C. Cir.1970), *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970); *Rockland Institute v. Ass'n of Independent Colleges*, 412 F.Supp. 1015, 1018 (C.D.Calif.1976); *Parsons College v. North Central Ass'n of Colleges & Secondary Schools*, 271 F.Supp. 65, 73 (N.D.Ill.1967).

Since 20 M.R.S.A. § 102.7 has the potential of affecting the first amendment rights of these plaintiffs and the school approval statute and regulations establish a state licensing scheme, the vagueness doctrine demands narrowly drawn, definite and reasonable standards for the guidance of the administering officials.

Accordingly, defendants' motion for summary judgment must be denied.

2. *Ultra Vires Regulations.*

[17] "Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid." *United States v. Boyd*, 491 F.2d 1163, 1167 (9th Cir.1973). *See E.I. duPont de Nemours & Co. v. Collins*, 432

U.S. 45, 53–55, 97 S.Ct. 2229, 2233–2234, 53 L.Ed.2d 100 (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 379–81, 89 S.Ct. 1794, 1800–1801, 23 L.Ed.2d 371 (1969); *Ciampa v. Schweiker*, 511 F.Supp. 670, 677 (D.Mass.1981). The presumption is rebuttable on "a showing that the challenged regulation is an unreasonable exercise of the delegated power—*i.e.* inconsistent with the statute." *Id.* *See Commissioner v. Acker*, 361 U.S. 87, 90–92, 80 S.Ct. 144, 146–147, 4 L.Ed.2d 127 (1959); *United States v. Calamaro*, 354 U.S. 351, 358–59, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957). Courts "must reject administrative constructions of [a] statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate ... [legislative] policy...." *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981). *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2496, 65 L.Ed.2d 532 (1980); *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Theriault v. Brennan*, 488 F.Supp. 286, 299 (D.Me.1980), *aff'd.* 641 F.2d 28 (1st Cir.1981).

[18] The challenged regulations governing school evaluation and approval, codified at 05–071 CMR 125,[21] were adopted pursuant to 20 M.R.S.A. § 51 "to assure that Maine school children [receive] protection against unsafe facilities, inadequate curriculum and unprepared teachers." 05–071 CMR 125, at 9. The Board is empowered and directed to "establish requirements for approval and accreditation of elementary and secondary schools" and to "establish standards for certification of teachers and other professional personnel." 20 M.R.S.A. § 51(3)(B) (as amended by 1981 Me.Laws c. 464, § 2). The Board is required to fulfill its administrative responsibilities in accordance with 20 M.R.S.A. § 21, which mandates the promulgation of administrative rules and regulations pursuant to the Maine Administrative Procedures Act, 5 M.R.S.A. § 8051, *et seq.* The Commissioner is authorized to "prescribe the studies to be taught ... in private schools approved for attendance ... purposes ... and the course of study prescribed by the commissioner shall be followed in ... all private schools approved by the said Commissioner." 20 M.R.S.A. § 102.7. *See also* 20 M.R.S.A. § 1236.

Most of the challenged administrative regulations cannot be considered *ultra vires*. The unrebutted affidavit of the Commissioner asserts that the Department requires this information in order to assess "whether the minimum curricula are being taught in the context of a course of study reasonably

21. Plaintiffs' *ultra vires* challenges fall into four categories. *See* Exhibits A & B, attached to Plaintiffs' Supplemental Memorandum, filed March 24, 1982.

(1) Plaintiffs challenge various regulations requiring the submission of a statement of educational philosophy, goals and objectives; a plan for accomplishing the same; a description of the methods and procedures to be utilized in measuring attainment; and information from which it may be ascertained that the course of study and pupil needs are consistent with the stated purpose of the school. *See* 05–071 CMR 125, at 1–2.

(2) Plaintiffs challenge, for lack of a statutory basis, the regulation requiring a statement of the school's financial position, financial policies and other financial information. *See* 05–071 CMR 125, at 2.

(3) Plaintiffs challenge, as *ultra vires*, the regulation requiring that *all* teachers hold a valid teaching certificate and that all schools maintain a pupil-teacher ratio of not more than 30:1, noting that though the statute requires that high schools employ only certified teachers and have a student-teacher ratio of not more than 30:1, *see* 20 M.R.S.A. § 1281(4), there is no such statutory requirement for elementary schools.

(4) Plaintiffs challenge the statutory basis for the regulation that private schools not operate with compulsory school age children in attendance without first obtaining written approval from the Department, *see* 05–071 CMR 125, at 3; 05–071 CMR 127, at 10, pointing out that the compulsory attendance statute penalizes *parents* for enrolling children in schools not approved for attendance purposes but does not *forbid the operation* of unapproved private schools.

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adequate for educational purposes" and that "[t]he adequacy of the total educational program is determined by assessing whether it is a planned and sequential program and whether it may reasonably be anticipated to accomplish the school's own stated educational goals." Second Supplemental Affidavit of Commissioner Raynolds, Jr., at 9. The affidavit further states that the adequacy of a course of study cannot be evaluated in a vacuum and that all of the requested information is relevant for that purpose. *Id.* The administrative power to require the information flows from the duty to establish school approval standards, imposed upon the Commissioner by the Legislature. The promulgation of administrative regulations requiring information as to the educational philosophy, goals, and course of study of applicant schools represents a reasonable exercise of the power delegated to the Board by 20 M.R.S.A. § 51.

The regulations requiring that applicant schools state their financial position and policies and their tuition refund policies enable the gathering of information "sought because of its relevance to school-municipal relations, where a private school receives public tuition payments" and, in addition, "as a general indicator of the school's economic stability." Second Supplemental Affidavit of Commissioner Raynolds, at 13. These regulations are consistent with the legislative mandate and represent a reasonable exercise by the Board in furtherance of its administrative duty to establish school approval standards.[22]

The Board is authorized by statute, 20 M.R.S.A. § 51.3(B), to promulgate the same elementary-school approval standards as to teacher certification and pupil-teacher ratio as are imposed upon secondary schools by statute, *see* 20 M.R.S.A. § 1281. The fact that the approval standards for secondary schools are prescribed by statute does not preclude the Board from adopting like administrative requirements for the approval of elementary schools. The certification requirement and the 30:1 pupil-teacher ratio are consistent with and tend to effectuate the legislative goals of compulsory education by assuring that all Maine children receive adequate instruction.

The defendants are entitled to summary judgment on each of plaintiffs' *ultra vires* challenges, except that relating to the regulatory prohibition against the operation of unapproved schools.

[19] The Commissioner asserts by affidavit that the regulatory requirement of school approval prior to the commencement of operations represents an "administrative interpretation and implementation of the approval requirement stated in 20 M.R.S.A. § 911.3 and the truancy prohibition of 20 M.R.S.A. § 911," Second Supplemental Affidavit of Commissioner Raynolds, at 3, and that it furthers the compulsory education scheme by assuring that private school students will obtain sufficient instruction from the outset of their attendance and that their education will not be interrupted in the event that a departmental review undertaken after the commencement of school operations should necessitate denial of approval, *id.* The requirement that an application for initial approval be filed nine months in advance of the opening of the school is said to be necessary to afford the Department and health and safety officials sufficient time to review school facilities and proposed programs, and to discuss and correct perceived deficiencies prior to student attendance. *Id.*

The promulgation of the regulations requiring prior written approval may have exceeded the power delegated to the Board

22. Plaintiffs' challenge to these regulations, which appear not to be enforced against church-schools, *see* Initial Application Form, question I(8); Renewal Application, question II(7); Exhibits 1 & 2, attached to Affidavit of Commissioner Raynolds, filed October 19, 1981, may in any case not be ripe for adjudication. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) [ripeness doctrine prevents judicial interference until administrative decision formalized and its effects are felt in a concrete way]. *See also* K. Davis, *Administrative Law Treatise*, § 21.00 (1982 Supp.) [controversies are not ripe unless hardship due to lack of decision is substantial].

by the Legislature. These regulations prescribe administrative sanctions for the enforcement of the compulsory education laws which differ materially from the enforcement sanctions selected by the Legislature.

The Maine Legislature has mandated that a child who is absent from school, without excuse, for the equivalent of 10 full days or for one-half day on seven consecutive school days within any 6-month period is "an habitual truant." 20 M.R.S.A. § 914. Any person who has control of an habitual truant and bears primary responsibility for the truancy is guilty of "a civil violation for which a forfeiture of not more than $200 shall be adjudged." 20 M.R.S.A. § 911.8. "Any person who induces a child to absent himself from school, or harbors or conceals such child when he is absent commits a civil violation for which a forfeiture of not less than $500 shall be adjudged." *Id.*

Local school authorities are responsible for the implementation of the truancy laws and are directed, under the guidance of the Commissioner, to "promulgate reasonable rules and regulations," 20 M.R.S.A. § 911.5, for local enforcement of the truancy laws. *See* 20 M.R.S.A. § 911.6–A. If unable to resolve an habitual truancy the local school superintendent must refer the matter to the local school committee or board of directors, 20 M.R.S.A. § 911.6–A(A), which must hear the matter, after providing the parents or guardian at least seven days' written notice of the hearing, its purpose, the necessity of their and their child's presence, and their right to inspect their child's records and the principal's report. 20 M.R.S.A. § 911.6–A(C) & (D). Information presented to the committee or board "shall include, but not be limited to, the report presented by the principal to the superintendent of schools." 20 M.R.S.A. § 911.6–A(B). "After considering the facts presented and after discussing the matter with the child and his parents or guardian," the committee or board

shall determine by a majority vote to:

. . . . .

A. Instruct the child to attend school as required by statute and inform the parents or the guardian of their legal responsibilities to assure the child's attendance; *or*

B. Waive the compulsory school attendance law provided the child is at least 14 years old;

(1) The parents or guardian may appeal this decision to the commissioner, who shall appoint a fair hearing officer to hear the appeal;

(2) The fair hearing officer shall make a report to the commissioner on the testimony presented at the hearing and shall make a recommendation to the commissioner as to the disposition of the appeal; and

(3) The commissioner shall review the report and recommendation of the fair hearing officer and shall affirm, modify or reverse the decision of the local school committee or board of directors.

20 M.R.S.A. § 911.7. Compulsory school age students not attending approved schools are considered truants and their parents and others who induce truancy are subject to civil forfeitures.

The Commissioner states, by way of affidavit, that he has discouraged local officials from undertaking truancy enforcement actions because parents may be sending their children to unapproved schools "in the good faith belief [that their children] ... are receiving the benefits and protections of the state's compulsory education laws." Second Supplementary Affidavit of Commissioner Raynolds, at 4. The Commissioner represents that truancy actions conducted on a broad scale would be "unduly burdensome" and expensive for local school officials, the Department, and the courts, *id.* at 5, and would neither prevent the operation of unapproved schools nor satisfy "[t]he Department's duty to review and approve schools, according to a systematic administrative process and general standards." *Id.*

These regulations may have transformed the scheme selected by the Legislature for the enforcement of the compulsory education laws, i.e., the truancy laws, into an unauthorized administrative system for the

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name and address of the administrative head of the proposed school.

c. The applicant must submit the following additional information to the Department three months prior to the projected opening of school:

i. a copy of any certificate of incorporation;

ii. a statement of financial position and policies;

iii. a statement of the tuition refund policy;

iv. a list of the names, addresses and social security numbers of the certified teachers to be employed; and

v. evidence that all adult employees are "tubercular free."

d. The applicant must request facility inspection by the State Fire Marshal's office and by the Sanitary Engineering Division of the State Department of Human Services at least three months prior to opening. The sanitation inspection must extend to all food preparation facilities and demonstrate a clean and healthful environment. A licensed plumbing inspector may provide the requisite approval of school facilities in relation to the State Plumbing Code.

e. After notice of facility approval regarding sanitation and fire safety, the applicant must request inspection of its facilities, curriculum and staff by the Department and supply all information necessary to determine whether it has met Department standards, after which it is entitled to a prompt decision by the Commissioner. A school may not operate until it obtains written approval from the Department.

f. Secondary school approval requires a showing that the school has "a graded or sequential educational program of at least two years length . . . available to each student", and a statement of the graduation requirements, including American history, four years of English and "other courses approved by the Commissioner."

g. Within 30 days of the receipt of notice that the Department intends to withhold approval, the school may "request a board of review." The board of review, consisting of one person appointed by the Commissioner, one by the school, and a third chosen by the other two, makes a recommendation to the Commissioner, whose decision "shall be final."

2. *Maintaining Approval.*

The regulations in subsection B, section 1, chapter 125 establish standards for *maintaining* school approval, including requirements that:

a. all teachers hold a valid Maine Teaching Certificate at the appropriate level, except teachers "of religion, theology, religious philosophy or similar courses in nonpublic schools" and ordained ministers functioning as headmaster or directors of sectarian schools;

b. pupil-teacher ratios not exceed 30 to 1 and that normal class size not exceed 30 pupils;

c. all children in grades K–12 be immunized against common childhood diseases, exemptions available on an individual basis by written parental request;

d. new staff prove that they are tubercular free;

e. the history, geography and natural and industrial resources of Maine be taught in at least one grade after 6th grade;

f. buildings be safe, hygienic, approved by the Department of Public Safety and by the Department of Human Services, and provide a physical environment acceptable to the Department;

g. new school construction meet the standards of the Division of School Facilities in accordance with existing statutes and with Board procedures;

h. the school year consist of at least 180 days, no more than 5 days to be devoted to in-service teacher education;

i. the total instructional time in a school week (normally Monday through Friday) equal at least 25 hours and not less than 3 hours in any one day;

j. the school safely maintain a daily register of student attendance and other student records, and record student accom-

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plishment at least quarterly, forwarding such records upon student transfers; and

k. schools complete and submit to the Department "reports deemed necessary by the Commissioner."

The regulations further require that schools, once approved, must notify the Department of "any substantive changes in [their] program of studies, facilities, certified teaching staff, number of pupils, [or] administration." Private schools must file a roster, containing the name and residence of each pupil in attendance, with the public school superintendent of the school administrative unit within which the pupil resides, and must provide notification upon the withdrawal of any pupil from the private school. Private schools are required to "provide assurance" that the record of each pupil will be transferred to the appropriate public school superintendent in the event that the private school is closed. Finally, private schools are required to provide the parents of their pupils "a statement indicating the school entrance age requirements for entering public schools of the State of Maine."

Subsections C and D of chapter 125, section 1, prescribe the time periods for which approval may be granted. Newly established schools may not operate without the prior written approval of the Commissioner.[1] Annual approval is required for each of the first five years of operation. During the fifth year of operation, unless the school otherwise requests, a "self-evaluation study" must be conducted by the school, addressing its present needs and long-term goals, "using the instrument (sic) and procedures designed by the Department...." Within three months after the completion of its study, the school must file with the Department a five-year plan regarding its facilities, curriculum and staff development. A school which has been continuously approved by the Commissioner for five years and completes the "futures planning process" receives a five-year approval certificate. A school which opts to omit the self-evaluation study and five-year plan must submit an annual report to the Department[2] and its certificate of approval must be renewed annually.

Secondary schools which participate in an accreditation program under the direction of the New England Association of Schools and Colleges (NEASC) need not conduct self-evaluation studies, but "must file a report indicating short- and long-range goals directing attention to facilities, curriculum and staff development." *See* 05–071 CMR 125, at 8. If such a school obtains NEASC accreditation, it will be granted approval by the Commissioner for a period commensurate with its accreditation. *See* 05–071, CMR 127, at 10.

> Notwithstanding any other section of law, the Commissioner may remove basic approval from any school for cause. Whenever a school fails to meet requirements, the Commissioner shall give due notice and shall hold a hearing. If the school fails to comply and does not take necessary remedial action, the Commissioner may remove basic approval.

The Commissioner may waive any approval requirement, provided a written request is made by the school documenting the existence of extenuating circumstances warranting waiver in the interests of the state and of the pupils.

B. *Course Requirements*

In addition to the requirements of chapter 125 of the Board regulations, schools seeking state approval for purposes of the compulsory education laws must comply with the requirements of chapter 127, relating to the "course of study." The instructional requirements for the basic approval of nonpublic schools, codified at section

1. The information required for initial approval is normally provided on an eight-page questionnaire-application form issued by the Department. *See* Exhibit 1, attached to the Affidavit of Commissioner Raynolds, filed October 19, 1981.

2. The annual report is a seven-page questionnaire. *See* Exhibit 2, attached to Affidavit of Commissioner Raynolds, filed October 19, 1981.

APPENDIX—Continued

2(A), 05–071 CMR 127, direct that the school:

1. teach in English (with certain exceptions);

2. instruct all students (grades one through eight) in reading, grammar, spelling, composition, and communications skills; [3]

3. provide four years of high school English, including instruction in grammar, spelling, composition, literature, and communications skills;

4. provide mathematics instruction in grades one through eight, including instruction in mathematical concepts, the metric system, computation skills, measurement skills, and problem-solving skills; [4]

5. provide at least one year of high school mathematics;

6. provide at least one year of instruction in American history and civil government, for grades one through nine, including the U.S. Constitution, the Declaration of Independence, voting and citizenship;

7. require students in grades seven through twelve to take at least one year of instruction in history, geography, and the natural and industrial resources of Maine;

8. require science instruction in grades one through eight and at least one year of science instruction in high school;

9. provide physical education to all students in grades one through twelve, in a program "appropriately adapted to the physical facilities available to the school;" and

10. provide at least one-half hour of instruction weekly "in correlation with appropriate components of the school curriculum[,] in the great principles of humanity as intended by 20 M.R.S.A. § 1221."

Elementary schools are required by chapter 127 to provide a planned, sequential program for the elementary grades, including the basic course requirements described above. Secondary schools must provide instructional programs for at least two grade levels, including the basic course of study described above, and prescribe additional requirements for graduation. Graduation requires a minimum of 16 units of instruction, based on the Carnegie unit or an equivalent measure. Graduation requirements must "be published and made known to all students upon entry into high school." Schools must report to the Commissioner, in their annual reports or by other timely means, all changes in their courses of study, including their graduation requirements.

Section 2(B) of chapter 127 directs that "[n]o nonpublic school shall operate for purposes of the compulsory education law without the prior review and approval of the Commissioner ... of its course of study." A certificate of basic school approval signifies that the school offers "equivalent instruction" for purposes of 20 M.R.S.A. § 911(3). "Basic approval of a school's course of study may be removed by the Commissioner for cause," including, "but not limited to, the failure to provide the minimum course of study required by law and regulation, and the failure ... to file ... a course of study, or [to provide] notice of changes in the course of study or related reports as required by the Commissioner."

Where it is believed that school officials have failed to provide the course of study requirements specified by this rule and applicable statutes, or school officials fail to provide information sufficient to demonstrate compliance with course of study requirements, the Commissioner shall give due notice of probable removal of basic approval and schedule a hearing on the matter pursuant to the requirements of the Administrative Procedure Act. The hearing may also consider allegations that the school has failed to comply with (1) any other requirement of basic school approval, as defined by the

3. The addendum to the rules governing the approval of private schools states that the English and mathematics course requirements apply in grades one through *six*.

4. *See* note 3 *supra*.

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APPENDIX—Continued

State Board of Education in Chapter 125, or (2) specific statutory requirements. 05–071 CMR 127, at 11.

C. *Teacher Certification Requirements*

The teacher certification requirements contemplate "a bachelor's degree with two years of liberal education, appropriate subject matter concentration, professional knowledge and supervised teaching experience." *See* 05–071 CMR 115, Introduction.

An elementary school teacher must either have graduated "from a four-year baccalaureate program approved for the education of elementary teachers, together with the formal recommendation of the preparing institution" *or* (1) a bachelor's degree from an accredited institution; (2) at least 50% of all undergraduate study in liberal education courses; *and* (3) "thirty hours of approved general professional education courses," at least six of which must provide teaching experience.[5] Teacher certification must be renewed every five years; "six hours of approved study" is a prerequisite to renewal.

A secondary school teacher can obtain certification either by graduating from a four-year baccalaureate program approved for the education of secondary school teachers and by obtaining the formal recommendation of the preparing institution, or by making a satisfactory showing that he or she has: (1) a bachelor's degree from an accredited institution; (2) devoted at least one-half of all undergraduate studies to courses in liberal education; and (3) an established teaching field[6] and at least 18 hours of approved general professional teaching courses. Secondary school teachers must also complete six hours of approved study every five years to obtain renewal of their certification.

5. Teachers who complete a graduate program in elementary education and are recommended by their preparing institution need not meet the third requirement.

6. An "established teaching field" requires either a 30-credit hour major and an 18-credit hour minor in any subject commonly taught in secondary schools, or at least 50 credit hours in one area of specialization, such as social studies, science, physical science and mathematics.

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: HB - 357
Title: ...regulation of religious schools
Sponsor: Fritz
Requestor: House HESS

II. FISCAL DETAIL

Agency Affected: Education
Program Category Affected: Elem. & Sec.
BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

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

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Steve Hole
Phone: 465-2865
Division: Management, Law, & Finance
Date: 4/18/83

Approved by Commissioner: Marshall Lind
Date: 4/18/83
Department: Education

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

TO: Don

FROM: Jan

DATE: 5/14/83

RE: HB 357 - dregulation of religious schools

AFter reviewing the HESS committee information and the committee substitute for HB 357, I have some concerns about this bill.

Section 1 - This exempts "general supervision" over pre-elementary religious schools and "general supervision...over the educational component" of religious nursuries.

The regulations [illegible]re-elementary schools govern:

1) certi[illegible]e of approval
2) insur[illegible]ce
3) physical examinations for children
4) physical examainations for staff and volunteers
5) regulations for children with special needs
6) disaster plans
7) facility inspections for health and safety
8) curriculum
9) nondiscrimination
10) programs
11) transportation

While the state may not regulate the curriculum of a school it should be allowed to regulate health, safety and nondiscrimination in the schools.

The bill later says that religious schools can be regulated for health and safety reasons, the first section seems to take pre-elementary schools and nursuries out of the education laws all to gether.

I am told that these schools try to qualify as educational schools rather than as day care centers to avoid the strict regulations of DHSS. Under this bill, they can qualify as schools, rather than as daycare, then there are no regulations, for even safety, health or nondiscrimination reasons.

One of the dangers of the private schools is that they are formed in order to avoid integration.

AMENDMENT: qualify the exemption in sec. 1 so that the schools can be regulated for safety, health, and nondiscriminator reasons. *or take sec. out all together - it's covered later.*

QUESTIONS: WHat are the regulations in HSS for these schools
What are the proposed regulations that the religious schools so adamantly oppose?

NOTE: Only three states exempt preschools all state certification and inspection except for health and safety coes: ARkansas, Illinois, Virginia (in Ark. the statute is being challenged on equal protection grounds (discriminates against private schools or treats preschool children differently)

Scetion 2 - This eliminates the requirement of meeting standards for education. The statute originally allows a religious school to qulaify by requiring teachers to be certified or testing students on subjects set by the dept.

The bill exempts the religious schools from all of these requirements although it allows them to test their own students by means of a standardized test whose results must be made available to the dept.

It seems that the religious schools ought to have certified teachers or be required to conform to certain standards on national tests chosen by the dept. Recently, the U.S. Supreme Court refused to hear a challenge to NEbraska laws that would required teacher certification on the basis there were no constitutional or federal issues.

Note: I beleieve most states require the teachers to be certified (this needs to be checked). ONly trhee states require standardized testing. North Carolina is the pattern for the bill.

AMENDMENT: REquire certified teachers or require standardized testing (possibly the dept. and the schools could work out which tests)

Section 6 - see above

CONSTITUTIONALITY: Keith Levy from legislative affairs thinks the bill is unconstitutional because it discriminates against other private schools. This is being litigated in Arkansas.

STeve Hole of DOE suggested that an amendment be added to require

MEMORANDUM State of Alaska

TO: Steve Hole
Administrator
Department of Education

DATE: June 10, 1983

FILE NO: 366-657-83

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: CSHB 357 (Rules)

By: Thomas H. Robertson
Assistant Attorney General
Human Services-Juneau

This memorandum is written in response to our recent telephone conversation in which you asked whether language in CSHB 357 (Rules) which would exempt certain pre-elementary schools from supervision by your agency raises a question of equal protection under the law.

A substantial question exists as to whether this and other provisions of CSHB 357 (Rules) violate the equal protection clauses of the state and federal constitutions.

Section 1 of CSHB 357 (Rules) would exclude pre-elementary schools and nurseries operated by "a church or other nonprofit religious organization that is exempt from federal taxation and does not receive direct state or federal funding" from supervision by your agency under AS 14.07.020(8). Other sections of the bill would amend AS 14.30.010 which governs compulsory attendance and would exclude other educational programs operated by these organizations from regulation by the state. In effect, this bill would establish two categories of private schools, church related and not church related, and would provide for disparate treatment of each.

To the extent CSHB 357 (Rules) is intended to assure that your agency does not infringe first amendment protections, it is unnecessary. 1/ Your agency has no power to violate the

---

1/ The first amendment to the United States Constitution provides, in part, that Congress shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof". Similar language is contained in Article 1, sec. 4, of the Alaska Constitution.

constitutional rights. To the extent CSHB 357 (Rules) would go beyond first amendment protections, it raises a serious question of equal protection under the state and federal constitutions.

Equal protection analysis under either the state or federal constitutions requires an evaluation of the purpose of the legislation at issue. CSHB 357 (Rules) does not contain a statement of purpose and none, other than that of accommodating first amendment rights, is readily apparent. If as a factual matter sufficient reasons cannot be articulated to support a distinction between these categories of private schools, then a court would probably find this legislation to deny equal protection. 2/

In an opinion dated January 24, 1983, the Attorney General for the State of Arkansas addressed the constitutionality of a similar bill under consideration in that state. That opinion, a copy of which is attached, concludes that the bill unlawfully discriminates against children in religious child care facilities and the owners and operators of non-religious facilities. In addition, it concludes that the bill may impermissably benefit religious organizations in violation of the First Amendment. Unless circumstances in this state require a different result, we would probably reach a similar conclusion if asked to undertake a more comprehensive analysis of this legislation.

2/ Generally speaking, the Fourteenth Amendment to the United States Constitution requires that disparate treatment be supported by a rational basis unless a suspect classification (race, creed, etc.) or a fundamental right is involved, in which case it must be supported by a compelling state interest. In State v. Erickson, 574 P.2d 1 (Alaska 1978), the Alaska Supreme Court established a single standard for equal protection analysis under the Alaska Constitution. This standard, which is more demanding than the federal rational basis test, requires an evaluation of the purpose of the statute and, if the purpose is legitimate, a determination whether it is substantially furthered by the means chosen. Finally, the means must be balanced against the nature of any constitutional right which may be infringed.

If you have additional questions, or desire further research in this area, please do not hesitate to contact this office.

THR:ja

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

STEVE CLARK
ATTORNEY GENERAL

(501) 371-2007

January 24, 1983

OPINION NO. 83-15

The Honorable Joseph K. Mahony
The Honorable Robert L. McGinnis
State Representatives
1983 General Assembly
State Capitol
Little Rock, AR 72201

RE: House Bill 54

Gentlemen:

I am writing in response to your request for an opinion regarding the constitutionality of House Bill 54. An examination of the bill reveals an obvious concern that House Bill 54 is legally invalid as a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article 2, Section 3 of the Arkansas Constitution.

The Fourteenth Amendment states, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis supplied]

These constitutional provisions have consistently been interpreted to strike down statutes which discriminate between different groups of citizens or businesses which are regulated by the same legislation.

That is to say, when the law attempts to regulate a business, industry or practice, it must do so on an equal basis to all the members of the regulated class unless there is a significant difference in the way the exempted class operates its business, industry or practice and the exemption is reasonably related to the purpose of the original legislation. Jacks v. State, 219 Ark. 392, 242 S.W.2d 704; Wometco Services, Inc. v. Gaddy, 272 Ark. 452, 616 S.W.2d 466, Rayco Construction Co., Inc. v. Vorsanger, 397 F.Supp. 1105; Milnot Co. v. Douglas, 452 F.Supp. 505. See also Milnot v. Arkansas State Board of Health, 388 F.Supp. 901 and Dicks v. Naff, Mayor, 255 Ark. 357.

In the Rayco case the Court stated:

> A state may validly differentiate between people or corporations on the basis of classifications providing that the state has legitimate and significant (in some contexts a "compelling") interest in the differentiation and provided that the classification is based on some reasonable and rational criterion or criteria; however, absent an appropriate state interest or absent rational and relevant standards of classification, state-imposed differentiation amounts to unconstitutional discrimination. [Emphasis supplied]

The exemption which H.B. 54 creates is the type of "classification" which these cases address.

Therefore unless the exemption can be justified because of differences in the operation of religious child care facilities as opposed to non-religious facilities this bill appears to discriminate, unlawfully, against not one but two classes of citizens: the children the Child Care Facility Review Board Act was intended to protect and the owners and operators of non-religious facilities.

Since there is no language in the bill indicating that children in these religious facilities are fed, supervised, etc. any differently from children in secular facilities and since there is no language in the bill indicating that children in the religious facilities are any less likely to be neglected, abused or left in hazardous circumstances than children in secular facilities there is no justification for denying to the children in these centers the protection of the state and forcing the owners of secular facilities to compete with unlicensed facilities who are operating the identical kind of business.

It is important to remember in this regard that the intent of the original act, as stated at Ark. Stat. Ann. §83-904(b), is the protection of children:

> (B) In establishing requirements and standards for the granting, revoking, refusing, and suspending of a license for a Child Care Facility the Welfare Department [Child Care Facility Review Board] shall adopt such rules and regulations as will: promote the health, safety and welfare of children attending a Child Care Facility; promote safe, comfortable, and healthy physical facilities for the children who attend the Child Care Facility; insure adequate supervision of the children who attend the Child Care Facility, insure adequate supervision of the children by capable, qualified and healthy individuals; insure appropriate educational programs and activities within each Child Care Facility; and insure adequate and healthy food service where food service is offered by the Child Care Facility.

With this in mind H.B. 54 demonstrates no rational, much less compelling state interest, in exempting facilities from licensure simply because they happen to receive no state or federal money and are associated with a religious organization.

The source of the facilities' funds and its association with a religious association simply does not appear to be connected in any way with whether or not these children deserve the same protection from abuse, neglect or hazardous circumstances as children in secular centers.

Likewise the source of the facilities' money and association with a religious organization does not appear to justify compelling a secular facility to spend the money and resources necessary to comply with the original act when the religious facilities operate the identical type of business enterprise.

Since there is no language in the original act which appears to authorize the Child Care Board to interfere with the religious beliefs of any church, this exemption seems irrelevant to any need to protect the First Amendment rights of religious groups.

However, if a religion's beliefs are manifested in practices which may threaten the safety and well being of children, then the state through its police power and the doctrine of parens patriae can and should lawfully discover and prevent such dangers. See Cude v. State, 237 Ark. 927, 377 S.W.2d 816.

In the Cude case the Arkansas Supreme Court overruled parents' religious objections to having children vaccinated, saying that the state's police power superceded the dangerous beliefs of parents which threaten the well being of the children. The Court quoting the United States Supreme Court in Prince v. Massachusetts, 321 U.S. 158, said:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death.
>
> . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Again however, it is important to note that the intent of the original legislation has nothing whatsoever to do with parents' religious rights or the rights of a religious association but simply with the

protection of all children, religious or not, in facilities which are religious or secular.

Therefore any argument that this exemption is necessary to protect the First Amendment rights of the prospectively exempt facilities is without support from any language in H.B.54.

In fact the bill itself appears that it may violate the doctrine of church/state separation by awarding an unjustifiable benefit to religious organizations not enjoyed by private facilities which operate identical enterprises.

Without a justifiable secular legislative purpose which neither advances or inhibits religion, the bill is, in fact also suspect from the point of view of the First Amendment. Roemer v. Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179

Again, it is difficult to see, from the bill itself, a secular and neutral legislative purpose for exemption of only the religious facilities. Rather it appears that this legislation is clearly intended to further the alleged religious interests of certain denominations since there is no rational justification for the exemption in view of the legislative purpose quoted above.

The courts, in reviewing a challenge to this bill, can look behind the legislation into the history of the bill, something that has been done recently in McLean v. Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982), and Epperson v. Arkansas, 363 U.S. 97, 89 S.Ct. 260, 21 L.Ed. 2d 228 (1968).

Since the burden is on those defending a discrimination to make out a claim for justification (Wengler v. Druggist Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107) I can advise you that this bill presents no such justification and the state could therefore not carry that burden in a court action.

It is important to remember that:

1. Many children in the so-called religious centers are not members, nor are their parents, of the religious facility seeking exemption. So again the particular beliefs of the religious association are irrelevent to protecting the children at the facility. Circle H and Faith Christian homes recruit children from all over Arkansas regardless of the children's religion at the time of their arriving at these facilities. The Alamo foundation solicits new born babies from all over the nation totally disregarding any beliefs of the child.

There is simply no rational justification for denying these children protection of state law because the institution they end up in, through no choice of their own, has a religious objection to licensure.

2. This exemption would not have protected Circle H Ranch because records at social services reflect it received well over $100,000 in state and federal aid.

3. Many of these children come from broken homes, and have learning disabilities which require expert counseling and often special education which, as Judge Barrier found in the Circle H case, are not available at some of these facilities. These are children who need society's protection and assistance.

4. Health department inspections are inadequate to insure the safety of children because they do not have specific day care rules and regulations to address vital areas of the operation of a child care center such as playground safety, etc. The same is true with the Fire Marshal. Such problems were observed at the Alamo Foundation where an unfenced swimming pool and unfenced fishing pond were less than 100 feet from a playground serving 70 children.

5. Current criminal laws against child abuse are not adequate to protect children in these centers because: (1) These laws cannot operate without a report of abuse by a witness. At some facilities absolute loyalty is the rule and therefore it is unlikely that employees will file such a complaint; (2) Employees at other centers are not likely to report abuse because it may cost them their job; (3) Criminal statutes don't authorize closing the facility where abuse or neglect is practiced. They only allow prosecution of individuals. And if the only witnesses are children who are too young to testify, there is no case to take to a prosecutor although the abuse, unreported, is nonetheless occuring.

In conclusion, House Bill 54 is constitutionally suspect as being without rational justification and thus discriminates both against a large class of children and the owners and operators of secular facilities.

I am informed of the likely prospect of an immediate court challenge if the bill is enacted. In that eventuality, it is my judgment that the bill would be struck down as a violation of the constitutional provisions I have mentioned.

If I may be of assistance in providing additional information on this or other proposed legislation, please do not hesitate to contact this office.

Sincerely,

STAV. CLARK
Attorney General

SC:mgv

Give To Nancy ✓

Anchorage Community College A Unit of the University of Alaska System

September 23, 1983

RECEIVED

Ernestine Griffin, President
State Board of Education
Box 302
Sitka, AK 99835

Dear Ms. Griffin,

I am writing you in regard to the proposed preschool regulations which are soon to come before your board for action. I speak as one with a doctorate in Early Childhood Education. I teach at Anchorage Community College in Early Childhood. I am also president of the Anchorage Association for the Education of Young Children.

The proposed regulations need to be approved. They represent minimum standards for providing experiences which promote development in young children. You may have received much correspondance against the proposed staff:child ratio (60.115) and space requirements (60.119). Recent research supports the proposed changes.

The Children's Environment Project (Moore, Lane, Hill, Cohen, & McGinty, 1979) reviewed the literature on the relationship of space to quality experiences for preschool age children. The Project also conducted research of its own on the subject. It was found that in dense settings (30 square feet or less per child) there was a higher incidence of aggressive behavior and/or low degree of child involvement.

Furthermore, it was determined that space of 40 to 45 square feet per child "provides a much more flexible program, options, active and quiet pursuits happening simultaneously without disturbing each other, etc." (Moore at al., 1979).

The Children's Environment Project recommends a minimum of 42 square feet of usable floor space per child. The proposed space requirement of 35 square feet per child is less than what research indicates is necessary for providing quality experiences for children.

Staff ratio in young children's programs, and a related issue, group size, were studied extensively recently by Ruopp, Travers, Glantz, & Coelen (1979). The size of the group of children was found to have a direct relationship to the behavior of the children in that group. This is an issue in the proposed regulations since the ratio of staff to children effects the size of a group of children within that setting: the fewer the staff, the larger the group.

Ruopp et al. (1979) found that as group size increased, children's reflection/involvement and cooperation decreased while noninvolvement and aimless wandering increased. Furthermore, children's gain scores on two measures, the Preschool Inventory and the Peabody Picture Vocabulary Test, decreased as group size increased.

Ruopp et al. (1979) recommend a staff: child ratio of 1:5 for 3 year olds and a 1:8 (1:7.5) for 4 and 5 year olds. Thus, the proposed ratio of 1:10 is to be considered minimal for promoting quality experiences for young children.

At the very least, I urge you to support these regulations; better yet, I urge you to raise the standards in them to the levels recommended in the research I have cited.

I thank you in advance for approving these regulations.

Most sincerely,

Mary Jo Hotchkiss

Dr. Mary Jo Hotchkiss, Ed. D.

CC: Governor Sheffield
Josephson
Fritz
Tischer
Gottstein
Kito

SCS CSHB 357 (Rules)

Section 1 - DOE will have general supervisory powers, excluding licensing over public and private pre-elementary schools, but not over the educational component of pre-elementary schools operated by a church or other non-profit religious organization. Authorizes DOE to require physical exams and immunizations. The fire marshall has independent authority over fire safety matters and the Department of Environmental Conservation has independent authority over sanitation.

Section 2 - Attendance at a public school is not required if 1) a child attends a private school which complies with regulations set by the Department of Education, 2) attendance is at a program operated by a church or other non profit religious organization exempt from federal taxation and does not receive direct state or federal funding.
Nothing in this chapter authorizes DOE to license any private school.

Section 3 - A religious school which elects to comply with this chapter is exempt from other state laws relating to education except for laws relating to physical health, fire safety, sanitation, immunizations, and physical examinations.

Section 4 - Teachers shall file regular monthly attendance reports to the Commissioner of Education unless Section 5 applies.

Section 5 - Parents of a child enrolled in a religious school shall file a notice of enrollment with the Department of Education. The religious school shall notify the Department immediately if the child is no longer enrolled. A religious school that complies with this chapter shall maintain monthly attendance records, maintain a regular schedule, and make an annual report to the Commissioner.

Section 6 - A religious school that complies with this chapter shall administer a nationally standardized test selected by the chief administrative officer of the religious school from a list supplied by the Department of Education, to all students in grade one, three, six, and nine at least once a year. These tests shall measure achievement in grammar, reading, spelling, and mathematics. Religious schools shall maintain records of these examinations. A religious school that complies with this chapter shall maintain records of immunizations, physical exams, testing, and courses.
Definition of religious school.

Section 7 - Religious schools shall administer their own program at the elementary, secondary, and adult levels.

Section 8 - Repeals the statue which authorizes the state to grant diplomas to 8th grade graduates.

June 1

DOE, Rick, Paul, Pappy, Folks

CSHB 357 - Regulation of Religious Schools.

Steve Hole - D.O.E.

Dept. does not have a position - Policy issue for the legislature.

Change in House Rules pg 1, line 13 inclusive (pg. 2 line 12) from health, immunization and physical exam.

Daniel Oliver - Harvester

Bill instituted after problems w/ HSS over health requirements for pre-Elem. schools.

Parents are responsible for health of children — opposed to dictating size of room, teacher/ratio etc.

Bill Brown - Glacier Valley Baptist Church
Juneau minister & teacher

Cannot support bill — but supports the intent.

Bill gives two options

1) apply for Exemption - which says the State has the right to control
2) Status quo still under supervision of DOE

Sam Rettinger - Co-sponsor

Catholic position - Incidentally neutral to bill. Archbishop Hurley → OK.

Cheri Jacobus

major author of bill – carefully worded to be like other states where law is working successfully.

language is broad

Je explain opting in/out — benefits

Cathy Brown – Cdeclare Valley Baptist
teacher
opposed to HB 357
More regs than status quo.
pg 2 lines 10-14
17-21
23-29
} oppose

Sue Miller – 25 yr teacher – Eagle Forum
supports bill. Superior Education in religious school.
vote for bill a recognition of the devotion of Paul Colvin to Ed.

Barbara Tindell – support

Mike Price – Pat Munroe – DHSS / FHS
administration has no opinion on bill
impacts DHSS in exemption of pre-school life/health safety factors.
licence & regulate pre-schools in state.
young children need to be protected.
Under 47.35 reg nurseries since 1962 Exempted
educational programs in '75 – DOE attempted
to regulate but stopped. Con. audit in 1981
and DOE neglecting responsibility. DOE
worked w/ DHSS to draft regs.

Different concerns for pre-school children. Ego life/safety apply to all programs in State.

Pat Brayton — support

Alys Birdall

DATE: 6/1/87 SPONSOR: Fritz

SUBJECT(S): CSHB 351 - Religious Schools

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness		
CLOVER, DANIEL ✓	HARVEST CHRISTIAN CHURCH	9101 BRAXTON DR	(907) 344-0528		—		
BROWN Bill ✓	Glacier Valley Baptist Church	P.O. Box 2869 Juneau	(907) 789-2803		—		
Brown, Kathy ✓	Valley Baptist Academy	P.O. Box 2869 Juneau	(907) 789-2803		—		
Mullen, Lee ✓	Eagle Forum	P.O. Box 376 Douglas	907 789 7479		✓		
Barbara Tyndall ✓	AFC	P.O. Box 465 Juneau	907-789-7339		✓		
Michael Fried ✓	DPYS	together	465-3120		✓		
Pat Monroe ✓	DPYS FYS		465-3206		✓		
Pat. Brayton ✓	Valley Chapel	8486 Thunder Mt. Rd.	789-0311		✓		
Steve Hsia ✓	DOE	Pouch F	2890		—		
Alice Bergdall ✓	Valley Baptist Academy	5896 Land street	586-1355		✓		
Carolyn Wilcox ✓	Valley Baptist Acad.	8305 Aspen Circle	789-7348		✓		
SAM PESTINO ✓	Pat P	Capitol Bldg	465-3817				
Marie Jacobus ✓							
BURTON CARNEY	Harvester Church Christian	9101 Brayton Drive Anchorage, Ak 99507	344-0528		✓		

SENATE ~~AESS~~ COMMITTEE OBSERVER/WITNESS SIGN-UP SHEET

DATE: 6/10/83 SPONSOR: Fritz

SUBJECT(S): HB 357 - Req. Religious Schools

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness		
Ed Rabeau	DHHS	Bruce HHB	3090	✓	Neutral		
Ed Essa							
Dr. Marjorie Fields		2910 Glaciewood Dr.	789-0109		✓		
Susan R Clark	AAUW	1109 C ST	6-6952		✓		

THE WALL STREET JOURNAL, THURSDAY, APRIL 14, 1983

Fundamentalist Schools Vs. the Regulators

By Neal Devins

For fundamentalist Christian educators, "Big Brother" has already arrived. He has taken the form of intrusive state regulations governing the curricula of their schools and the qualifications of their teachers. He has revoked their tax-exempt status when their religious practices conflicted with federal policies. He has forced them to pay unemployment taxes although he exempts "established" churches from such payments. And he has limited their ability to dismiss teachers who violated the codes of moral and religious conduct established by their schools.

The conflict is receiving increasing national attention. Front-page coverage was given to the Bob Jones University lawsuit and Nebraska's jailing of fundamentalist minister Everett Sullivan for his continued operation of the nonlicensed Faith Baptist church school. Such attention is likely to continue.

Between 8,000 and 10,000 of these schools have been established since the mid-1960s with a current enrollment of more than one million. Since many fundamentalists refuse to abide by laws they believe are inconsistent with their mandate to serve God, when government refuses to accommodate the fundamentalists a showdown is set whereby government will either have to back down or send many fundamentalist ministers and parents to jail. (Nebraska county prosecutor Dale Stelkis had estimated that as many as 12 other Nebraska ministers may face jail for operating unlicensed schools. Similarly, Maine Association of Christian Schools director Ralph Yarnell contends that the ministers who run its member schools are willing to go to jail if state procedures aren't nullified.)

Stranglehold on Religious Liberty

The fundamentalists allege that state and federal bureaucracies have an unjustified stranglehold on their religious liberty. Government agencies, however, contend that the laws and regulations are necessary to ensure nondiscrimination and adequate education. The government's position is supported by civil rights groups (NAACP, American Civil Liberties Union) and mainstream private and public school bodies (National Association of Independent Schools, Catholic Conference, National Education Association, National School Public Relations Association). This jumble of divergent interests makes for extremely complicated and controversial negotiations, legislation and litigation between the fundamentalists and government.

The controversy centers on efforts by state agencies to license private schools and to prescribe courses and teacher qualifications. The fundamentalists believe that education is inherently religious and consequently refuse to comply with broad-based regulations which would make the state "lord over their schools." Additionally, they view many of the regulations as antithetical to quality education.

The fundamentalist objections shouldn't be discounted as the misguided paranoia of religious kooks. Fundamentalists have an important point, that the state has gone too far in trying to control the life style of the family. Perhaps careful listening to the protests could cure some of the ills of public education.

> *Ours is supposed to be a pluralistic society and it ought to acknowledge that people have radically different values and beliefs.*

The fundamentalists are dissatisfied with public schools for a number of very sensible reasons. The most significant is the perceived breakdown of the nuclear family. This is evidenced, fundamentalists say, by increased willingness of parents to have the state take over formation of their children. This, they add, is unacceptable since parents shape the future through the upbringing of their children.

The fundamentalists are also fearful of what they consider a moral breakdown in public schools associated with lack of discipline, sexual permissiveness, and increased drug and alcohol use. This perceived breakdown is viewed as antithetical to the learning of both ethical and academic lessons. The fundamentalists attribute the alleged moral corruption and intellectual decay among youth in part to television.

Finally, they accuse the public schools of inculcating in students a system of values known as secular humanism. According to fundamentalist attorney John Whitehead, humanism signifies "the idea, that men and women can begin from themselves without reference to the Bible, and by reasoning outward, derive the standards to judge all matters." The fundamentalists object to this concept for three reasons. First, they believe that God—as reflected in the Bible—is the proper source of values. Second, they assert that the humanistic value system is in constant flux and thus is incapable of serving as the basis for consistent moral judgment. Third, they think that public school students are denied access to important lessons from the Bible. This has resulted from Supreme Court decisions which prohibited organized prayer, Bible reading and the posting of the Ten Commandments in public schools.

As Prof. James Carper of Mississippi State University has noted, "To many evangelicals the public school exemplifies the trends they deplore in the changing American social order, such as uncertainty concerning sources of authority, dissolution of standards, waning of the Judeo-Christian value system, loosening of system and constraint, scientism and government social engineering." Many of these criticisms of public schools strikingly resemble a number of studies by the College Entrance Examination Board and the American College Testing Program to explain the score decline on college entrance examinations.

This doesn't mean that fundamentalists best know how to advance education. (On nationally recognized achievement tests, students in fundamentalist schools generally perform no better than their public school counterparts.) Yet it makes understandable the fundamentalists' exodus from the public schools to their own loose network of small schools.

The rise of Christian schools can't be entirely explained by mere dissatisfaction with public schools. Equally significant is the fundamentalists' belief that education is inherently religious. As described by pastor Levi Whitaker of Ohio's Tabernacle Christian School: "... we feel that children need Bible guidance for their spiritual and moral foundations ... we feel that our students need the influence of a Godly teacher ... we draw lines of separation from the [secular] world." Corresponding to their belief of church-state separation in the regulation of their schools, the fundamentalists don't accept state aid. More traditional private school groups, like the Catholic Conference, which desire state aid, have lobbied against fundamentalist attempts to deregulate private schools in Pennsylvania, Colorado and Ohio. These groups fear that state legislatures will change their views as to the quality of private education, and in turn will be less receptive to aiding private schools.

The states are generally unwilling to give up their authority over nonpublic schools, believing that existing regulations make educational sense. The states also argue that they are not noticeably interfering with religious practices and that the fundamentalists' argument is philosophical and not religious. Nevertheless, Alabama and North Carolina have recently passed legislation which effectively deregulates fundamentalist schools. Idaho, Colorado and Vermont have also declined to adopt measures which would regulate those schools. On the other hand, Pennsylvania, Maine and Nebraska have refused to modify their regulations of fundamentalist schools.

The state's argument isn't weak, for the provision of good education to all youngsters is one of the state's most compelling responsibilities. And more often than not the state prevails in court. Courts have upheld state procedures in Wisconsin, Oregon, Arkansas, Nebraska, Massachusetts, North Dakota, North Carolina, Iowa and West Virginia. The fundamentalists have successfully challenged state procedures in Vermont, New Hampshire, Kentucky and Michigan. Ohio has issued two conflicting decisions. Cases are pending in Maine, Michigan, Iowa and Nebraska.

'Kingdoms of God and Caesar'

The fundamentalists' claim, though, shouldn't be downgraded. Their schools are—for the most part—doing an adequate job. Additionally, education is an integral part of their life style. Finally, the fundamentalists do perceive state regulations of their schools as an intrusion into their religious practices. It makes sense as a matter of policy to allow the fundamentalists to direct the upbringing of their children. This wouldn't preclude the state from requiring the schools to meet core curriculum requirements and satisfy reasonable safety standards (although some fundamentalists refuse to abide by even that sort of regulation, claiming that there must be a total separation between "the kingdoms of God and Caesar"). The state could also, as many of the fundamentalists argue, ensure that all students receive an adequate education through standardized testing.

The tragedy of governmental refusals to accommodate the fundamentalists is that the education of thousands of children could be thrown into disarray. This is a result of the uncertainty which exists these children's education due to an apparently never-ending stream of conflicts between government and Christian educators. But, as fundamentalist leaders point out, our country needs to rethink its commitment to the principles of separation of church and state and to a government of limited powers.

Ours was designed to be a government of limited powers and it ought not interfere with the efforts of concerned parents to ensure that their children receive a good education and the proper religious upbringing. Ours is supposed to be a pluralistic society and it ought to acknowledge that people have radically different values and beliefs. And as ours pretends to be a sensible society, it ought to recognize that if something isn't broken you don't fix it.

Mr. Devins is a lawyer and a former research associate at the Vanderbilt Institute for Public Policy Studies.

Official Business

Alaska State Legislature

House of Representatives

Committee on Rules

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-3764
465-3765

F6

LETTER OF INTENT

HB 357 "An Act relating to the regulation of religious schools."

The House of Representatives recognizes that operating a church school is an integral part of the free expression of religion and that schools operated by religious bodies are quite different from other private schools. Therefore, the purpose in sending HB 357 to the floor and in urging its passage is to prevent possible church-state constitutional conflicts by protecting the fundamental rights of religious freedom of parents, children, and church schools in Alaska and, at the same time, to balance the state's interest in assuring that each child receives a good education. The House specifically intends to exempt pre-elementary and nursery programs operated by religious organizations from the general supervision of the Departments of Education and of Health and Social Services.

The House only intends to exclude from the purview of this bill those church schools that receive direct federal or state funds. This would not affect those schools that receive incidental benefits from government, such as fire or police protection, health care or other benefits to which all citizens are entitled.

Any church school that satisfies all the requirements of AS 14.45 would be exempt from any additional provision of law relating to education except those requirements of law relating to fire, health, and safety. While each church school would be subject to reasonable fire, health, and safety regulation, the House intends to specifically limit health regulation to that regulation that is reasonably related to the state's interest in preventing and curing physical diseases. For example, the House does not intend for the state to regulate minimum space requirements (except as it directly relates to the fire code), hours of attendance, or reasonable methods of discipline.

In summary, the Rules Committee Substitute for HB 357 balances the state's interest in ensuring that each child receives a good education with the constitutional right to religious freedom.

Not approved

HB

384

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

3/2/84

Date

Mr. President

The Committee on HESS considered CSHB 354(Fin)

expenditures by local school districts; aid.

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

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for

[ ] new title

[ ] same title and recommends

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Chairman

Do Pass

Chairman recommendation

Offered: 2/22/84
Referred: Rules

Original Sponsors: Tischer, Adams and Abood by request

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 384 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to expenditures by local school districts; and providing for an effective date."

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

* Section 1. AS 14.14.050 is amended by adding a new subsection to read:

(e) The audit shall identify those expenditures that comply with AS 14.14.100(c) and those that do not.

* Sec. 2. AS 14.14.100 is amended by adding new subsections to read:

(c) The expenditures of a school district shall conform to the bylaws adopted under (a) of this section.

(d) The department shall adopt regulations setting out procedures to implement this section.

* Sec. 3. AS 14.14 is amended by adding a new section to read:

Sec. 14.14.103. RESTRICTION ON COMPENSATION. A school board may not compensate an employee of any school district, in excess of the employee's established salary, for lobbying activities that are regulated under the Regulation of Lobbying Act (AS 24.45).

* Sec. 4. AS 14.14.130 is amended by adding new subsections to read:

(d) A school district shall keep the records of the terms of employment of a chief school administrator open to the public at the principal administrative office of the district during reasonable business hours and shall submit these records to the department annually.

(e) Before a school board executes a settlement agreement for

the termination of the contract of a chief school administrator, the school board shall submit a copy of the agreement to the commissioner. The commissioner shall submit an advisory opinion and recommendations to the school board regarding the settlement agreement within 10 days of receiving a copy of the settlement agreement from the school board. A settlement agreement may not be entered into by a school board until 30 days after the commissioner submits the advisory opinion and recommendations to the school board.

* Sec. 5. AS 14.17.180 is amended to read:

Sec. 14.17.180. PAYMENT UNDER FINAL COMPUTATION. Before June 16 each district shall transmit to the commissioner a final computation of the district's state aid. The commissioner shall process each district's computation in the manner provided by AS 14.17.150(a). However, in no event may the entitlement of a school district to state aid under AS 14.17.021 be less than that computed under this section for the preceding year, except as otherwise provided in AS 14.17.031, or under AS 14.17.170, whichever is greater. Additional state aid shall be obligated by the commissioner before June 30. If the district received more state aid money than it was entitled to under this chapter, or if it made an expenditure in the previous fiscal year in violation of a policy adopted under AS 14.14.100, it shall immediately, after notice from the commissioner of the overpayment or expenditure, remit the amount of overpayment or expenditure to the commissioner to be returned to the public school foundation account.

* Sec. 6. Sections 1 and 5 of this Act take effect July 1, 1985.

* Sec. 7. Section 3 of this Act takes effect July 1, 1984.

* Sec. 8. Sections 2 and 4 of this Act take effect immediately in accordance with AS 01.10.070(c).

MEMORANDUM

TO: SENATE HESS COMMITTEE
FROM: NANCY DEITRICK
RE: HESS CS FOR CSHB 384 - EXPENDITURES BY LOCAL SCHOOL DISTRICTS.

SECTION 3

Provides that out of pocket expenses reported under the Lobbying Act by employees of school districts who lobby may be reimbursed.

SECTION 4 (e)

Requires:

1. That a settlement agreement be made available for public review and comment for at least 10 days.

2. That a copy of all settlement agreements be submitted to the commissioner of the Department of Education and be kept on file.

3. That a school district may request, or the commissioner may on his own motion provide an advisory opinion and recommendations on a settlement agreement.

4. That a settlement agreement may not be entered into until 40 days after submission to the commissioner.

May 9

Joe, Paul

CSHB 384 - School district expenditures

amendment from Bergman - relates to dis
Yukon-Kuskokwim School District letter
questions opening contracts for
public scrutiny.
AK Council of Sch. Admin - supports bill

Terry Martin -
had bill in House Finance subcommittee
one in Senate mtgs in 1983 and worked
out CS with DOE, admin etc.
Rem reads message

Joe - public concerns of local control

DOE has no control over districts'
expenditures

Bob Manness NEA
financial penalty - will holding
funds may not address problems
agree that a district should be able
to go along with their own bylaws.

Steve Hale - DOE
DOE - Boards have attorneys to advise on
termination contracts. Maybe BE should
give advice.
spoke at great length on this issue
would prefer Commissioner's response
to be permissive rather than mandatory

Joe - the Commissioner would need more info than appears on paper.

Steve - DOE doesn't want to get involved.

Concerned in:

- District not bring off contract to their detriment
- 30 day cool off - prevent back judgements.

Lower Kuskokwim District bought out super for too much. Using too big a weapon for opera.

Pappy moving backwards

Steve - concerned about DOE liability

Martin - recommendation from school board association.

Joe → proposed agreement made public; (10 days) public comment - copy to DOE permit board to request advice from Commissioner

Steve - Ferguson amend

delay in F-6.

dissolution - only take money from kids / programs

state board approves concept of bill.

Joe will not consider Ferguson amendments.

SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

WITNESS REGISTER

BILL NUMBER HB 384 - School district expenditures DATE May 9, 1984

NAME	REPRESENTING	ADDRESS	PHONE NUMBER
Terry Martin	Mtn Bell		
Bob Mannes	Nat Assn		
Steve Hale	DOE		

SECTIONAL ANALYSIS FOR CSHB 384 - AN ACT RELATING TO EXPENDITURES BY LOCAL SCHOOL DISTRICTS; EFD.

SECTION 1 ADDS A NEW SUBSECTION TO THE ANNUAL AUDIT STATUTE REQUIRING THE AUDIT TO IDENTIFY EXPENDITURES AS ALLOWABLE OR OUT OF COMPLIANCE WITH THE WRITTEN SCHOOL POLICIES.

SECTION 2 ADDS TWO NEW SUBSECTIONS TO BYLAWS AND ADMINISTRATIVE RULES REQUIRING THAT THE EXPENDITURES OF A DISTRICT SHALL CONFORM TO BYLAWS, AND THAT THE DEPARTMENT SHALL ADOPT REGULATIONS ON IMPLEMENTATION OF THIS SECTION.

SECTION 3 ADDS A NEW SECTION TO THE STATUTE DISALLOWING SCHOOL EMPLOYEES FROM EARNING MONEY IN ADDITION TO THEIR SALARIES FOR LOBBYING ACTIVITIES.

SECTION 4 ADDS TWO NEW SUBSECTIONS TO CHIEF SCHOOL ADMINISTRATOR STATUTE REQUIRING THE DISTRICT TO KEEP RECORDS OF THE TERMS OF EMPLOYMENT OF THE ADMINISTRATOR OPEN TO THE PUBLIC, AND TO SUBMIT THE RECORDS TO THE DEPARTMENT. SUBSECTION (e) REQUIRES A SCHOOL BOARD TO SUBMIT A SETTLEMENT AGREEMENT FOR THE TERMINATION OF A CHIEF SCHOOL ADMINISTRATOR TO THE COMMISSIONER OF EDUCATION FOR AN ADVISORY OPINION AND RECOMMENDATIONS. THE COMMISSIONER MUST RESPOND WITHIN 10 DAYS, AND THE SCHOOL BOARD MAY NOT ENTER INTO THE SETTLEMENT AGREEMENT UNTIL 30 DAYS AFTER THE COMMISSIONER'S SUBMISSION.

SECTION 5 REQUIRES THAT STATE FUNDS SPENT OUT OF COMPLIANCE WITH THE DISTRICT'S WRITTEN POLICIES MUST BE RETURNED TO DOE FOLLOWING NOTIFICATION FROM THE COMMISSIONER.

SECTION 6 JULY 1, 1985 EFFECTIVE DATE FOR SECTIONS 1 AND 5.

SECTION 7 JULY 1, 1984 EFFECTIVE DATE FOR SECTION 3.

SECTION 8 IMMEDIATE EFFECTIVE DATE FOR SECTIONS 2 AND 4.

Intent Foundation Formula

It is the intent of the legislature that public funds may not be used to fund cost-of-living allowances for chief school administrators, if the administrator does not reside within the school district in which employed more than 80% of the total number of contract days.

and executive personnel

Ferguson put this in today! (FY85 Budget)

SENATE AMENDMENT

By Ferguson

To: _____ SENATE BILL No. _____

To: _____ CS _____ HOUSE BILL No. 384 (FIN)

PAGE: 2 LINE: 9

Add new subsections to read as follows:

"(f) A chief school administrator for a school district shall not be absent from that school district for more than 25 percent of the school year.

(g) For the purposes of this section, "school district" is defined as the geographical boundaries of a school district as well as the community in which the district office of a school district is located if that community is surrounded by or immediately contiguous to the school district.

SENATE AMENDMENT

By Ferguson

To: _____ SENATE BILL No. _____

To: _____ CS HOUSE BILL No. 384(Finance)

PAGE: LINE:

Page 2, line 9

Add two new subsections to read as follows:

"(f) A school board may not compensate a chief school administrator for expenses or the cost relating to travel and per diem, salary or other form of emolument, compensation or reimbursement for time the administrator is not physically present in the district which exceeds twenty five percent of the working days in the fiscal year.

(g) A school board may not compensate a chief school administrator through the use of cost of living allowances, housing allowances, salary adjustments for consideration of area differentials or deferred compensation and may not compensate the chief school administrator more than the prevailing wage for comparable service in other school districts of the state if the school district central office is not located in a municipality within the school district boundaries or in a municipality which is surrounded by or immediately contiguous to the school district."

Page 1, line 13

Add a new section to read as follows, renumber sections accordingly

"* Sec. 2. AS 14.14 is amended by adding a new section to read:

Sec. 14.14.052. RESTRICTION ON STATE SUPPORT. Chapter 82, SLA 1983 notwithstanding, the state aid which may be paid to a school district whose central office is not located within the boundaries of the district nor in a municipality that is contiguous to or surrounded by the school district shall be reduced in the current fiscal year by the amount spent in general support services expenditures category during the prior fiscal year for the staffing and operation of a central office, in a ratio established by the difference between the area differential of the district and the area differential of the location of the central office as established in statute prior to the passage of Chapter 82, SLA 1983.

• ALASKA COUNCIL OF SCHOOL ADMINISTRATORS •
9115 Minor Ct. Juneau, Alaska 99801

an organization of Alaskan School Administrators

May 8, 1984

The Honorable Joe Josephson, Chairman
Senate Health, Education and Social Services Committee
State Capitol, Pouch V
Juneau, AK 99811

Dear Senator Josephson:

The Alaska Council of School Administrators would like to go on record as supporting Committee Substitute for House Bill 384 (Finance). It is our belief that this bill provides many good features relating to school expenditures without adversely affecting the districts' local control.

The Section 14.14.100 requirement that school districts adopt fiscal policies and auditors attest to their following them is a good section and for most districts should require little or no change, as they follow this as a standard practice anyway. It should not significantly impact the cost of the audit as most auditors presently review the district minutes and policies, and would only have to attest to the fact that they were in compliance.

Section 14.14.103, the restriction of compensation of district employees for lobbying above their regular salary is reasonable and we urge its adoption.

Section 14.14.130 which provides for a process in dealing with crisis situations when a school board considers the termination of the superintendent's contract. This would provide a cooling off period, and some semblance of reason, possibly avoiding an extremely costly settlement.

In conclusion, the Council would urge favorable action on this bill.

Sincerely,

Donald L. MacKinnon
Executive Director

DLM/sam

From The

SENATE FINANCE COMMITTEE

Sen. Josephson
Ms. Nancy D.

Attached is copy of letter to John S. from Joe Cooper, Sup. for the YKSD, regarding HB-384 (attached).

John thinks he brings up some valid points of criticism. Can anything be done while bill is in your committee?

Thanks, Max

HB

403

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

5/23/83

Date: June 9 1983

Mr. President:

The Committee on 1838 has had HB 403 am

Insurance trade practices; rate.

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

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for HB 403 am [ ] same title [ ] new title

and recommends do pass

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

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

V. T. Smith

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Jack P. Josephson.
CHAIRMAN

STATE OF ALASKA
FISCAL NOTE

Revision Date ., 1983

I. REQUEST

Bill/Resolution No.: HB 403
Title: insurance trade practices
Sponsor: Furnace
Requestor: Labor & Commerce

II. FISCAL DETAIL

Agency Affected: Commerce & Ec. Dev.
Program Category Affected: Public Prot.
BRU, Program of Subprogram(s) Affected: Division of Insurance

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

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

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Kenneth C. Moore / Director
Phone: 465-2515
Division: Insurance
Date: 5/13/83

Approved by Commissioner: Richard A. Lyon
Date: 5/13/83
Department: Commerce & Economic Development

DATE: 6/10/83 SPONSOR: L&C Committee

SUBJECT(S): HB 403 - Insurance Trade Practices

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness		
DON KOCH	DIV OF INSURANCE	POUCH D	465 2577	←	IF NEEDED		

SENATE HES COMMITTEE OBSERVER/WITNESS SIGN-UP SHEET

DATE: 5/30/83 SPONSOR: Labor/Commerce

SUBJECT(S): HB 403 - Insurance trade practices

NAME	REPRESENTING	ADDRESS	PHONE	Observer	Witness		
DON KOCH	DIV OF INSURANCE	POUCH D JUNEAU 99811	465 2577		←		
Jeff Barry	House Labor + Commerce	Pouch V, Juneau	465-3892		L		

Alaska National
INSURANCE COMPANY

A policy of service and protection

LEGISLATIVE POSITION PAPER
CS FOR SENATE BILL 177
(HESS)

PURPOSE:

An act relating to insurance trade practices.

SUBSTANCE:

Would prevent unfair discrimination by a group medical insurance company or a group medical service contract company among types of medical service providers.

POSITION:

Would not oppose the bill provided some clarifying language has been added.

ACTION:

Seek to obtain the clarifying language. If the language is not included the bill should be opposed.

BACKGROUND:

I suspect the purpose of the bill is to prohibit insurance companies and medical service contractors, such as Blue Cross, from discriminating against chiropractors and other health care providers licensed by the state. Where contracts now provide for medical care which, though perhaps not specifically so provided for in the insurance policy, were intended to be provided by a physician.

I believe it is safe to say that fundamentally insurance companies are willing to reimburse for services provided by any health care practitioner, if the efforts of the health care practitioner result in healing. The problem is that there is not adequate assurance that some licensed health care providers are equiped to provide the kind of care which current medical science regards as necessary for some kinds of health care problems.

For example, there are some kinds of skeletomuscular problems which are incurred and covered by medical service contracts which current medical science believes can be satisfactorily addressed only by surgery or drugs. Indeed, the proper diagnosis of these problems requires the latest in medical diagnostic equipment and techniques which can only be administered by a licensed physician.

7001 Jewel Lake Road • Post Office Box 10-3440, Anchorage, Alaska 99510 • Telephone (907) 248-2642 • Telex (090) 25-456

It is contemplated that these modalities be performed by a physician and that the company not be required to pay for services rendered by a chiropractor who is not qualified to administer these modalities. It is argued that the person ought to be paid or reimbursed for the expenses incurred in seeing a chiropractor who cannot provide surgery or drug therapy but whos alternate modalities are manipulation.

Whether manipulation by a chiropractor is equally as therapeutic as surgery or drugs is not the issue. The question is should an insurance carrier which enters into a contract to provide indemnity for services of a physician be required to pay for services rendered by a chiropractor? The language of this bill would prohibit a person providing such coverage from limiting the application of that coverage to a physician or other health care providers for which the carrier is prepared to provide indemnity and requiring them to provide indemnity or expense reimbursement to any health care provider providing any kind of treatment.

While it may be reasonable to assume that chiropractors and nurse midwives do provide a valuable service, it does not follow that an insurance company should be required to pay for that type of care if that is not it's desired business.

Perhaps the suggested language of the bill is acceptable for cases where the carrier has not specifically designated the kinds of services for which it wishes to provide coverage, but a carrier should be allowed to limit the applicability of it's coverage if it wishes to do so.

I would urge that the following language be added in line 16:

> "...occupational license <u>and services by the class of provider is covered by the terms of the policy or contract.</u> In this section, "Provider" means a state...".

IMPACT ON ALASKA NATIONAL INSURANCE COMPANY:

The impact statement in the original position paper is still applicable.

HB

418

To: Senator Vic Fischer

From: Ginger Baim

Date: May 17, 1984

Re: HB 418 - relating to the rights of blind and physically disabled persons.

You have asked me to research questions you raised about HB 418 when it came before the HESS Committee last week.

Specifically, whether problems exist in Alaska with use of service animals and, if so, whether legislation is the most appropriate way to address the issue.

In order to define the scope of the problem, I spoke with the following agencies and persons: David Maltman, Protection and Advocacy for the Developmentally Disabled; Mike Morgan, Division of Vocational Rehabilitation; Clyde Farington, Employment and Training Center of Alaska; the Ombudsman's office; Audrey Aanes, Access Alaska; Doug Burton, Alaska Marine Highway System; and Christine Hagmeier, an Alaskan who uses a dog trained to aid the hearing impaired.

Ms. Hagmeier said she has twice been denied access to restaurants in Alaska because of her dog, but otherwise she has encountered no further problems. Audrey Aanes said that a disabled Alaskan she was taking to a restaurant in Anchorage this past summer had also been denied access with their service dog.

Otherwise, none of the above agencies or people had ever heard of a problem with service animals or were aware of any disabled person who had been denied access or accommodations because of their service animals. David Maltman, Audrey Aanes and others, however, felt that we may have a problem soon because of the increased use of service animals other than dogs by disabled people other than the blind.

I called the Alaska Marine Highway system because I had heard a rumor that someone was told they couldn't bring their service animal up to the passenger deck. Mr. Burton said that pursers have the authority to allow service animals above deck upon request of the passenger and have done so in the past.

Restaurants present a special problem. As you know, current law forbids animals in areas where food is served except for seeing-eye dogs. Therefore a restaurant owner does not have the latitude to allow a service animal on the premises as a "policy" call. The concensus, however, is that a simple change in regulations, not legislation, could address this problem.

Ms. Hagmeier is a strong supporter of HB 418 but would like to see some changes in the bill if possible. Specifically, she felt that special penalties should be assessed against anyone who steals a service animal because the training these animals receive is specific to the person they are servicing and is extremely costly. She estimates her dog's value at somewhere near $10,000. Also, she felt the legislation should require that the service animal be certified in some way to separate well-behaved pets from animals specifically trained as service animals.

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

HOUSE BILL NO. 418

"An Act relating to the rights of physically disabled persons."

The effect of the act: As 18.06.020(b) entitles a visually and otherwise physically disabled person full and equal accommodations, advantages, facilities and privileges on all common carriers, airplanes, motor vehicles, trains, buses, street cars, boats or any other public conveyance, hotels, lodging, places of public accommodation, amusement, or resort and other places to which the general public is invited.

Section (c) of AS 18.06.020 provides that a blind person has a right to be accompanied by a guide dog in places listed in Section (b).

HB 418 expands Section (c) to include a service dog in the same way as a guide dog is now allowed to accompany a physically disabled person in places listed in (b) of AS 18.06.020.

The existing law and the amendment proposed by HB 418 each provide that the guide or service dog shall be allowed to accompany the person at no extra charge and that the person with the dog shall be liable for any damage done by the dog.

Discussion:

Guide dogs have for a long period of time, been provided by law with sanctions which allowed them to accompany their master as he conducted his normal living routine. More recently dogs have been trained beyond the seeing eye skill and are being utilized as "hearing dogs" to aid the deaf as well as to retrieve and facilitate for the immobile person. This expanded use of the trained service dog to aid the physically handicapped has presented a legal and financial problem to the owner who must deal with a system which limits itself to the single class of guide dog as a recognized exception and treats all other service dogs as pets.

HB 418 includes services dogs as equal to guide dogs and elevates these animals from the category of being only a pet.

Recommendation:

The Department of Health and Social Services supports HB 418.

Recommended by: Philip Shapiro

Philip Shapiro, M.D.
Director, Division of
Mental Health and
Developmental Disabilities

Date: 5/25/83

Approved by: Robert London Smith

Robert London Smith, Ph.D.
Commissioner
Department of Health and
Social Services

Date: 5/25/83

STATE OF ALASKA
FISCAL NOTE

Revision Date _____, 1983

I. REQUEST

BILL/Resolution No.: House Bill 418
Title: Rights of physically disabled persons
Sponsor: Lacher, Fritz, and Lindauer
Requestor: _____

II. FISCAL DETAIL

Agency Affected: Health & Social Services
Program Category Affected: Mental Health & DD
BRU, Program of Subprogram(s) Affected: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Philip Shapiro, M.D. Phone: 465-3370
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Approved by Commissioner: Robert London Smith Date: 5/25/83
Department: Health and Social Services

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