Spring 1985

Fighting for the Fourth "R"

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FIGHTING FOR THE FOURTH "R"

If it's reading, writing and arithmetic, government sets the guidelines. What should its role be when a religion sponsors the school?

by Neal Devins

Fundamentalist Christian educators have recently scored their most significant victory and suffered their greatest loss against state education officials. In December 1983, U.S. District Judge Conrad Cyr ruled in *Bangor Baptist Church v. State* that Maine cannot close church schools that refuse to seek state approval because of religious conviction. An opposite results, however, was reached in the *Sheridan Road Baptist Church v. State of Michigan* decision. In February 1984, the Michigan Court of Appeals upheld as constitutional state teacher certification and licensing requirements.

Bangor Baptist, *Sheridan Road*, and other state regulation lawsuits raise significant constitutional issues under the Free Exercise and Establishment Clauses of the First Amendment and the Fourteenth Amendment. The Free Exercise Clause prohibits the government from unnecessarily interfering in religiously

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based practices. The Establisment Clause, in part, bars the state from fostering an excessive government entanglement with religion. The Fourteenth Amendment, through its extension of due process requirements to the states, protects the rights of parents to direct the upbringing of their children.

The test normally applied in determining whether regulation of religiously motivated conduct violates the free exercise clause requires a three-part determination:

> (1) whether the challenge is motivated by, and rooted in, a legitimately and sincerely held religious belief;
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> (2) whether and to what extent state regulations burden free exercise rights; and
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> (3) whether any such burden is justified by a sufficiently compelling state interest. *Bangor Baptist Church v. State*, 549 F. Supp. 1208, 1217 (D. Me. 1982) (Summary Judgment refused).

Government regulation which significantly burdens the free exercise of religion cannot withstand constitutional challenge unless it represents "the least restrictive means to achieve some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). But the exemption of a religious activity from regulation is not constitutionally required where it would "unduly interfere with fulfillment of the (compelling) government interest." *United States v. Lee*, 455 U.S. 252 (1982).

On this issue, Christian educators claim that a constitutionally unjustifiable stranglehold is being placed on their religious liberty by state laws and bureaucracies. Christian educators believe that private religious schools are mandated by God. This belief on the part of Christian educators, that education is inherently religious, demands noncompliance with state licensing procedures which grant broad authority to state boards of education to promulgate "equivalent educational standards" for nonpublic schools. Most Christian educators acknowledge, however, that some limited state regulation is appropriate to ensure that students learn basic subject areas in a healthy environment. See generally Carper, "The Christian Day School Movement," 47 Educational Forum 135 (Winter 1983).

State officials contend that they have broad authority to promulgate "reasonable" educational standards in private schools. Noting Supreme Court decisions that held "education [to be] the most important function of the state and local governments," states frequently claim that expansive regulations are the least intrusive means available to satisfy their compelling interest in the education of the young. *Brown v. Board of Education*, 347 U.S. 483 (1954).

State legislators have enacted, to varying degrees, regulations which require private sectarian schools to satisfy minimum standards in the following areas: (1) fire, health, and safety; (2) curriculm; (3) textbook selection; (4) instructional time; (5) teacher certification; (6) zoning; (7) consumer protection; (8) student reporting; (9) testing; (10) state licensing; (11) community interaction, and (12) guidance services. The most controversial of these regulations are programmatic ones which govern actual teaching practices in nonpublic schools, including curriculum, textbook, and teacher certification.

In addition to raising issues under the free exercise clause, state regulations frequently conflict with the Establishment Clause prohibition of excessive governmental entanglement with religion. If Christian educators can demonstrate expansive government involvement in the daily operations of their schools, the state must prove that its regulatory scheme meets the least restrictive means-compelling interest test. In

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denying the state's summary judment motion in *Bangor Baptist Church v. State*, the Maine U.S. District Court discussed the importance of the excessive entanglement concept in Establishment Clause litigation:

> An unconstitutional entanglement generally involves the government's continuing monitoring or potential for regulating the religious activity under scrutiny.
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> . . . In determining whether there is entanglement, the question is "whether particular acts in question are intended to establish or interfere with religious beliefs of practices or have the effect of doing so." 549 F. Supp. at 1221 (citations omitted).

The excessive entanglement prong of the Establishment Clause test is often viewed as a list of prohibited entanglements—that government may *not*:

(1) involve itself in "continuing day-to-day relationships" with such pervasively religious schools;

(2) have relationships with church-schools which involve an "element of governmental evaluation and standards;"

(3) carry out legislation or regulations which create situations readily leading to "confrontations and conflicts" between government and churches;

(4) have "programs whose very nature is apt to entangle the state in details of administration;"

(5) have a "sustained and detailed relationship [with church institutions] for enforcement of statutory and adminstrative standards;"

(6) employ, in respect to relationships between teachers and children in church-schools, "comprehensive methods of surveillance and control;"

(7) engage in inspection of church institutional records;

(8) carry out legislation or regulations which create situation requiring "negotiations" between church institutions which have *even the "potential"* for the foregoing entanglements.

W. Ball, Memorandum to Our Fundamentalist Christian Friends and Other Friends of Religious Liberty, App. 14, 1981, at 3-4.

HEALTHY IDEAS: IRR RESOLUTION PASSED

The ABA House of Delegates, acting on the recommendation of the Section of Individual Rights and Responsibilities, has approved a resolution on "the importation of ideas and information" into the United States. Approval of the resolution at the 1985 Midyear Meeting followed submission of a larger IRR Section recommendation concerning U.S. policy on information and the issuance of visas to visiting scholars and political activists.

The delegates approved a resolution stating that "the American Bar Association recommends that U.S. policy concerning the importation of ideas and information be guided by the following principle:

"There should be no prohibition on the import into the United States of ideas and information if the circulation of the ideas and information in the United States is protected by the First Amendment to the Constitution. However, this principle would not preclude (a) labeling requirements as to the source of information; (b) restrictions on quantities of material that a foreign power may import into the United States; or (c) procedures to screen incoming materials to determine if their circulation is restricted by law within the United States."

In its report, the IRR Section quoted President Ronald Reagan: "Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it."

"A free flow of information," the report said, "and ideas among American citizens is crucial to the health of our democratic society. Through open and robust debate in the 'marketplace of ideas,' American citizens inform themselves of policy choices which shape and affect their lives. The flow of information in and out of the United States is an important part of this exchange. Moreover," the report submitted to the house said, "international obligations of the United States commit us to faciliate the flow of information."

Prior court decisions on the state regulation issue suggest that the outcome of lawsuits involving state regulation of Christian schools often hinge on whether the courts prefer unrestrained parental choice in education or state control over some of the essential components of Christian education. The Kentucky Supreme Court, for example, held state teacher certification requirements unconstitutional in its 1979 *State v. Rudasill* decision. 589 S.W.2d 877 (Ky. 1979). For that court:

> One other issue involved in lawsuits between Christian educators and the state is the right of parents to direct the upbringing of their children. One of the leading court decisions that supports the position of Christian educators is the Supreme Court's 1925 *Pierce v. Society of Sisters* decision. In it, the Court explicitly recognized the (due process) right of parents to direct the upbringing of their children. 268 U.S. 510 (1925). The *Pierce* Court held unconstitutional an Oregon statute which required all children to attend public schools. The Court ruled that the State could not outlaw private schooling and that
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> > [t]he fundamental theory of liberty upon which all governments in this Union repose, excludes any general power over the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 268 U.S. at 535.
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> In *Wisconsin v. Yoder*, the Court similarly ruled that Amish parents have a First Amendment religious liberty right to remove their teenage chil-

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dren from public schools. 406 U.S. 205 (1972). According to the Court: "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. at 232. The Court further noted that the parent's right to prepare his child for additional obligations extended to "the inculcation of moral standards, religious beliefs, and elements of good citizenship." 406 U.S. at 233. Finally, in the case of Free Exercise challenges, the Court held that parental decisions must be respected unless it appears that these decisions "will jeopardize the health or safety of the child or have a potential for significant social burdens." 406 U.S. at 234. As the Court stated in *Prince v. Massachusetts*: "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 158, 166 (1944).

These decisions, however, should not be interpreted to give parents carte blanche authority over their children's educations. In fact, the *Prince* court acknowledged:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. 268 U.S. at 534.

Presently, the Supreme Court explicitly recognizes the constitutionality of reasonable state regulations of private schools which promote a compelling state interest in education. In *Board of Education v. Allen*, for example, the Court observed that:

> [s]ince *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. 392 U.S. 236, 245-247 (1968).

In other words, "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." *Allen* at 247. Numerous other Supreme Court decisions have recognized the rights of states to impose reasonable regulations on its private schools. But the Supreme Court has yet to determine where the line separating reasonable from unreasonable state regulations should be drawn.

> [i]t cannot be said as an absolute that a teacher in a nonpublic school . . . will be unable to instruct children to become intelligent citizens . . . [T]he receipt of 'a bachelor's degree from a standard college or university' is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and pa-

> rochial school teachers are unable to teach their students to intelligently exercise the elective franchise. 589 S.W.2d at 884.

The Ohio Supreme Court and a Michigan trial court have similarly held such certification requirements unconstitutional. *State (of Ohio) v. Whisner*, 47 Ohio St. 2d 181 (1976), *State (of Michigan) v. Nobel*, S-7-91-0114-A (Allegan Cty., Mich.) In the Ohio case, the court noted:

> In the face of the record before us, and in light of the expert testimony, [I]t is difficult to imagine a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause . . .We shall not, therefore, attempt to conjure up such an interest in order to sustain application of the 'minimum standards' to these appellants. 47 Ohio St. 2d at 217-218.

In stark contradiction to these decisions, the Nebraska Supreme Court upheld a teacher certification requirement in *State v. Faith Baptist Church*, 301 N.W. 2d 571 (Neb. 1981). 301 N.W.2d 571 (Neb. 1981). That court thought that:

> it cannot be fairly disputed that such a requirement is neither arbitrary nor unreasonable. [A]dditionally, we believe it is also a reliable indicator or the probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.

The North Dakota Supreme Court, in reaching the same conclusion, approached the teacher certification issue in a different manner. For that court:

> courts are ill-equipped to act as school boards and determine the need for discrete aspects of a compulsory school education program. The Courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational equality. Although North Dakota's minimal requirement for state approval of a private or parochial school may be imperfect, without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being protected. *State v. Shaver*, 294 N.W.2d 883, 899-980 (N.D. 1980).

A North Carolina trial court also upheld state teacher certification procedures as "[a necessary means] to insure that the child receives [essential] skills." *State v. Columbus Christian Academy*, No. 78 CVS 1678 at 14 (Wake County Super. Ct.).

This variance among court decisions can be attributed to a number of factors. The most significant is that Supreme Court decisions on the parent-child-state issue are sufficiently diverse to support lower courts in their decisions to either uphold or invalidate state regulatory schemes. Consequently, judges were able to find precedential support to justify apparent value preferences. Moreover, litigants in these lawsuits fed the possibility of such judicial bais by failing to adequately present their cases before the courts.

Bangor Baptist and *Sheridan Road* are especially important cases because they represent the most extensive trials on the religious freedom issue in the Christian school context to have taken place. In the past, Christian school lawsuits have been characterized by poor lawyering on the part of some state prosecutors and Christian school attorneys. Consequently, previous court decisions frequently did not address legal issues in a defintive matter because attorneys failed either to introduce evidence to support their claims, or raise legal arguments which would support their position. See T. Minnery, "Does David Gibbs Practice Law as Well as He Preaches Church-State Separation?," *Christianity Today*, November 12, 1982 at 48.

The *Bangor Baptist* case is also significant because it is the first Christian school lawsuit to be resolved by a federal district court. All previous Christian school cases were initiated in state courts. The *Bangor Baptist* decision thus stands as a unique precedent. This is particularly important because federal court opinions are

An important issue involved in lawsuits between Christian educators and the state is the right of parents to direct the upbringing of their children

generally accorded more precedential value than out-of-state court decisions. What this means is that Christian school attorneys will emphasize their legal victory in Maine in forthcoming lawsuits with other states.

It is important, however, to realize the possible limitations of the *Bangor Baptist* case. Judge Cyr's ruling was based on statutory grounds, not constitutional grounds. Since Maine's statutory scheme varies in significant respects from regulatory schemes of other states, the *Bangor Baptist* decision does not directly repudiate the authority of state officials to promulgate teacher certification, curriculm, and many other types of regulations. Instead, Judge Cyr merely held that Maine education officials were without statutory authority to shut down unaccredited church schools.

Judge Cyr found controlling the fact that no Maine law "prohibits private schools from operating merely because they are unapproved or refuse to seek or accept approval." The judge felt that "[i]f the legislature had meant to ban the *operation* of unapproved private schools, 'it would have said so in the clear and unmistakable language.'" Rather, Cyr noted that Maine's compulsory education law establishes an elaborate plan for prosecuting individuals responsible for keeping students out of school. Consequently, he concluded that if the state were to shut down the schools, "the administrative safeguards of notice, hearing and conciliation" of the truancy process would be eliminated.

The limited statutory nature of the *Bangor Baptist* decision should not severely diminish its value as a precedent in future Christian school lawsuits, however. Judge Cyr's decision suggests that even if state officials had statutory authority to shut down unaccredited Christian schools, "grave constitutional problems" and "serious constitutional difficulties" would be raised relating to religious liberty, rights of enterprise and prior restraints on First Amendment liberties. In fact, in October 1982, Judge Cyr refused on First Amendment grounds to grant the state the right to shut down Maine's unaccredited Christian schools without a trial on the merits. Apparently, Judge Cyr based his recent decision on statutory grounds because of the Supreme Court's admonition to, whenever possible, avoid constitutional determinations.

The State of Maine did not appeal the *Bangor Baptist* ruling.

Unlike the *Bangor Baptist* case, the *Sheridan Road* court resolved the constitutional issue presented to it. That court upheld—on constitutional grounds—regulations quite similar to those utilized in Maine. Instead of viewing this regulatory scheme to be of dubious constitutional validity, the Michigan Court concluded: "that any burden [that state procedures place on the religious] beliefs [of Christian educators] is not constitutionally significant." These educators had alleged that state teacher certification and licensing requirements unjustifiably burdened their right to religious liberty. Additionally, Michigan's Christian educators contended that state requirements infringed on the due process rights of parents to direct the upbringing of their children.

The Michigan Court of Appeals did not deny that the state interfered with constitutional rights of Michigan's Christian educators. Yet, since Christian educators did not object to having their children taught by certified teachers who shared religious beliefs similar to their own, the *Sheridan Road* court concluded that "[t]here is no showing that compliance with the requirement would render, the [religious] mission of [these] schools impractical or impossible."

Combined with this ruling that only a "minimal burden" was placed on religious beliefs, the Michigan court validated state officials' contentions that their laws and regulations are a necessary and unobtrusive means to ensure that their youth receive an adequate education. In so doing, the court dismissed as irrelevant evidence proffered by Christian educators which indicated that their children performed as well on nationally recognized achievement tests as did their public school counterparts.

Significantly, the state court of appeals also sought to distinguish its ruling from state court decisions in Kentucky (*Rudasill*) and Ohio (*Whisner*) which upheld the rights of Christian educators on constitutional grounds; noting that in Kentucky a constitutional provision unique to that state was at issue and in Ohio the state regulations were so intrusive as to "make meaningless" the rights of parents to direct their children's religious upbringing.

The Michigan Supreme Court refused to review this ruling.

The *Sheridan Road* and *Bangor Baptist* decision provide a mixed message to both state legislators and Christian educators. On the one hand, *Bangor Baptist* suggests that state efforts to extensively regulate schools might be foreclosed by legal action. On the other hand, *Sheridan Road* indicates that state officials have great leeway in their development of regulations which govern the operation of church-affiliated private schools.

At this juncture, it is impossible to determine which of the two decisions is more significant. Although the *Bangor Baptist* case was decided by a more influential court, the decision did not directly address the case's religious liberty issue. The *Sheridan Road* decision, however, is of limited precedential value since it was not affirmed by the Michigan Supreme Court.

Both decisions, however, point to the need for some definitive resolution of the Christian school issue. Over the past five years, at least 16 state courts have issued decisions on this matter. These decisions, as a whole, are quite inconclusive as to the rights and responsibilities of both the state and Christian educators. This varied body of court decisions suggest that this issue will remain unresolved until the U.S. Supreme Court addresses this matter. **hr**

The ABA Commission on Legal Problems of the Elderly has published a monograph describing the private law practice of serving the elderly. Copies of the publication, "Doing Well by Doing Good: Providing Legal Services to the Elderly in a Paying Practice," are available free from the Commission on Legal Problems of the Elderly, ABA, 1800 M St. N.W., Washington, DC 20036.