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Fighting for the Fourth "R"

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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
“Courts,” said one decision, “are not equipped to act as school boards.”

based practices. The Establishment Clause, in part, bars the state from fostering an excessive governmental 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;
2. whether and to what extent state regulations burden free exercise rights; and


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 Carpenter, “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) curriculum; (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.
denying the state’s summary judgment 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.

... 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 administrative 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;


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 facilitate 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 [the 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.]

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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children 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: "since 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 v. Ohio v. Whisner, 47 Ohio St. 2d 181 (1976), State v. Michigan v. Nobel, 5-7–91-0114–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). 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, 899–900 (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 bias 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 definitive 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
generally accorded more preceden-
tial value than out-of-state court de-
cisions. What this means is that Chris-
tian school attorneys will emphasize
their legal victory in Maine in forth-
coming 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 con-
stitutional grounds. Since Maine's
statutory scheme varies in significant
respects from regulatory schemes of
other states, the Bangor Baptist de-
cision does not directly repudiate
the authority of state officials to pro-
mulgate teacher certification, cur-
riculum, and many other types of
regulations. Instead, Judge Cyr
merely held that Maine education
officials were without statutory au-
thority to shut down unaccredited
church schools.

Judge Cyr found controlling the
fact that no Maine law "prohibits pri-
ivate schools from operating merely
because they are unapproved or re-
fuse to seek or accept approval." The
decision noted that "judges have said in
the clear and unmistakable language." Rather, Cyr
noted that Maine's compulsory educa-
tion law establishes an elaborate
plan for prosecuting individuals re-
sponsible for keeping students out of
school. Consequently, he con-
cluded that if the state were to shut
down the schools, "the administra-
tive safeguards of notice, hearing
and conciliation" of the truancy pro-
cess would be eliminated.

The limited statutory nature of the
Bangor Baptist decision should not
severely diminish its value as a prece-
dent in future Christian school law-
suits, 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 liber-
ties. 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 statu-
tory grounds because of the Supreme
Court's admonition to, whenever
possible, avoid constitutional deter-
minations.

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 constitu-
tional grounds — regulations quite sim-
ilar 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 constitu-
tionally significant." These educators
had alleged that state teacher certi-
fication and licensing requirements
unjustifiably burdened their right to
religious liberty. Additionally, Michi-
gan'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 Michi-
gan's Christian educators. Yet, since
Christian educators did not object to
having their children taught by certi-
fied teachers who shared religious
beliefs similar to their own, the Sher-
idan Road court concluded that
"[t]here is no showing that compli-
ance with the requirement would
render, the [religious] mission of
these schools impractical or impos-
sible."

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 nation-
ally recognized achievement tests as
did their public school counterparts.

Significantly, the state court of ap-
peals also sought to distinguish its
ruling from state court decisions in
Kentucky (Rudasill) and Ohio (Whis-
ners) which upheld the rights of Chris-
tian 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 Bap-
tist 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 re-
ligious 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 resolu-
tion 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 un-
resolved until the U.S. Supreme Court
addresses this matter.

The ABA Commission on Legal Prob-
lems 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.