GOVERNMENT REGULATION OF NONPUBLIC SCHOOLS IN THE UNITED STATES (US)

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This paper is the first in a series of two that explore government regulation of schooling in the United States of America (US) and Australia under constitutional, federal and state law. In a forthcoming paper, we consider the degree to which federal legislation in Australia has used the power of the purse to develop control over educational provision in both public and nonpublic schools.† In this paper, restrictions on federal intervention in nonpublic schooling is discussed in the US. While the state and federal governments in the US cannot abolish nonpublic schools altogether, they do have extensive authority to impose regulations on those schools. Generally, state statutes and regulations can determine the content of nonpublic schools' curriculum, set teacher credentialing requirements, and prescribe rules for nonpublic school participation in extracurricular activities. The federal government's control over nonpublic schools flows from their reception and use of federal funds.

I Introduction

The United States (US) has a rich tradition of education being provided by private sectarian or nonsectarian institutions. Two of the first three universities established in the US, Harvard and Yale, have maintained their distinctiveness for over three hundred years as private institutions. While private educational institutions can choose to become part of public education,¹ the US Supreme Court, almost two hundred years ago, declared that public efforts to take over private schools can constitute an impermissible infringement on the constitutional right of contract. In the singularly memorable US Supreme Court decision, Trustees of Dartmouth College v Woodward (‘Dartmouth College’),² the Supreme Court invalidated the effort of the legislature of the state of New Hampshire to assume control over the private institution, Dartmouth College, by granting the state the authority to appoint members of the board of trustees. Holding that the royal grant of King George III of England to Reverend Eleazar Wheelock to establish Dartmouth College³ was a contract that had not been revoked by the American revolution,⁴ the Court was persuaded by the eloquence of the oral argument of the attorney representing the College, Daniel Webster,⁵ that to rule for the state would put all private schools at risk.

This, sir, is my case. It is the case not merely of that humble institution, it is the case of every college in our land... Sir, you may destroy this little institution; it is weak; it is in your hands! I sh know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so you must carry through your work! You must extinguish,

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one after another, all those greater lights of science which for more than a century have thrown their radiance over our land. It is, sir, as I have said, a small college. And yet there are those who love it!\footnote{16}

Approximately one hundred years after the \textit{Dartmouth College} case, the US Supreme Court declared, in \textit{Pierce v Society of Sisters} (‘Pierce’),\footnote{7} that the Liberty Clause of the Fourteenth Amendment\footnote{6} prohibited a state from requiring that all K–12 students attend public schools. In striking down a state of Oregon Compulsory Education Act requiring attendance at public schools, the Supreme Court observed that the Act ‘unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control’.\footnote{9} However, the Court noted that the Tenth Amendment’s\footnote{10} implied grant of power to states over education did not deprive them of the authority to reasonably regulate educational institutions.

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.\footnote{11}

Forty-seven years after \textit{Pierce}, the Supreme Court, in \textit{Wisconsin v Yoder} (‘\textit{Yoder}’),\footnote{12} revisited the subject of state control over nonpublic education, this time to determine whether the children of Amish parents must attend a school until age 16, the maximum age for compulsory attendance at that time in the state of Wisconsin.\footnote{13} In reversing truancy convictions against Amish parents for sending their children to Amish schools that provided instruction only through the eighth grade (ages 13 or 14), the Court did not dispute, pursuant to \textit{Pierce}, the authority of the state of Wisconsin to impose ages for compulsory attendance, but held that the application of that authority had to allow for the religious views of the Amish parents. Invoking the Free Exercise Clause of the First Amendment,\footnote{14} the Court held that the Amish community’s three hundred year tradition as an identifiable religious sect that had limited its contact with the secular world and that had a history of producing successful and self-reliant members of society would be threatened if its children were required to attend public schools for two or three years to satisfy the state’s compulsory attendance requirements.\footnote{15} In the wake of \textit{Yoder}, all states with Amish populations created an exemption for them from compulsory attendance requirements.

The Court in \textit{Yoder} created a framework for analysing whether state action violated the free exercise clause. If parties had a sincerely held religious belief supporting their actions, the state needed to produce evidence of a compelling interest to justify its actions in restricting the limitations on religious liberty.\footnote{16} However, despite the compelling interest test, subsequent state and federal courts displayed a willingness to uphold government regulation on a lower reasonableness standard.\footnote{17}

The \textit{Dartmouth College}, \textit{Pierce} and \textit{Yoder} cases reflect that constitutional limitations exist on government authority in controlling private schools. However, the limits for this control are elastic and a considerable patchwork of litigation since \textit{Yoder} indicates that the private schools can be subject to a wide range of federal and state statutory and regulatory requirements.

The measure of US constitutional protection under \textit{Dartmouth College}, \textit{Pierce} and \textit{Yoder} has been undercut by two developments. First, the US Supreme Court, in \textit{Employment Division v Smith} (‘\textit{Employment Division}’),\footnote{18} dealt an almost fatal blow to the use of the free exercise clause as a defense to government regulation. In this non-education case, the Court held that the clause would no longer be used as a defense to ‘a neutral, generally applicable regulatory law’.\footnote{19} The effect of
Employment Division on religious liberty claims was immediate and devastating.\textsuperscript{20} Free exercise of religion still survives as a restriction on government action, but only in the rare situations where those actions can be demonstrated to be hostile toward a particular religion.\textsuperscript{21} Second, the Supreme Court, in Locke v Davey (‘Locke’),\textsuperscript{22} held that states could set more restrictive uses of state funds under their own constitutions than would be required under the US constitution. In Locke, the Court upheld a State of Washington regulation that prohibited the use of a state scholarship for a person training for the ministry, even though other vocational training uses were permissible. Despite Scalia’s vigorous dissent that Locke was not neutral toward religion under the free exercise clause,\textsuperscript{23} the Locke majority found that ‘a play in the joints’ existed between the US constitution’s free exercise and establishment clauses that left states with broad discretion to regulate religious matters. Locke became an extension of an earlier case, Witters v Washington Department of Services for the Blind,\textsuperscript{24} that, while the state’s providing vocational assistance to a blind student attending college to prepare for the ministry did not violate the US constitution’s establishment clause, the state could apply its more restrictive constitutional limitations on state aid to prohibit the scholarship.\textsuperscript{25}

The liberty clause’s right of parents to direct their children’s education still maintains some viability against arbitrary state action. Thus, in Barrow v Greenville Independent School District (‘Barrow’),\textsuperscript{26} the Fifth Circuit Court of Appeals held that when a public school teacher was denied an assistant principal position by the superintendent because she enrolled her children in a private school, she had a claim against the superintendent for violation of her right to educate her children in a private school. Similarly, in Barrett v Steubenville City Schools,\textsuperscript{27} the Sixth Circuit Court of Appeals held that an elementary teacher who was repeatedly denied a teaching position by the school district superintendent because the teacher’s child attended a religious school was entitled to a trial as to whether his liberty clause child-rearing right had been violated. Both courts found the law so well established regarding parent choice of the venue for the children’s education that the superintendents were denied qualified immunity for their denial of the teaching positions.\textsuperscript{28} Earlier, the Ninth Circuit Court of Appeals, in Peterson v Minidoka County Local School District,\textsuperscript{29} held that a school superintendent’s reassignment of an elementary school principal to a teaching position because he decide to home school his children was a violation of free exercise. While the court of appeals recognised that the school district might have ‘a compelling interest if well-informed persons understood Peterson’s action as a vote of no confidence in the school system rather than as the practice of his religion’, their assumption that ‘a religiously-motivated school principal following his conscience as to his own children would somehow be the object of scorn or distrust of his faculty or parent patrons … trammel[ed] his exercise of religion without compelling reason’.\textsuperscript{30} General evidence of the former principal’s desperate struggle to survive following his reassignment to a teaching position supported a jury’s award of $200,000 in special damages and $100,000 in general damage, plus the appeals court’s award of attorney fees, for his mental anguish, humiliation, embarrassment, and emotional distress.

II State Regulation of Private Schools

The Supreme Court’s Yoder decision energised many private, religious schools in the 1970s and 1980s to challenge state imposition of the same regulations on them that applied to public schools. The most contentious areas involved curriculum and teacher certification. Curriculum, the specific courses to be taught in school districts and the content of those courses, is left to states, as opposed to the federal government. Similarly, requirements for teachers are determined by each state, although the federal government has intervened to require that states receiving

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federal financial assistance (all of the states) must have teachers who satisfy a state’s ‘highly qualified teachers’ standards.

Courts have been restrictive regarding the Amish exemption from state requirements and have refused to apply the Amish exemption to non-Amish religious schools and, with only limited exceptions, upheld the imposition of state certification and curriculum requirements under a reasonableness standard. The success of private (usually religious) schools’ resistance to state requirements has often not been successful where those schools have attempted to use their religious claims as a rationale for not following certain state and federal laws. However, undergirding the applicability of state requirements on private schools has been the notion that the same standards would apply to both public and private schools, and that the government requirements would not impede a religious school from having sufficient time to present its religious beliefs. Thus, in State of Ohio v Whisner, the state supreme court invalidated the Department of Public Instruction’s efforts to impose 400 regulatory requirements on private religious schools where the requirements had not been uniformly applied to public schools and where mandates on the amount of time to be spent on various required courses would prevent religious schools from having sufficient time to instruct in their religious doctrines and beliefs.

A Homeschooling

The confrontation between state and private (usually religious) schools diminished beginning in the late 1980s as state legislatures began enacting statutes freeing private schools from many of the more onerous requirements. However, the confrontation moved on to other issues involving state control over homeschooling and restrictions on private school students in participating in public school courses and activities.

All fifty states recognise that homeschooling can satisfy compulsory attendance requirements, but they differ significantly in the amount of regulation. The history of state responses to homeschooling has not been particularly sympathetic or understanding. In addition to a significant judicial record of truancy convictions for parents who choose to home school without satisfying state requirements, courts have upheld a wide range of regulatory methods applicable to home schools but not necessarily to other nonpublic schools. While wide disparities exist among states regarding the amount of regulatory control, some common themes occur:

1. Thirty-four states have statutes and/or administrative regulations directly addressing home schools;
2. Forty-one states require notification by those providing home instruction, with thirty-three requiring notification to local officials, seven to state officials, and one to either local or state officials;
3. Forty-five states specify home schools to operate a specific number of days and/or hours each year;
4. Forty-four states set curriculum requirements; and
5. Twenty-one states do not have specific qualifications for parents or non-parents as instructors; on the other hand, two states (Alabama and Michigan) require all parents, including parents, to be certificated, but beyond these two states, qualifications vary widely as to diplomas, degrees, or certifications required for instructional purposes.

Generally, home schools must fall within state guidelines that define a private school. Satisfying the requirements as a private school will assure that homeschooled students are
meeting the state’s compulsory attendance standards, and, as a result, protect parents from being charged with truancy. The classification of homeschooling as a private school is important as well under the Individuals with Disabilities Education Act (IDEA) where disability services are available on a proportionate basis only to those children in private schools. The IDEA leaves the definition of private school to the states. States vary widely as to their characterisation of home schooling. Nevada specifically declares that home-schooled students are eligible for special education services while other states declare that homeschools are not private schools.

B Participation in Curricular and Extracurricular Activities

Efforts by private school students to enroll in public school courses or participate in public school extracurricular activities generally have not been successful. Most of the case law in this area involves state statutes or organisational rules restricting or prohibiting private school student involvement in public schools. In the absence of a state statute permitting private school students to participate in public schools, students will not succeed. However, if a state has a dual enrollment statute that allows students to be both a public and private school student, a private school student is likely to be successful in the absence of evidence that the class was full. In Embry v O’Bannon, an Indiana appeals court upheld a state statute that permitted certain courses to be taught on-site at private (including religious) schools against a state establishment clause constitutional challenge, the court reasoning under a child benefit theory argument that the beneficiary was the student not the religious school. Most of the case law has concerned state athletic associations that refuse to permit students in private schools to participate in public school activities regulated by the associations. Because the US Supreme Court has determined that state athletic associations are state actors, challenges to association decisions are subject to constitutional scrutiny. Nonetheless, courts have consistently upheld denial of private school or individual student participation in state athletic association events under a variety of rational justifications.

III Control of Private Schools Under Federal Statutes

Federal control over private schools occurs within two broad categories. The first involves control that flows from reception of federal funds, most notably the Rehabilitation Act of 1973 (Section 504) that prohibits discrimination on the basis of disability, Title IX of the Educational Amendments of 1972 that prohibits gender discrimination, the Age Discrimination Act of 1975 that prohibits discrimination based on age, the Family Education Rights and Privacy Act that protects confidentiality and disclosure of student education records, and Title VI of the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color or national origin.

These nondiscrimination statutes apply only to those private schools that receive federal financial assistance. Two of the most frequently litigated statutes are Section 504 that prohibits discrimination on the basis of disability in academic programs and employment and Title IX that prohibits discrimination involving gender. Liability under Section 504 requires several levels of analysis: whether the educational institution receives financial assistance; whether the student or employee has a disability; and, whether the student or employee has experienced an adverse academic or employment decision. In a well-reasoned religious school case, Dupre v Roman Catholic Church of Diocese of Houma-Thibodeaux, a federal district court held that Section 504 applied to the school because it was a recipient of federal assistance under four federal programs: Title I (Helping Disadvantaged Children Meet High Standards); Title II (the Federal,
State and Local Partnership for Educational Employment of the Education Consolidation and Improvement of 1981); Title IV (the Drug-Free Schools and Communities Act of 1986); and, Title VI (Innovative Education Program Strategies). Liability, however, does not extend to individual school officials since they are not the recipients of federal assistance. Disabilities under Section 504 are a broader category than under the IDEA and apply to any impairment that affects a major life function. However, unlike the affirmative obligation aspect of the IDEA where services may have to be provided regardless of cost, Section 504 requires only a reasonable accommodation and exempts private educational institutions where providing requested services would represent undue hardship. Courts permit both public and private educational institutions to expel or otherwise discipline students with disabilities where the student’s presence would affect the essential function of the academic program. Title IX affects all private schools receiving federal financial assistance in much the same way as public schools. The most singular litigated difference has concerned religious educational institutions which punish students and employees, on religious grounds, who engage in premarital sex. In a number of cases, female students or employees have challenged discipline by religious schools under Titles IX and VII where the discipline seems to be directed against females only because of their pregnancy, but complainants must produce evidence that the school does not punish males who cause pregnancies with similar punishment.

The second category involves federal control that flows from a private school being an employer, with the most important statutes being Title VII of the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, religion, sex, and national origin, the Equal Pay Act of 1963 that prohibits gender-based wage discrimination, the Age Discrimination Act of 1967 (‘ADEA’) that prohibits discrimination against persons forty years of age or older, the Americans with Disabilities Act of 1990 (‘ADA’) prohibiting discrimination on the basis of disabilities in private and public employment and in public accommodations, the Federal and Medical Leave Act furnishing employees the right to extended leave for personal and family needs and illnesses, and the Uniform Services Employment and Reemployment Act (‘USERA’) that prohibits discrimination against an employee who applies for or is called up for military service.

The workhorse of the employment statutes is Title VII because of the range of protected areas. However, Title VII has four exemptions, three of which apply specifically to religious institutions;

1. Title VII does not apply to employers with fewer than fifteen employees. Neither churches nor religious schools are excluded as employers. In many cases, religious schools function as units of a church, and courts must use a four-part test under a judicially constructed ‘single employer doctrine’ to determine whether employees of different parts of a ministry should be counted together for purposes of Title VII jurisdiction: interrelations of operations; common management; centralised control of labor relations; and common ownership or financial control.

2. Title VII exempts hiring, discharge, or classification based on religion, sex, or national origin where ‘religion is a bona fide (BFOQ) reasonably necessary to the operations of that particular business or enterprise’. The burden is on the employer to prove a BFOQ exemption. The BFOQ must be of the nature that the essence of the business would be undermined if the exemption were not granted, but a BFOQ cannot be based on stereotyping. The EEOC and federal courts interpret BFOQ narrowly. In Vigars v Valley Christian Center of Dublin, California, a federal district court refused to grant summary judgment for a religious school
that had discharged a librarian who was pregnant out-of-wedlock. Despite the school’s claim that being a Christian role model was a BFOQ, the court held that factual questions remained as to whether the discharge of a pregnant female constituted gender discrimination. Religious qualifications tend to receive favorable judicial treatment as they apply to hiring and firing, but courts scrutinise more closely religious qualifications that appear to treat women on a different basis than men, have no application to the facts of the case, or are inconsistently applied.

3. Title VII exempts employment of persons of a particular religion if the institution is ‘in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion’. The amount of control or support necessary to invoke this exemption is not that considerable. Courts have interpreted this exemption broadly to apply to termination of employees whose conduct or religious views are inconsistent with those of the employer. In Wirth v College of Ozarks, a nondenominational ‘Christian-based college’, a federal court upheld the termination of a tenured Catholic faculty member because his religious views were different from those of the college. In Hall v Baptist Memorial Health Care Corporation, the Sixth Circuit Court of Appeals upheld the termination of a female employee of a Baptist-affiliated college, operated by the corporation, from her position as a student services specialist after being ordained as a lay minister in a church with a large gay and lesbian membership. Even though the college permitted the plaintiff to function as an ordained women minister despite Baptist religious objections to female ordination, the court rejected the plaintiff’s argument that the college had to oppose ordination of women with the same intensity as it opposed homosexual lifestyle. ‘The First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices’. In Little v Wuerl, the Third Circuit Court of Appeals interpreted the Title VII exemption broadly and upheld a Catholic school’s decision not to rehire a non-Catholic teacher because of her remarriage. EEOC scrutiny of religious educational institutions under this exemption is limited. In EEOC v Mississippi College, the EEOC would be prohibited from inquiring as to whether the Baptist College’s decision not to hire a female Presbyterian part-time instructor for a full-time position was pretext for gender discrimination once the college produced evidence of its preference for hiring Baptists. However, in EEOC v Southwestern Baptist Theological Seminary, the seminary was exempt from EEOC’s record-keeping requirement only as to employees that fit the definition of ‘ministers’.

4. Title VII exempts ‘a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities’. In 1972, Congress had amended this exemption, and in effect, expanded the application of the exemption by striking the word, ‘religious’, prior to the final word, ‘activities’. In Amos v Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (‘Amos’), the Supreme Court upheld this amendment to the exemption under an establishment clause challenge. In finding the exemption not to be a violation of the tripartite Lemon v Kurtzman test, the Amos Court observed that ‘it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions’. Amos represents a
significant victory for religious institutions in carrying out their religious missions, and the Court’s decision can be found in chapter 9, Law Cases. As a result of the amendment, as Justice O’Connor observed in her concurring opinion in *Amos*, “[t]he church had the power to put [the Gymnasium employee] to a choice of qualifying for a temple recommend or losing his job because the *Government* had lifted from religious organizations the general regulatory burden imposed by [Title VII].” Subsequent lower federal court interpretations of this Title VII exemption have rejected a ‘rigid sectarianism’ approach or a requirement that a religious organisation must engage ‘in a strict policy of religious discrimination’ that amounts to hiring only persons consistent with the organisation’s religious beliefs.

Missing from this list of federal statutes is the *Individuals with Disabilities Education Act* (‘*IDEA*’), the massive US federal affirmative obligation statute requiring public school districts to evaluate students suspected of having a disability and then determine whether a student is eligible to receive services or alternate placements and, if so, what those services should be and where those alternative placements should be. However, the rights of students in private schools can be different than from their counterparts in public schools and whatever rights private school students may have is carefully scripted by the *IDEA*. In *St Johnsbury Academy v DH* (‘*St Johnsbury*’), the Second Circuit Court of Appeals held that, even though a public school district lacked a high school and had contracted with a private high school to provide education to a student with several disabilities, the private school was not required to provide the services that would have been available at a public school because ‘the *IDEA* applies only to the State and other public agencies, *not* to private schools in which public agencies may place children’. In terms of enforcing the *IDEA*’s requirements of an ‘individualized educational program’ (IEP) and the ‘least restrictive environment (LRE)’ in a private school in which a public agency (school district) has placed a child, the responsibility falls solely on the public school district to provide whatever resources are necessary under the *IDEA*.

However, *St Johnsbury* is somewhat unique because most states will have public high schools for students to attend and, thus, the question in private schools where parents have unilaterally placed their children, is whether such private school children can receive the same services that they would have received if they were enrolled in the public school. The answer is an unqualified ‘no’ largely because the *IDEA* sets limits on the amount of funds available for private school students. The total funds available to children with disabilities in private schools located within any particular public school district is determined by a proportionate ratio based on the numbers of students in public and private schools within the district. Since private schools generally have considerably fewer disabled students than their public school counterparts, the number of dollars to purchase special education services in private schools within any particular school district is very limited. In addition, once the number of dollars for private school students has been determined, the *IDEA* permits public school districts, while they are required to consult with private school parents, to decide which services it will purchase for private school students and whether those services will be provided on site in the private school or at a public school site to which the private school students will be transported. Students with disabilities enrolled by their parents in private schools receive service plans rather than the IEPs (which those students placed in private schools by public school districts would receive) and, except in very limited situations, private school parents do have the right to a due process hearing.

In the emerging areas of sexual-orientation discrimination, the District of Columbia Court of Appeals decision, in *Gay Rights Coalition v Georgetown University* (‘*Georgetown University*’),
indicates that even clearly held religious beliefs must accommodate changing expressions of public policy. In this case, student gay/lesbian groups brought suit against a Jesuit university under a District of Columbia ordinance prohibiting discrimination in the use of or access to facilities and services based wholly or partially on the basis of sexual orientation.101 Despite the university’s belief opposing homosexuality, the appeals court determined that the District of Columbia could protect its interest of ‘the eradication of sexual orientation discrimination’102 and the university’s religious beliefs103 if it provided facilities and services to gay/lesbian students without formally recognising the student group. Citing to Bob Jones University v United States ('Bob Jones University')104 and Roberts v United States Jaycees,105 the appeals court reasoned that ‘government has a compelling interest in the eradication of other forms of discrimination’106 and concluded that ‘discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims’.107 Religious nonpublic educational institutions that have exclusionary practices based on sexual orientation, but not grounded in religious beliefs, have little chance of prevailing when challenged under state or local anti-discrimination laws.108

The issue of opposition by some religious educational institutions to homosexuality has resulted in a division among federal courts as to whether educational institutions (especially public ones) can be required to recognise student organisations that restrict the membership privileges of homosexual students.109 The extent to which educational institutions can prohibit student or employee expression regarding sexual orientation has been the subject of considerable litigation and commentary,110 but, like the Supreme Court’s Bob Jones University decision that denied federal tax exempt status to a university that discriminated on the basis of race, similar denial of government benefits for sexual orientation will likely have the same outcome.

IV CONCLUSION

Private schools in the United States enjoy some differential treatment by courts and legislatures, as for example under the IDEA, but legislatures are political creatures and can change the status of schools. Thus, as in the IDEA, Congress, while not making private schools responsible for providing related services, the statute also limits significantly the services available to disabled students in private schools. Students in religious educational institutions enjoy the constitutionally protected right to make decisions appropriate to their religious beliefs, but even this right is severely circumscribed.

The applicability of federal and state anti-discrimination legislation to private schools has varied. Most states have exemptions for private schools from teacher licensure requirements and curriculum standards but exemptions from anti-discrimination employment statutes are more difficult to find. While private religious educational institutions can impose their religious belief systems as conditions of employment, they cannot set standards based on race or that disadvantage a protected category, such as discharging pregnant female students or teachers without also penalising males as well.

**Keywords:** private education; religious education; establishment clause; parents’ liberty clause rights; state regulation; federal aid; federal regulation.
ENDNOTES

* Editors’ Note: This paper is forthcoming LILE 17(2).

1 See, eg, the College of William and Mary in Williamsburg, Virginia, founded in 1693 from a royal warrant and the second oldest higher education institution in the US, now part of the public Commonwealth of Virginia higher education system <http://www.wm.edu/about/history/index.php>. However, see also, Philadelphia National Bank v United States, 666 F 2d 834 (3d Cir, 1981), cert. denied, 457 US 1105 (1982) (even though a 1965 Pennsylvania statute gave slightly under 40% of the seats on Temple University’s board of trustees to designated public officials and appointees of the governor and leaders of the legislature, the university was nonetheless considered state-related, not state-controlled, and, thus, was not entitled to the exemption from interest charges on debts that it had incurred, a benefit available only to state-controlled institutions).

2 17 US 518 (1819).

3 The royal grant read in part:

   The said jurors, upon their oath, say, that his Majesty George III., king of Great Britain, &c., issued his letters-patent, under the public seal of the province, now state, of New Hampshire, bearing the 13th day of December, in the 10th year of his reign, and in the year of our Lord 1769 … And further, we have will’d, given, granted, constituted and ordained, and by this our present charter, of our special grace, certain knowledge and mere motion, with the advice aforesaid, do, for us, our heirs and successors for ever, will, give, grant, constitute and ordain, that there shall be in the said Dartmouth College, from henceforth and for ever, a body politic, consisting of trustees of said Dartmouth College. Ibid 519, 524.

4 The case was resolved under the US Constitution’s Contract Clause: ‘No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility’. US Constitution Art I § 1 cl 10.

5 Daniel Webster had graduated from Dartmouth College in 1801.


7 268 US 534 (1925). Pierce had been preceded two years earlier in the Supreme Court by Meyer v Nebraska, 262 US 390 (1923) where the Court held that the state of Nebraska’s criminal punishment of a teacher who taught the Bible in German, contravening a state statute requiring instruction in English, was a violation of parents’ right to direct the education of their children.

8 US Constitution amend. XIV: ‘No State shall … deprive any person of life, liberty, or property, without due process of law’.

9 Pierce, 534–535.

10 The Tenth Amendment is part of the Bill of Rights that were adopted shortly after ratification of the Constitution to control the federal government. The Amendment provides quite simply that ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively’. Since the Constitution contains no direct grant of authority to the federal government to control education, the states are considered to have the constitutional authority under this reserved power clause to do so.

11 Pierce, 534.


13 Wisc Stat Ann § 118-15 provided at the time of the Yoder case:

    (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in
session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age ...

(5) Whoever violates this section … may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both.

Wisconsin has, since Yoder, amended its compulsory attendance statute, to require attendance from age 6 until age 18: Wisc Stat Ann § 118-15(1)(a).

US Constitution amend. I: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …’. The free exercise clause had not been available in Pierce because the Supreme Court did not determine that the due process clause of the Fourteenth Amendment applied to limit states actions until Cantwell v Connecticut 310 US 296 (1940).

The Supreme Court captured the conflict between the religious beliefs of the Amish and the Department of Public Instruction of Wisconsin as follows:

They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of ‘goodness’, rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society. (Yoder, 210–211).

See ibid 211–246 for discussion of these factors.

See Sheridan Road Baptist Church v Department of Education, 348 N W 2d 263, 274 (Mich Ct App, 1984) (upholding application of state’s certification requirements to religious school because the requirement ‘was a reasonable means to give effect to a broader, compelling interest—indeed this case, the provision of education to all children’).

494 US 872 (1990) (in a claim for unemployment compensation by two government employees who had used an illegal substance (peyote) allegedly as part of a Native American ceremony, the Court upheld the State of Oregon’s refusal to award the compensation, reasoning that Oregon’s regulation was neutral and had not been enacted solely for the purpose of restricting religious practices).

Ibid 880. The irony of Employment Division is that the Court’s opinion was written by Justice Scalia, an otherwise strong supporter of religious liberty.


See Church of the Lukumi Babalu Aye, Inc v City of Hialeah, 508 US 520 (1993) (invalidating four city ordinances purporting to prohibit the killing of animals but with so many exceptions that the clear purpose was to prohibit the Santeria religion’s practice of animal sacrifices).


Justice Scalia strives valiantly to overcome the effect of his opinion in Employment Division:

[T]he interest to which the Court defers is not fear of a conceivable Establishment Clause violation, budget constraints, avoidance of endorsement, or substantive neutrality—none of these. It is a pure philosophical preference: the State’s opinion that it would violate taxpayers’ freedom of conscience not to discriminate against candidates for the ministry. This sort of protection of ‘freedom of conscience’ has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context.

This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State’s policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. Ibid 730, 733 (Scalia J, dissenting).

Witters v State Commission for the Blind, 771 P 2d 1119 (Wash, 1989), cert. denied, 493 US 850 (1989). The Washington Constitution, Art I, § 11 provides that ‘No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment’.

332 F 3d 844 (5th Cir, 2003).

388 F 3d 96 (6th Cir, 2004).

See ibid 972–974 for the Sixth Circuit’s discussion of Pierce, Yoder, and other cases, (‘it is clearly established that parents have a fundamental right to direct the education of their children … There is also a clearly established law that forbids employers shielded by the constitutionally protected rights of privacy and liberty, “from denying one employment based only on a ‘person’s involvement in activity shielded by the constitutionally protected rights of privacy and liberty”’. In Barrow, the Fifth Circuit, relying on its precedents derived from Meyer and Pierce, opined that, ‘The state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee’s selection of private school materially and substantially affects the state’s educational mission’: at 848.

118 F 3d 1351 (9th Cir).

Ibid 1357.

See Fellowship Baptist Church v Benton, 815 F 2d 485 (8th Cir, 1987) (a state statute exempting Amish from teacher certification requirements did not apply to a Baptist school); Johnson v Charles City Cnty. Schools Board of Education, 368 N W 2d 74 (Iowa, 1985) (a state statute exempting the Amish did not apply to fundamentalist Baptist church). But see, People v DeJonge, 501 N W 2d 127 (Mich, 1993) (reversing truancy conviction, holding that state’s teacher certification requirement did not apply under the free exercise clause to parents who homeschooled their children).

See, eg, State v Faith Baptist Church of Louisville, 301 N W 2d 571, 579 (Neb, 1981) (upholding the imposition of teacher certification regulations on a religious school: ‘the state has a compelling interest in the quality and ability of those who are to teach its young people’ because ‘such requirement is neither arbitrary nor unreasonable’ and because ‘reasonable government regulations as to the quality of education furnished appear to be very minimal in nature’); Sheridan Road Baptist Church v Dep’t of Education, 348 N W 2d 263, 274 (Mich Ct App, 1984) (upholding application of teacher certification requirements to teachers in a religious school because the requirement ‘[was] a reasonable means to give effect to a broader, compelling interest—in this case, the provision of education to all children’).

See Donovan v Shenandoah Baptist Church, 573 F Supp 320, 326 [14 Education Law Reporter 495] (W D Va, 1983) (upholding application of FLSA minimum wage requirements to employees of religious school because the requirements ‘would not impermissibly burden [the church’s] Free Exercise rights’); EE0C v Fremont Christian School, 781 F 2d 1362, 1369 (9th Cir, 1986) (upholding application of Title VII that invalidated ‘head of household’ allowance only for male married employees because ‘eliminating the employment policy involved here would not interfere with religious belief and only minimally, if at all, with the practice of religion’).

351 N E 2d 750 (Ohio, 1976).

See, eg, State v Patzer, 382 N W 2d 631 (N D, 1986) (upholding truancy convictions where parents were not certificated teachers); Burrow v State, 669 S W 2d 441 (Ark, 1984) (upholding truancy conviction where parents’ instructional program was not approved by the state).

See Battles v Arundel County Board of Education, 904 F Supp 471 (D Md, 1995), aff’d, 95 F 3d 41 (4th Cir, 1995) (upholding a state monitoring system that included parent maintenance of a portfolio in established curriculum areas and a requirement that a state department of education representative observe teaching on-site); Brunelle v Lynn Public Schools, 702 N E 2d 1182 (Mass, 1998) (upholding the right of local public schools to oversee homeschooling curriculum and parent teaching qualifications, but rejecting the claim that a superintendent could conduct on-site visits).


See Texas Educ. Agency v Lmeer, 893 S W 2d 432 (Tex, 1995) (holding that homeschooling fit within the state’s definition of a private school).
See People v Leisen, 90 N E 2d 213 (Ill, 1950) (reversing truancy conviction where a homeschooled seven-year-old child was considered to be attending a private school where she received regular instruction for five hours per day, her instructor-mother had two years of college and some training in pedagogy and educational psychology, and the girl showed a proficiency comparable to other third-grade students).

See Williams, 18 IDELR 742 (US Dep’t of Educ., Office of Special Educ. Programs 1992).

Nev Rev Stat § 392.070(2) (reversing Hooks v Clark County School District, 228 F 3d 1036 (9th Cir, 2000) (upholding state determination that homeschooled child was not in a private school for purposes of receiving special education services).

See Va Code Ann, § 22.1-254 (‘Instruction in the home of a child or children by the parent, guardian or other person having control of such child or children shall not be classified as a private, denominational, for-profit, or nonprofit school’.). See also, Fla State Ann §§ 1002.01, 1002.41 (homeschooling satisfies state compulsory attendance as a private school but not for other purposes).

See Snyder v Charlotte Sch. Dist., 365 N W 2d 151 (Mich, 1984) (state statute providing that certain courses and activities must be available to private school students was held to require public school to allow student to participate with the band in the absence of evidence that no seats were available).


See Ind Const art I § 6 (‘No money shall be drawn from the treasury, for the benefit of any religious or theological institution.’).

Tennessee Secondary School Athletic Ass’n v Brentwood Academy, 551 US 291(2007) (state athletic associations are considered to be state actors for purposes of determining constitutional violations because the membership in state associations is overwhelming from the public schools). However, by way of comparison, the National Collegiate Athletic Association (NCAA) is not considered to be a state actor because 40% of the membership is private which represents a sizeable nonpublic input into the decision making. See NCAA v Tarkanian, 488 US 179 (1988) (reversing jury verdict assigning § 1983 damages against the NCAA for its alleged violation of a basketball coach’s Fourteenth Amendment procedural rights because the NCAA is considered to be a private, not a public actor, and, thus, was not a state actor for purposes of a constitutional violation).

See, eg, Denis J O’Connell High School v Virginia High School League, 581 F 2d 81 (4th Cir, 1978), cert. denied, 440 US 936 (1979) (upholding the exclusion of private schools from the state athletic association against an equal protection claim, reasoning that a rationale basis existed for excluding private schools where no specifically designed drawing areas had been drafted and difficulties existed in enforcing the association’s transfer rule); Windsor Park Baptist Church v Arkansas Activities Ass’n, 658 F 2d 618 (8th Cir, 1981) (upholding exclusion of religious school from state athletic association where the school was not state accredited as required by Association rules; the Eight Circuit reasoned that the requirement of accreditation was reasonable and neutrally applied to both public and nonpublic schools); Valencia v Blue Hen Conference, 476 F Supp 809 (D Del, 1979), aff’d without opinion, 615 F 2d 1355 (3d Cir, 1980) (finding no equal protection or free exercise violations in excluding religious school from state athletic association where the association had legitimate interests in preventing athletic recruiting and maintaining a competitive balance among schools within the association).

29 USC § 794.

20 USC § 1681 et seq.

42 USC § 6101.

20 USC § 1232g.

42 USC § 2000d.

1999 WL 694081 (E D La, 1999).

20 USC § 6301 et seq (now Subchapter I of the Strengthening and Improving Elementary and Secondary Schools Act (‘SIESSA’), Improving the Academic Achievement of the Disadvantaged).


20 USC § 3171 et seq (now Subchapter 4 of SIESSA, Safe and Drug-free Schools and Communities, 20 USC § 7103).
57 20 USC § 7301 et seq (now Subchapter 6 of SIESSA, Improving Academic Achievement).
58 See Emerson v Thiel College, 296 F 3d 184, 190 (3d Cir, 2002) (affirming dismissal of complaint against a former college president and other individuals ‘because the individual defendants do not receive federal financial assistance’).
59 34 CFR § 104.3.
60 See Bercovitch v Baldwin School, Inc., 133 F 3d 141 (1st Cir, 1998) (vacating federal district court injunction ordering a private school to re-enroll a disruptive student with a behavior disorder where the court of appeals determined that a waiver of the school’s discipline code for the student was not a reasonable accommodation). But see, Axelrod v Phillips Academy, Andover, 36 F Supp 2d 46 (D Mass, 1999) (federal district court ordered reinstatement of private school student with ADHD who had been expelled after the first trimester of his senior year where the student was passing his courses, and the court reasoned that the instructors could have provided additional time as a reasonable accommodation in order for the student to complete his assignments).
61 See Southeastern Community College v Davis, 442 US 397 (1979) (upholding decision not to admit student with hearing impairment to nursing program where no reasonable accommodation was available for student to complete all of the clinical rotations, especially surgery); Wynne v Tufts University School of Medicine, 976 F 2d 791 (1st Cir, 1991) (upholding dismissal of medical student with cognitive deficits where an alternative form of a multiple choice exam for biochemistry requested by the student would result in program alteration and lower academic standards and would devalue the school’s end product); St Johnsbury Academy v DH, 240 F 3d 163 (2d Cir, 2001) (upholding private high school’s fifth grade reading level requirement for student with disabilities to participate in regular education as a reasonable requirement).
62 See Hall v Lee, Inc., 932 F Supp 1027 (E D Tenn, 1996) (dismissing Title IX claim of female student suspended after she became pregnant where she could not produce evidence that the male students would not have been treated similarly).
63 42 USC §2000 et seq.
64 29 USC § 206(d)(1).
65 29 USC § 621 et seq.
66 42 USC § 12101 et seq.
67 29 USC § 2611 et seq.
68 38 USC § 4311.
69 42 USC § 2000e (b).
70 See EEOC v St Francis Xavier Parochial School, 928 F Supp 29 (DDC, 1996) (although an ADA case, the court in dismissing the claim on jurisdictional grounds, noted that the ADA incorporates jurisdictional requirements of Title VII), rev’d, 117 F 3d 621 (DC Cir, 1997) (whether church and school employees should be counted together is a fact question), on remand, 20 F Supp 2d 66 (DDC, 1998) and 77 F Supp 2d 71 [140 Education Law Reporter 913] (DDC, 1999) (granting summary judgment for the school because the parish and the school were unincorporated entities of archdiocese and could not be sued separately), aff’d, 254 F 3d 315 (DC Cir, 2000).
71 42 USC § 2000e-2 (c)(1).
72 See, eg, Fernandez v Wynn Oil Co, 653 F 2d 273 (9th Cir, 1981) (rejecting a claim of undermining business, in not appointing a female to an international director position, that South-American clients would refuse to deal with a female director).
73 See, eg, Hernandez v St Thomas University, 793 F Supp 214 (D Minn, 1992) (in a case involving the university’s BFOQ argument for not hiring a male custodian for a women’s dorm, the university had the burden of proving privacy considerations for hiring only female custodians). See also, Capací v Katz and Besthoff, Inc, 711 F 2d 647 (5th Cir, 1983) (creating separate columns of advertised positions for female applicants and separate leadership columns for male applicants violated Title VII). 42 USC § 2000-3 (b) prohibits such ‘printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination’ except where a BFOQ is involved. Under the ADEA, unless a statutory exception applies, 29 CFR § 1625.4 prohibits ‘help wanted notices or advertisements contain terms and phrases such as age 25 to 35, young, college student, recent college

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graduate, boy, girl, or others of a similar nature, such a term or phrase deters the employment of older persons.’).


75 See, eg, Maguire v Marquette University, 627 F Supp 1499 (ED Wis, 1986) (upholding a university’s decision not to hire a female Catholic with pro-abortion moral views for a theology position), aff’d on narrower grounds, 814 F 2d 1213 (7th Cir, 1987); Pime v Loyola University of Chicago, 585 F Supp 435 (ND Ill, 1984) (upholding a university’s decision to hire a Jesuit over a female applicant for the philosophy department where fixing the number of Jesuits at seven of thirty-one was reasonable).

76 See Vigars v Valley Christian Center of Dublin, Cal, 805 F Supp 802 (ND Cal, 1992) (discharge of a librarian on a basis of out-of-wedlock pregnancy could be a Title VII violation, even though the school was entitled to discharge employees on a non-gender basis for adultery); EEOC v Fremont Christian Sch., 609 F Supp 344 (ND Cal, 1984), aff’d, 781 F 2d 1362 (9th Cir, 1986) (health insurance benefits paid only to ‘heads of household’ employees as interpreted by the school to be single persons and married men were held not to be a BFOQ since it discriminated against women who were heads of households).

77 See Ritter v Mount St Mary’s College, 495 F Supp 724 (D Md, 1980) (denying summary judgment as to a Catholic lay teacher’s denial of tenure where Title VII religious exemption had nothing to do with the tenure decision), decision after trial, 1981 WL 27030 (D Md, 1981) (granting a college’s summary judgment on a Title VII claim where the teacher was not as qualified for tenure as the male to which she compared herself), aff’d without opinion, 814 F 2d 986 (4th Cir, 1987).

78 See Dolley v Wahlert High School, 483 F Supp 266, 270 (ND Iowa, 1980) (an unmarried pregnant Catholic high school teacher had a Title VII cause of action because, despite Catholic moral views on premarital sex, male employees allegedly were not discharged for engaging in premarital sex. ‘The only issues the court need decide are whether those moral precepts, to the extent they constitute essential conditions for the continued employment, are applied equally to defendant’s male and female teachers; and whether [plaintiff] was in fact discharged only because she was pregnant rather than because she obviously had pre-marital sexual intercourse in violation of defendant’s moral code’); Ganz v Allen Christian School, 995 F Supp 340 (EDNY, 1998) (denying a school’s motion for summary judgment as to whether termination by the church-affiliated school of an unmarried pregnant teacher was based on pregnancy, and therefore a Title VII violation, or based on the school’s religious beliefs). But see, Boyd v Harding Acad. of Memphis, Inc, 88 F 3d 410 (6th Cir, 1996) (upholding a summary judgment of a religious school’s termination of a pregnant preschool teacher where the teacher was not able to refute the school’s nondiscriminatory reason that it enforced its anti-adultery policy against both males and females).

79 42 USC § 2000e-3(e)(2).

See Killinger v Samford University, 113 F 3d 196 (11th Cir, 1997) (despite the Alabama Baptist Convention’s having discontinued control of the university in terms of appointing members of the board, the convention’s $4,000,000 annual contribution constituted substantial support, even though it was only 7 percent of the university’s annual budget); Hall v Baptist Mem’t Health Care Corp, 27 F Supp 2d 1029, 1037 (W D Tenn, 1998), aff’d, 215 F 3d 618 (6th Cir, 2000) (a single three-hour course in religion required by the college controlled by the Corporation was sufficient under the Title VII exemption; ‘the College does not have to hire only Baptists or follow a strict policy of religious discrimination to be eligible for the Title VII exemption’). But see, EEOC v Kamehameha Schools/Bishop Estate, 990 F 2d 458 (9th Cir, 1993), on remand, 848 F Supp 899 (D Haw, 1993) (finding that the Protestant-only hiring requirement for teachers was not protected under Title VII where the schools controlled a church rather than vice versa).

81 26 F Supp 2d 1185, 1188 (W D Mo, 1998), aff’d, 208 F 3d 219 (8th Cir, 2000) (‘[T]he Title VII exemptions allow religious institutions to employ only those persons whose religious beliefs are consistent with the views of the religious organization.’).

82 215 F 3d 618 (6th Cir, 2000) (The Baptist Memorial College of Health Sciences, which was controlled by the Baptist Memorial Health Care Corporation, was started by the Mississippi, Arkansas, and Tennessee Baptist State Conventions and hosted a number of religious functions).
Ibid 626.
626 F 2d 477 (5th Cir, 1980).
485 F Supp 255 (N D Tex, 1980), rev’d in part, 651 F 2d 277 (5th Cir, 1981) (ministers included the following employees: all faculty, president, executive vice president, deans of men and women, academic deans and, other personnel ‘who equate to or supervise faculty’; excluded from the definition of minister were several hundred full and part-time support personnel and ‘those administrators whose functions relate exclusively to the Seminary’s finance, maintenance, and other nonacademic departments’.)
42 USC 2000e-1 (a).
483 US 327 (1987) (the nature of the challenge before the Court was the church’s imposition of its religious temple recommend requirement on a building engineer working in a gymnasium owned by the church but open to the public; no one argued that the gymnasium involved religious activities.).
403 US 602, 612-613 (1971) (the three parts of the well-known test are whether the statute has a secular purpose; whether the effect of the statute’s enforcement would advance or inhibit religion; and whether the statute fostered an excessive entanglement with religion).
Amos, 335.
Ibid 347 (emphasis in original) (O’Connor, J, concurring).
See Killinger v Samford University, 113 F 3d 196, 199, 200 [118 Education Law Reporter 48] (11th Cir, 1997).
240 F 3d 163 (2d Cir, 2001).
The student’s disabilities included cerebral palsy, a learning impairment, and a visual deficit.
St Johnsbury, 171 (emphasis in original).
20 USC § 1414(d)(1)A(i). The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--
(I) a statement of the child’s present levels of academic achievement and functional performance, including--
(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;
(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and
(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives.
20 USC § 1412 (a5)(B)(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
20 USC § 1412(a)(10)(A)(i)(1); 34 C.F.R. § 300.133. The proportionate share is determined for each public school district by the number of students in students enrolled in private schools within the districts, not by the number of private school students who are residents of that district. 20 USC § 1412(a)(10)(A)(i)(1).
20 USC § 1412(a)(10)(A)(iii)(II)-IV). No parentally-placed private school child with a disability ‘has an individual right to receive some or all of the special education and related services the child would receive in a public school’: 34 C.F.R. § 300.182(b)(2).
536 A 2d 1 (DC Cir, 1987).
Ibid 4, n 1 for copy of ordinance.
Ibid 33.