

# **The Case for State Protection of Private School Students from Discrimination**

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## I EVIDENCE OF DISCRIMINATION IN PRIVATE SCHOOLS

More than 5 million U.S. elementary and secondary students, approximately 10% of the school-age population, attend private preK-12 schools (hereafter “private schools”). Of this large group of private school students, roughly 85% attend a religious private school (about 50% in Catholic schools, 15% in “Conservative Christian” schools, and 20% in other religious schools) and 15% attend a secular private school.<sup>1</sup>

Undoubtedly, the educations students receive in private schools, just as in public schools, range from superior to abysmal, and these public and private educations more specifically cover a spectrum from no to pervasive discrimination. While this paper does not suggest that discrimination is a hallmark of private schools, or is present in all or even most private schools, it does posit that discrimination exists in some private schools.

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<sup>1</sup>Office of Non-Public Education, Statistics about Non-Public Education in the United States 1999-2000, available at [www.ed.gov/about/offices/list/oii/nonpublic/statistics.html](http://www.ed.gov/about/offices/list/oii/nonpublic/statistics.html) (last visited December 6, 2005).

Recently, several legal and social science commentators have examined and identified grave concerns about the discriminatory educational opportunities afforded to some private school students, focusing largely on an examination of the curriculum materials used in some private schools. Professor Frances Paterson obtained a research grant to purchase and review published instructional materials published by Bob Jones University Press, A Beka Books, and Accelerated Christian Education/School of Tomorrow (hereafter “ACE”) and used by many Conservative Christian private schools.<sup>2</sup> Among other problems identified in these materials,<sup>3</sup> Paterson found numerous instances of discrimination against various groups, including :

- faiths other than Protestantism are depicted negatively (Catholicism is a “false religion” or a “perversion,” non-Western religions are portrayed as “false,” “heathen,” pagan,”<sup>4</sup> the prayers of Muslims are labeled “worthless words spoken to a false god,”<sup>5</sup>).
- racist statements (a high school American History text treats slavery as “God’s providence because it taught African- Americans the “patience to wait on the Lord,”<sup>6</sup> and describes most masters as being good to their slaves until the abolition movement destroyed the social order,<sup>7</sup> social studies textbook describes Hopi Indians as “primitive pagans,”)<sup>8</sup>
- sexist statements (e.g. in a civics text, “Governmental authority flows from God to human institutions and to the individuals responsible for ruling others within those

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<sup>2</sup>Frances Paterson, Christian School Curricula and Public Funding of Sectarian Schools (hereafter “Christian School Curricula”), presentation at 2000 Education Law Association Annual Conference, Atlanta, Georgia, November 2000. The paper is published at 2000 Education Law Annual Conference Proceedings 209 - 213 (Education Law Association 2000). Professor Paterson reviewed about 250,000 lines of text from 23 social studies and English textbooks and 84 self-instruction booklets. The materials were published by A Beka Books, Bob Jones University Press, and Accelerated Christian Education/School of Tomorrow. *Id.* at 210. A more recent report by Professor Paterson, *With God on Their Side*, is available at [www.rethinkingschools.org/special\\_reports](http://www.rethinkingschools.org/special_reports) (last visited December 31, 2005) and notes a forthcoming book on these issues. This more recent report notes these textbooks and booklets are used in as many as 10,000 Christian schools.

<sup>3</sup>Frances Paterson, *Christian School Curricula*, at 210.

<sup>4</sup>*Id.* at 211.

<sup>5</sup>*Id.* (citing *World Studies for Christian Schools* 217, 218 (teacher’s ed. 1993).

<sup>6</sup>*Id.* at 212 (citing Michael R. Lowman et al, *United States History in Christian Perspective: Heritage of Freedom* 219 (A Beka Books 2<sup>nd</sup> ed. 1996).

<sup>7</sup>*Id.* at 219.

<sup>8</sup>*American Origins: The Age of Discovery and Explorations* (Social Studies 109) at 4 (Reform Publications (School of Tomorrow) 1974, revised 1995).

institutions [according to] a definite order of command from God to human leaders to their followers. For example, the husband is the head of the wife and the parents are God's representatives to rule their children. Individuals obey God when they submit to and obey the God-appointed authorities over them."<sup>9</sup>

-homophobic statements. A high school current events textbook explains that the "vile affections" of gays means "[t]hese people have no more claim to special rights than child molesters or rapists."<sup>10</sup>

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<sup>9</sup>Professor Paterson, *With God on Their Side*, at n. 12 and accompanying text (citing William Bowen et al, *American Government in Christian Perspective* 16 (A Beka Books 2<sup>nd</sup> ed. 1997)).

<sup>10</sup>Id. at n. 13 and accompanying text (citing Bob Jones University's *Teachers Resource Guide to Current Events* 21).

Psychology Professor David Berliner's Educational Psychology Meets the Christian Right<sup>11</sup> compares the child rearing practices of the Christian Right on the one hand, including the curriculum in some fundamentalist Christian schools, with accepted educational psychology principles on the other. Berliner describes education in the ACE program: students work on packets alone, performing "low level cognitive tasks that emphasize simple association and recall;" they are not supposed to speak to each other. There is no cooperative or other group learning, which is "seen to undermine the relationship of subservience of children to adults and to God," or instruction delivered by a teacher.<sup>12</sup> In fact, in many ACE schools there is no teacher, merely an adult manager who maintains order and gives students permission to visit the restroom.<sup>13</sup> The instruction is entirely prescriptive; learning activities which involve independent thinking (lab work, cooperative learning, inquiry-based learning, etc.) are absent.<sup>14</sup> Berliner describes this pedagogical approach as "reject[ing] all of contemporary learning and curriculum theory."<sup>15</sup> Berliner also finds that the emphasis on obedience and low level learning and obedience to adults (with corporal punishment a common punishment for disobedience) strongly discourage students from questioning what they are taught. Like Paterson, Berliner finds bigotry in the ACE curriculum. The educational environment he identifies likely exacerbates the harm to private students who read these bigoted statements. Students exposed to this material are not encouraged, nor apparently allowed, to question it and are not taught the skills to think critically about it in the first place.

As part of his body of work arguing against parent rights<sup>16</sup> Professor James Dwyer has written extensively about the educational environments and curricula in Catholic and fundamentalist Christian schools.<sup>17</sup> He reports teachings and curricular materials at some fundamentalist Christian schools including:

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<sup>11</sup>Available at [www.courses.ed.asu.edu/berliner/readings/differingh.htm](http://www.courses.ed.asu.edu/berliner/readings/differingh.htm) (last visited December 31, 2005). The paper is adapted from the author's E.L. Thorndike Award Address to the American Psychological Association in 1996.

<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>Id.

<sup>15</sup>Id.

<sup>16</sup>Dwyer argues that parent rights are wrong and archaic in the same manner as slavery and the common law approach to women.

<sup>17</sup>James Dwyer, *Vouchers within Reason: A Child-Centered Approach to Education Reform* (2002); James Dwyer, *Religious Schools v. Children's Rights* (1998); James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 Cal. L. Rev. 1371 (1994); James Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denial of Equal Protection*, 74 N.C. L. Rev. 1321 (1996).

-some instructional materials indicate slavery is consistent with the Bible<sup>18</sup> (and therefore presumably not wrong),

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<sup>18</sup>James Dwyer, *Religious Schools v. Children's Rights* 19 (1998).

-ACE curricular materials instruct that women are to “obey and serve” men and “[s]tudents reading these materials learn to oppose equal rights for, and assertiveness in, women,” and “teachers openly tell their students that . . . [if a woman does not submit] ‘the doors are wide open to Satan’”<sup>19</sup>

-in a private school studied by sociologist Alan Peshkin, girls were not permitted to run for certain class offices,<sup>20</sup> and students there “strongly opposed interracial marriage,”<sup>21</sup>

-one textbook “suggests that the founder of Islam, Muhammad, was actually the devil,” and describes India as “a crowded land of heathen people,”<sup>22</sup>

-students are often forbidden from friendships with or dating persons who are not born-again Christians, as well as interracial dating, and engage in sports contests only with other fundamentalist schools,<sup>23</sup>

-a “workbook characterizes the Civil War as a Christian holy war to protect God-given property rights and to preserve the Biblically mandated separation of the races,”<sup>24</sup> and

-Catholicism’s “‘false doctrines’ [are] the result of ‘infiltration’ by the Church of Satan.”<sup>25</sup>

Dwyer also synthesizes social science findings on the long term effects of a discriminatory educational experience on female students. He reports “voluminous research” indicating that

[e]ven subtle forms of discrimination and bias in curriculum, teaching methods and language, and teacher interactions with students result in diminished self-esteem, inhibited cognitive development, passivity, reduced aspirations, and lower achievement on the part of female students. Many female students suffer psychological and material harm and great frustration because they are discouraged from pursuing any interests that are nontraditional, have fewer opportunities than boys for challenging pursuits, and receive fewer rewards for achieving in traditionally male-oriented domains, such as athletics and science. These harms affect females not only when they are in school but throughout their adult lives.<sup>26</sup>

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<sup>19</sup>Id. at 26 (citation omitted).

<sup>20</sup>Id. (citation omitted).

<sup>21</sup>Id. at 30 (citation omitted).

<sup>22</sup>Id. at 33 (citation omitted).

<sup>23</sup>Id. (citation omitted).

<sup>24</sup>James Dwyer, *Vouchers within Reason: A Child-Centered Approach to Education Reform* 171 (2002).

<sup>25</sup>Id. at 172.

<sup>26</sup>James Dwyer, *Religious Schools v. Children’s Rights* 10 (1998) (citations to 9 studies omitted).

## II STATUTORY REGULATION OF DISCRIMINATION IN PRIVATE SCHOOLS

### A. Federal statutes

1. Nature of federal regulation. Federal regulation of discrimination against students tends to have three common features: a) it is largely tied to federal funding or other financial subsidy, b) it tends to treat private schools (whether secular or sectarian) and public schools similarly, and c) it exempts curricular and instructional materials, consistent with another federal statute that the U.S. government will not interfere in curriculum<sup>27</sup>. This self-limitation preserves the Congressionally recognized province of education regulation to the states.<sup>28</sup>

2. Scope of protection. Federal statutes protect a more limited set of groups of students from discrimination than is so for federal regulation of discrimination against employees. Federal statutes do prohibit discrimination, with some limitations, against students based on race, color, national origin, gender, and disability in most private pre-K12 schools, but do not prohibit discrimination against students on the bases of age, religion,<sup>29</sup> and sexual orientation. In contrast, federal statutes prohibit discrimination against employees by both public and private employers on the basis not only of race/color/national origin, gender, and disability, but also age<sup>30</sup> and religion.<sup>31</sup>

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<sup>27</sup>20 U.S.C. § 1232a (2000). The Supreme Court has held that this statute does not prevent Congress from attaching conditions to grants. *Wheeler v. Barrera*, 417 U.S. 402 (1974). See generally *Effects of federal non-interference with curriculum statute*, 71 A.L.R. Fed. 588 (2005). The statutes thus apparently would not reach the bigoted curricular materials identified by noted by several commentators as discussed above.

<sup>28</sup>See 20 U.S.C. § 3403 (a) (2000) (establishment of federal Department of Education “shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States”).

<sup>29</sup>In public schools, religious discrimination against students would of course be prohibited by the Constitution.

<sup>30</sup>Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000) (protecting employees aged 40 and over from age discrimination).

<sup>31</sup>Title VII, 42 U.S.C. § 2000e (2000) (not only prohibiting discrimination against employees on the basis of their religion, but also requiring employers to reasonably accommodate employees’ religion). See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (two days’ unpaid leave would be reasonable accommodation for Jewish employee to celebrate the High Holy days).

Federal employment discrimination law also tend to prohibit a broader range of discrimination, have an easier standard for vicarious liability, and offer a broader range of remedies than do the federal student discrimination statutes. For example, Title VII protects employee from unintentional as well as intentional discrimination. Title VII provides for compensatory and punitive damages; it is unlikely that Title VI and Title IX offer a punitive damages remedy.<sup>32</sup> As to disability, Title III of the ADA does not make money damages available to student or other plaintiffs,<sup>33</sup> while employee plaintiffs can recover damages under Title I.<sup>34</sup> Title VII makes employers liable under normal agency principles and includes constructive notice (knew or should have known); Title IX imposes a much tougher standard actual notice and deliberate indifference for school liability for peer or employee sex discrimination.<sup>35</sup>

3. Federal prohibitions on discrimination against students.

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<sup>32</sup>See *Franklin v. Gwinnett Cty. Publ. Sch.*, 503 U.S. 60 (1992) (making damages available under Title IX, but not explicitly holding punitive damages available); *Banres v. Gorman*, 536 U.S. 181 (2002) (punitive damages not available under Title II of ADA nor Section 504, and suggesting the same result for Title IX since it is also Spending Clause legislation); *Mercer v. Duke Univ.*, 50 Fed. Appx. 643 (4<sup>th</sup> Cir. 2002) (no punitive damages under Title IX).

<sup>33</sup>See 42 U.S.C. § 2000a-3(a).

<sup>34</sup>See 42 U.S.C. § 12117(a) (making Title VII remedies available to employees).

<sup>35</sup>*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (liability for teacher harassment of student); *Davis Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (school liability for peer sexual harassment of student).

a. Race/color/national origin. Private schools must agree not to discriminate on the basis of race as a condition of tax-exempt nonprofit Section 501( c)(3) status.<sup>36</sup> Section 1981, a general civil rights statute prohibiting race discrimination in contracts, is also a vehicle for redressing intentional race discrimination, at least in admissions, by private schools.<sup>37</sup> A prohibition on race/color/national origin discrimination is a condition of receipt of federal funds by both public and private schools under Title VI.<sup>38</sup> Title VI reaches only intentional discrimination.<sup>39</sup> However, and despite the absence of any statutory or regulatory exemption, it may offer somewhat limited redress as to discriminatory instructional materials. The Ninth Circuit recently held that Title VI did not prohibit a public school district from assigning students literature including Huckleberry Finn which allegedly contained racist language but which the school board in its discretion had determined had significant educational and literary value. The same court held, however, that the students may have an actionable claim of a hostile learning environment under Title VI to redress alleged escalated harassment by their peers after these books were assigned.<sup>40</sup> A federal district court found that allegations that a public school’s curriculum “distorts and demeans the role of African Americans and excludes the existence, contributions, and participation of African Americans”<sup>41</sup> were not actionable under Title VI,

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<sup>36</sup>19 U.S.C. § 501; IRS Rev. Rul. 71-447. See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (upholding the constitutionality of this provision; “the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs”).

<sup>37</sup>See *Runyon v. McCrary*, 427 U.S. 160 (1976) (Section 1981 violated by private school which refused admission to black students). The *Runyon* Court also rejected claims that the application of the statute in this manner infringed constitutional freedom of association or parenting rights. *Id.* at 175-177. With regard to the former the court noted that there may be a free association right to attend a school which promotes racial segregation, but not to discrimination in admissions to such a school. *Id.* at 176 (also citing Congressional powers under the 13<sup>th</sup> Amendment).

<sup>38</sup>42 U.S.C. §§ 2000d - 2000d-7 (2000); regulations at 34 C.F.R. §§ 100.1 - 100.13 (2005).

<sup>39</sup>*Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

<sup>40</sup>*Montiero v. Tempe Union High School District*, 158 F.3d 1022 (9<sup>th</sup> Cir. 1998) (challenging assignment of works by Mark Twain and William Faulkner which repeatedly used a particularly offensive racist epithet and which allegedly caused escalated racial harassment by white peers). A concurrence noted there might be a cause of action under Title VI if “a school board assigned as required reading books with overt messages of racial hatred, such as those promoting the views of the Aryan Nation, the Ku Klux Klan, or similar groups”). *Id.* at 1035 (Boochever, J., concurring).

<sup>41</sup>*Grimes v. Sobol*, 832 F.Supp. 704, 706 (S.D.N.Y. 1993).

relying in part on the enforcing Title VI did not prohibit agency's determination that it did not involve itself in "the intrinsic content or purpose of . . . instruction."<sup>42</sup>

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<sup>42</sup>Id. at 712 (also analogizing from Title IX regulations, 45 C.F.R. § 86.42, which explicitly exclude curricular materials as actionable); id. at 710 (Title VI regulations do not reach content of curriculum).

b. Gender. Title IX similarly establishes a prohibition on gender discrimination for both public and private schools which receive federal education funds.<sup>43</sup> However, there are limits on Title IX's ban on gender discrimination which are not found in Title VI's language or regulations. First, Title IX does not apply to "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."<sup>44</sup> Second, Title IX regulations expressly exempt the use of "particular textbooks or curricular materials."<sup>45</sup>

c. Disability. Somewhat similarly to Title VI and Title IX, Section 504 prohibits discrimination against students with disabilities by public and private schools which receive federal education funds,<sup>46</sup> but establishes different standards for required academic and other adjustments for public and private schools.<sup>47</sup> Title III of the ADA goes further, prohibiting discrimination against persons with disabilities in places of public accommodation,<sup>48</sup> specifically defined to include public and private schools without regard to receipt of federal funds.<sup>49</sup> Title III however excludes religious organizations or "entities controlled by religious organizations, including places of worship."<sup>50</sup>

4. The larger context of federal support and regulation of private schools. The federal government does provide financial support for private schools, notably in requiring that

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<sup>43</sup>20 U.S.C. § 1681 (2000); regulations at 45 C.F.R. §§ 86.1 - 86.71 (2005).

<sup>44</sup>Id. at § 1681(a)(3); see also 45 C.F.R. § 86.12 (requiring such organizations to submit written notice to the Department of Education to the extent they wish to claim an exemption).

<sup>45</sup>45 C.F.R. § 86.42. The Department of Education notes that this regulation "explicitly states the Department's position that title IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex. . . . [T]he Department recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and thrust the Department into the role of Federal censor." 40 Fed. Reg. 24135 (1975) (also noting a different interpretation might pose First Amendment concerns).

<sup>46</sup>29 U.S.C. § 794 (2000).

<sup>47</sup>Compare 34 C.F.R. §§ 104.31 - 104.38 (standards for public schools which require a free appropriate education in the least restrictive environment) with 34 C.F.R. § 104.39 (requiring private schools which do not offer special education to make only "minor adjustments" to their programs).

<sup>48</sup>42 U.S.C. § 12182 (2000).

<sup>49</sup>Id. at § 12181(7)(J).

<sup>50</sup>42 U.S.C. § 12187 (2000).

in various federally funded programs such as the IDEA (the federal special education statute), and Title I of the Elementary and Secondary Education Act (hereafter “ESEA”) (the federal program offering remedial math and reading instruction) eligible private school students have an “equitable opportunity to participate.”<sup>51</sup> In contrast, the recently enacted No Child Left Behind Act (hereafter “NCLB”), which as a condition of federal ESEA funding aims for accountability by requiring public schools to administer standardized tests annually students in grades 3-8 does not impose the same requirements on private schools which receive ESEA services.

B. State statutes

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<sup>51</sup>See 20 U.S.C. § 1221c (2000).

1. Methods of regulation. States might extend protection against discrimination to private school students in a number of ways: for example states could follow the federal Title VI/Title IX/Section 504 approach and imposing nondiscrimination obligations as a condition of receipt of state education funds (including but not limited to vouchers), and/or follow the ADA Title III approach and imposing nondiscrimination obligations on private schools as places of public accommodation. In addition, however, and unlike the federal government, states might impose nondiscrimination obligations on private schools as a condition of attendance at the school fulfilling the state's compulsory education requirement, or somewhat similarly impose nondiscrimination obligations on private schools as a condition of state licensure.<sup>52</sup>

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<sup>52</sup>For an overview of the ways in which states regulate private schools, see James Rapp, Education Law § 3.02[3] (2005).

2. Existing state statutes. The federal DOE's Office of Non-Public Education comprehensively surveyed state regulation of private schools in 1993 (hereafter "ONPE Study").<sup>53</sup> The ONPE Study revealed enormous variation in the states' approach to regulation of private schools. For example, at one end of the regulatory spectrum, the ONPE Study reports that in Arizona the State Board of Education does not control or supervise private schools and there is no provision for state approval, licensing, registration, or accreditation.<sup>54</sup> Legislative regulation of private schools is limited to health and safety requirements, and requirements for school days and years.<sup>55</sup> There are no requirements reported concerning subjects of instruction, teacher qualifications, or discrimination.<sup>56</sup> At the other end of the spectrum are states such as Minnesota, which mandates subjects of instruction, teacher qualifications, and provides for visits by local school superintendents to private schools to monitor compliance.<sup>57</sup> Minnesota private schools must document the subjects taught, instructional materials used, class schedules, and methods of student assessment.<sup>58</sup> Students must take a nationally normed standardized test each year.<sup>59</sup>

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<sup>53</sup>Office of Non-Public Education, State Regulation of Private Schools (June 2000), available at [www.ed.gov/about/offices/list/oii/nonpublic/index.html](http://www.ed.gov/about/offices/list/oii/nonpublic/index.html) (last visited December 6, 2005).

<sup>54</sup>Id. at 15 (citation omitted).

<sup>55</sup>Id. at 15-16 (citation omitted).

<sup>56</sup>Id. at 15-16 (citations omitted). There are nondiscrimination requirements reported for residential private schools into which students with disabilities are publicly placed. Id. at 15 (citation omitted).

<sup>57</sup>Id. at 96-100 (citations omitted).

<sup>58</sup>Id. at 96 (citation omitted).

<sup>59</sup>Id. at 97 (citation omitted). Students at a private school which is accredited by a state-recognized agency are exempt. Id.

Minnesota is also reported by the ONPE study to impose broad nondiscrimination requirements on private schools as a condition of being a school which fulfills compulsory education requirements.<sup>60</sup> Private schools may not discriminate on the basis of race, color, or national origin, creed or religion, sex, age, marital status, “status with regard to public assistance,” disability, or sexual orientation.<sup>61</sup> There are limited exceptions reported: religious schools may consider religion in admissions, and single sex schools are permitted.<sup>62</sup> Several other states are reported to impose broad nondiscrimination and related obligations on private schools. Iowa requires a “multi cultural, nonsexist approach be used by state accredited nonpublic schools and that global perspectives be incorporated into all levels of the educational program”<sup>63</sup> and establishes comprehensive curricular requirements including AIDS instruction.<sup>64</sup> However, Iowa provides for an exemption from its compulsory education standards, upon written notice, for religious reasons by certain longstanding groups.<sup>65</sup> Kentucky requires state approval of text materials.<sup>66</sup> Michigan prohibits discrimination against students with disabilities and specifically forbids private schools from “utiliz[ing] textbooks and learning materials which promote or foster physical or mental stereotypes.”<sup>67</sup> In language since repealed, the state was also to make guidelines available for “expanding curriculum on the culture of ethnic, religious, and racial minority peoples, and the contributions of women.”<sup>68</sup> New York private schools must offer instruction in “human rights issues (with particular attention to the study of the inhumanity of genocide, slavery and the Holocaust).”<sup>69</sup> Discrimination on the basis of race, sex, marital

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<sup>60</sup>Id. at 97 (citation omitted).

<sup>61</sup>Id. (currently codified at Minn. Stat. Ann. § 363A.13 ( )).

<sup>62</sup>Id. (currently codified at Minn. Stat. Ann. § 363A.23 (2002)).

<sup>63</sup>Id. at 59 (citations omitted) (currently codified at Iowa Code Ann. § 256.11 (2002) (requiring a “multi cultural, gender fair approach” and incorporation of “global perspectives”).

<sup>64</sup>Id. at 59 (citations omitted) (currently codified at Iowa Code Ann. § 256.11.3 and .4 and .8 (2002) (requiring AIDS and STD education and providing a process for limited exemptions from curriculum requirements).

<sup>65</sup>Id. at § 299.24 (requiring “proof of achievement in the basic skills of arithmetic, the communicative arts of reading, writing, grammar, and spelling, and an understanding of U.S. History, history of Iowa, and the principles of American government”).

<sup>66</sup>Id. at 70 (citation omitted).

<sup>67</sup>Id. at 91 (citations omitted) (currently codified at Mich. Comp. Laws Ann.. § 37.1402 (2004)).

<sup>68</sup>Id. at 92 (citation omitted). These requirements were set out in Mich. Comp. Laws Ann. § 380.1174, which was repealed by P.A. 1995, No. 289 § 2, Eff. July 1, 1996.

status, color, religion, national origin or disability is forbidden, with limited exceptions for religion and gender.<sup>70</sup> South Dakota forbids private schools from discrimination on the basis of race, color, creed, religion, sex, ancestry, disability, or national origin, with limited exceptions for religion and gender, and includes a variety of curriculum requirements ranging from instruction on sexual abstinence and AIDS instruction to “respect for the contributions of minority and ethnic groups to the heritage of South Dakota and due deference to old age.”<sup>71</sup> Montana prohibits discrimination on the basis of race, national origin, religion, sex, marital status, disability, or age, or “because of mental disability unless based on reasonable grounds.”<sup>72</sup>

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<sup>69</sup>Id. at 132 (citation omitted).

<sup>70</sup>Id. There are limited exceptions permitting consideration of religion in admissions, and for gender for athletic teams, and single sex classes and schools. Id.

<sup>71</sup>Id. at 173-74 (citations omitted) (discrimination requirements currently codified at S. Dak. Cod. Laws § 20-13-22 (2004)).

<sup>72</sup>Id. at 106 (citation omitted) (currently codified at Mont. Code Ann. § 49-2-307 (2004)).

Other states are reported to impose more limited nondiscrimination and similar requirements on private schools, as compared with public schools. Nebraska requires that history courses “stress contributions of all ethnic groups in the growth of America.”<sup>73</sup> Washington will not approve a private school that “engag[es] in a policy of racial segregation or discrimination.”<sup>74</sup> A high profile example of this differential treatment occurs in the high profile Milwaukee voucher program, in which voucher schools were exempted from Wisconsin’s statutes prohibiting discrimination on the grounds of sexual orientation, gender, pregnancy and marital status. The recent U.S. Supreme Court case upholding the constitutionality of Cleveland’s voucher program is similar; voucher schools must agree not to discriminate on the basis of “race, religion, or ethnic background, or to ‘advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion,’”<sup>75</sup> but apparently remain free to discriminate on other bases such as gender, disability and sexual orientation. The ONPE Study lists other states as not imposing any nondiscrimination requirements on private schools.<sup>76</sup>

Finally, the ONPE Study reports several states treat religious private schools differently from secular private schools, beyond permitting religious schools to consider religion in admissions. For example, Alabama exempts “church schools” from private school curriculum and teacher qualifications requirements and other mandates,<sup>77</sup> as does Wyoming exempt “religious schools.”<sup>78</sup> Maryland exempts “institutions operated by bona fide church organizations” from its requirement that private schools be state-approved.<sup>79</sup> In South Carolina, religious schools are exempt from state requirements of being either state approved or members of certain private school associations.<sup>80</sup>

There is some evidence that state regulation of private schools is actually on the decline. One commentator suggests that the level of current judicial regulation is less than it was in the nineteenth century.<sup>81</sup> A recent 50-state survey by Professor Eric DeGroff compares the levels of

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<sup>73</sup>Id. at 110 (citation omitted).

<sup>74</sup>Id. at 199 (citation omitted) (currently codified at Rev. Code Wash. Ann. § 28A.195.040 (2004)).

<sup>75</sup>Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002) (citations omitted).

<sup>76</sup>See, e.g., id. at 101-02 (Mississippi); id. at 47-49 (Idaho); id. at 117-20 (New Hampshire); id. at 137-41 (North Carolina).

<sup>77</sup>Id. at 9-11 (citations omitted).

<sup>78</sup>Id. at 210-11 (citations omitted).

<sup>79</sup>Id. at 84 (citation omitted).

<sup>80</sup>Id. at 170 (citations omitted).

<sup>81</sup>Ralph Mawdsley, Parents’ Rights to Direct their Children’s Education: Changing

state regulation of private schools in 2001 with that in 1986 as established by an earlier third-party survey.<sup>82</sup> Professor DeGroff notes no national overall significant change in the level of regulation,<sup>83</sup> but notes that between 1986 and 2001 the number of states that either “do not regulate or only minimally regulate” private schools “has at least doubled.”<sup>84</sup> His survey does not review discrimination regulation specifically.

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Perspectives, 162 *Educ. L. Rep.* (West) 659, 678 (2002).

<sup>82</sup>Eric DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 *B.Y.U. Educ. & L. J.* 363 (2003).

<sup>83</sup>*Id.* at 394.

<sup>84</sup>*Id.* at 397.

3. The larger context of state support and regulation of private schools. This timidity of states in regulating discrimination in private schools also stands in marked contrast to the support many states offer to these schools. States have been much less bashful about subsidizing private schools, in the form of loaned textbooks,<sup>85</sup> other instructional materials such as library books and media equipment,<sup>86</sup> health services, diagnostic services, on-site special education related services,<sup>87</sup> on-site remedial instruction,<sup>88</sup> and most recently tuition vouchers.<sup>89</sup> Moreover, states' recent emphasis on accountability (specifically outcome assessment in the form of high stakes testing) of their public schools, such as recently enacted requirements in some states that students pass a standardized test in order to receive a high school diploma, tends to exclude private schools from accountability-based requirements. States seem to be requiring that public schools prove themselves via the measured achievement of their students, while assuming that private schools do a good job and closing their eyes to evidence to the contrary.

### III A PROPOSAL FOR STATE REGULATION OF PRIVATE SCHOOL DISCRIMINATION AGAINST STUDENTS

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<sup>85</sup>See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding constitutionality of state statute requiring public schools to purchase and loan textbooks to resident private school students).

<sup>86</sup>*Mitchell v. Helms*, 530 U.S. 793 (2000) (extensive public schools loans of library books and media equipment to private schools does not violate Establishment Clause).

<sup>87</sup>*Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (provision of sign language interpreter to deaf student attending Catholic school does not violate Establishment Clause).

<sup>88</sup>See *Agostini v. Felton*, 521 U.S. 203 (1997) (provision of onsite remedial instruction at New York religious private schools does not violate Establishment Clause).

<sup>89</sup>*Zelman v. Simmons-Harris*, 536 U.S. 639, 657-659 (2002) (upholding Cleveland voucher program).

This paper proposes that states prohibit preK-12 schools, public or private, secular or religious, from discrimination (in either an intentional disparate treatment or an unintentional disparate impact way) against applicants or students who apply or attend the school in order to fulfill compulsory education requirements. Discrimination on the bases of race, color, national origin, gender,<sup>90</sup> disability,<sup>91</sup> religion (with some limits described below), and sexual orientation should be prohibited.

A. Religious discrimination and accommodations and religious and other schools

Special language allowing religious private schools to consider religion in admissions decisions, and to provide religious instruction, is appropriate. However, religious schools should not be exempt from nondiscrimination requirements on other (race, gender, disability and sexual orientation) bases, and religious faith should not be treated as a valid reason for engaging in these other kinds of discrimination.

Religious schools' religious freedom to, for example, limit their student body to persons who share their faith, or to give preference in admissions to persons who share their faith, can be protected by the religious exemption for admissions. If however, religious schools decide to admit students from other faith, or secular backgrounds, the religious schools would be obligated not to engage in religious discrimination against these students. This means that such schools may need to offer any religious instruction separately from secular instruction, and allow students to opt out of such instruction.

Private religious schools need not and should not be exempted from race, gender, disability, and sexual orientation discrimination requirements. Their employees are protected by race, gender, and disability discrimination at the federal level by Title VII and the ADA. Aside from the narrow "ministerial exception,"<sup>92</sup> religious employers' faith-based race, gender, and disability discrimination is illegal. Similarly, religious private schools are not and should not be exempt from prohibitions on race, gender, sexual orientation, or disability discrimination as to their students.

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<sup>90</sup>States may want to preserve the right of schools be single-sex, to have single sex physical education or even other classes, and/or to have single sex athletic teams, but no other gender-based treatment of students should be permitted.

<sup>91</sup>Since most private schools do not provide special education services to students, it would be appropriate to clarify that disability discrimination obligations do not include anything beyond minor academic adjustments, in the manner of the Section 504 regulations' standard for private nonspecial education schools. See 34 C.F.R. § 104.39 (2004). Thus for example a private school need not make major instructional adjustments for an applicant with mental retardation, but could not exclude a student because she used a wheelchair or a service animal. Also note that unlike Title III of the federal ADA the proposal contains no exemption for private schools controlled by religious organizations. See note *supra* and accompanying text.

<sup>92</sup>42 U.S.C. § 2000e-1(a) (2000) (permitting religious discrimination in certain instances by religious organizations). Case law permits religious organizations to discriminate on other bases such as gender with regard to their clergy. See generally Janet Belcove-Shalin, Ministerial Exception and Title VII Claims: Case Law Grid Analysis, 2 Nev. L.J. 86 (2002).

In order to protect students' religious practices, states may want to borrow from Title VII and require schools to offer reasonable accommodations for student religious beliefs, for example creating exceptions in school dress codes for religious garb, not penalizing students for absence from school on important religious holidays, not penalizing student for their unavailability for school activities on the student's Sabbath<sup>93</sup> or important religious holidays.

B. Curriculum and instructional materials

Unlike Title IX and the similar manner in which some courts interpret Title VI, the proposal does not include an exclusion in for curricular and instructional materials. In sharp contrast to the role of the federal government in education, determining the general requirements for preK-12 instruction is at the core of the state's right and responsibility to assure a minimally adequate education for its students.

The proposal does not require or authorize states to pre-approve or engage in wholesale inspections of private school instructional materials. Choice of materials would remain with the private school. Moreover, an occasional arguably discriminatory statement in such materials would not be actionable. However, modeling the standards for sexual or other harassment under federal law, an actionable hostile learning environment could be created by a pattern of discriminatory instructional materials, particularly teaching that any group is inferior based on race, color, national origin, gender, disability, religion, or sexual orientation, and/or by discriminatory instructional materials in concert with other conditions at the school. The proposal also does not affirmatively compel schools to offer, for example, a multi cultural message to its students, nor a message that homosexuality is perfectly moral. It instead forbids schools from discriminatory messages that amount to a hostile learning environment, which would include prohibitions on messages to students that racial segregation was good or that one race is inferior to others, or that homosexuality is evil.

C. Conditioning nondiscrimination obligations on fulfillment of compulsory education requirements

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<sup>93</sup>For example, at the (private) law school where the author is a member of the faculty, some exams are scheduled for Saturdays. The law school has voluntarily made alternate arrangements for Seventh Day Adventist and Jewish students whose sabbath falls on Saturday. However, the author is unaware of any legal requirement for either public or private schools to make these modest accommodations of student faith.

As the Supreme Court recognized in *Brown v. Board of Education*, “[E]ducation is perhaps the most important function of the state and local governments. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>94</sup> In other cases the Court has identified the states’ specific interest in education as including preparing adult citizens who are economically self-sufficient and prepared to participate in a democracy.<sup>95</sup> States may and uniformly have enacted compulsory education laws.<sup>96</sup> States thus need not link nondiscrimination requirements to the receipt of state assistance.

Linking nondiscrimination obligations to compulsory education also preserves private schools’ autonomy to teach content of its choosing, perhaps for faith-based reasons, in settings other than that in which the school is offering instruction to fulfill compulsory education requirements. The proposal would not reach, for example, a private college which taught that women should submit to and obey their husbands or that slavery was not such a bad thing, nor a private school which taught such messages in evening religious classes not part of its compulsory education-fulfilling program.

D. Theories of discrimination, enforcement and remedies

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<sup>94</sup>*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

<sup>95</sup>Education provides "basic tools by which individuals might lead economically productive lives," *Plyler v. Doe*, 457 U.S. 202, 221 (1982); see also *Yoder*, 406 U.S. at 221 "education prepares individuals to be self-reliant and self-sufficient participants in society"; *Ambach*, 441 U.S. at 77 (education inculcates the values of civic participation that are "necessary to the maintenance of a democratic political system"); *Yoder*, 406 U.S. at 221 ("some degree of education is necessary to prepare our citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence").

<sup>96</sup>For an overview of state compulsory education laws, see James Rapp, *Education Law* § 8.03 (2005).

Modeling Title VII, both intentional/disparate treatment and unintentional/disparate impact discrimination would be actionable. Both public (perhaps via inspections and/or certification by private schools as well as agency and judicial enforcement) and private (perhaps via a complaint process involving the state department of education, or local boards of education as well as private lawsuits) enforcement should be available, and the broad variety of remedies available to successful private civil rights plaintiffs should be included.<sup>97</sup> Vicarious liability for discrimination by employees or other agents such as parent volunteers or by students should be on a know or should know basis modeled on Title VII, with a defense available to schools which took reasonable steps to deal with discrimination complaints.<sup>98</sup>

E. Protection of children's rights and interests

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<sup>97</sup>Public enforcement is necessary for a variety of reasons, not least of which is that in, for example, an all-white private school there may be no potential plaintiffs if racial hatred is taught.

<sup>98</sup>This would thus follow the model for Title VII vicarious liability, see e.g. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), rather than the actual knowledge and deliberate indifference Title IX standard established by the Court in the *Davis* and *Gebser* cases.

The proposal is consistent with the protection of children's rights and interests, although it does not go as far in limiting parent rights as some commentators taking a children's rights perspective advocate.<sup>99</sup> The proposal reflects in part a perspective that parent rights are and should be somewhat more limited for education than for other child rearing activities. First and most obviously, it is after all the children who are being educated, not their parents. Moreover, the purposes of education which underlie the state's interests as described above center on the future, when the children are, hopefully, economically self-sufficient adults engaged in meaningful participation in a democracy, and when any legal parenting rights have ended. Parenting rights in the area of education thus stand in contrast to and accordingly should be more limited than parenting rights in other areas such as discipline and medical care decisions about children, which latter decisions' primary impact is immediate and reaches the entire family.

The proposal also recognizes that, unlike other important reproduction-related decisions where minors have some constitutionally protected autonomy,<sup>100</sup> current case law does not offer minors similar autonomy with regard to their educations. Under current regulation in many states, parents can choose to send their minor children to a private school in which the child is the victim of discrimination. The proposal would ban private schools from operating in this way, and thus work to prevent children from experiencing this sort of discrimination.

#### IV CONSTITUTIONALITY OF THE PROPOSAL<sup>101</sup>

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<sup>99</sup>For examination of parent educational rights from a children's rights perspective, see Barbara Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 Wm. & Mary L. Rev. 995, 1041-1050 (1992) (underlying the parent right articulated in these cases is a patriarchal view of family in which the father owns the children rather than a more appropriate view of the parent as trustee for the child's best interests); Emily Buss, The Adolescent's Stake in the Allocation of Educational Control, 67 U. Chi. L. Rev. 1233 (2000) (social science child and adolescent development theory and research supports education of older teens in an ideologically diverse setting, where their peer interactions promote identity formation and successful adult functioning and where the religious and other values instilled by their parents are still likely to be adopted by the teen; compulsory education policies do not but should consider the value of these peer interactions); Dwyer, *supra* note (parent educational and other rights is wrong and archaic in the manner of slavery and the sexist common law treatment of women).

<sup>100</sup>See, e.g. *Carey v. Population Service Intern'l*, 431 U.S. 678 (1977) (constitutional right of minors to access birth control); *Bellotti v. Baird*, 443 U.S. 622 (1979) (constitutional right of minors to abortion cannot be limited by parent consent requirements).

<sup>101</sup>While this Section of the Paper addresses claims that imposing nondiscrimination claims on private schools are unconstitutional, it should be noted that there is some commentary suggesting that government subsidy of discriminatory private schools is unconstitutional. See James Dwyer, *Vouchers within Reason: A Child-Centered Approach to Education Reform* 208-10 (2002); James Dwyer, *Religious Schools v. Children's Rights* 121-35 (1998).

A. Pierce parenting rights

It is well known that the Supreme Court held in *Pierce v. Society of Sisters* that parents had a constitutional parenting rights, apparently as a matter of substantive due process, which included the right to choose private school education for their children.<sup>102</sup> The *Pierce* Court made it clear that this parenting right was not an absolute one as regards education, noting the ability of the states to engage in “reasonable” regulation and specifically mentioning the right of the state to impose curriculum requirements:

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.<sup>103</sup>

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<sup>102</sup>268 U.S. 510 (1925). This concept of constitutional parenting rights was earlier articulated in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

<sup>103</sup>*Id.* at 534.

In more recent cases the Court has repeatedly reaffirmed the right of the state under *Pierce* to subject private schools to reasonable regulation.<sup>104</sup> Moreover, the *Pierce* Court's reference to the state's power to bar private schools from teaching matters "manifestly inimical to the public welfare" supports the state's power to impose nondiscrimination requirements on private schools.

The *Pierce* Court's characterization of parent rights recognizes that these rights are partly as proxy for or trustee of their children's interests and are also in part utilitarian to serve the goal of preparing informed, self-sufficient adult citizens:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of 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.<sup>105</sup>

What does violate *Pierce* rights is state micro management of private schools. For example, the Court struck down a Hawaii statute which extensively regulated foreign language schools without articulated reasons. Students normally attended these schools for about one hour per day in addition to full-time attendance at a public or approved private school.<sup>106</sup> The Court held that this regulation

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<sup>104</sup>See *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) ("The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools ... they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (citations omitted) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable requirements for the control and duration of basic education"); *id.* at 239 ("[*Pierce*] lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society") (White, J., dissenting); *Board of Education v. Allen*, 392 U.S. 236, 245-47 & n. 7 (1968) ("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.... [I]f 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."); *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947) ("This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.").

<sup>105</sup>*Id.* at 535.

<sup>106</sup>*Farrington v. Tokushige*, 273 U.S. 284 (1927).

go[es] far beyond mere regulation of private schools. . . .[to] give affirmative direction concerning the intimate and essential details of such schools, intrust [sic] their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks. Enforcement . . . would deprive parents of fair opportunity to procure for their children instruction which they think important and which we cannot say is harmful.<sup>107</sup>

Lower courts hearing more recent *Pierce*-based challenges to state regulation of private school curricula have also upheld the state regulation so long as it did not micro manage the private schools' operation.<sup>108</sup>

The proposal is merely that states require schools to refrain from discrimination against their students. Given the amount of existing federal and state regulation of school discrimination, it is hard to argue this would not be within the "reasonable" regulation approved by the *Pierce* Court. Moreover, the proposal does not amount to state micro management of private schools. The proposal does not limit private schools choice of curricular and instructional materials, nor of pedagogical methods. It does not even affirmatively require private schools to speak messages of tolerance to their students. The proposal does not preclude private schools' ability to limit admissions to students who share a common faith, or to provide a religiously-based education, and thus preserves the ability of parents to choose a private education of this sort.

**B. First Amendment Religion (Free Exercise/Establishment Clause) Rights**

**1. Free exercise.** In *Employment Division v. Smith* ("*Smith*"), the U.S. Supreme Court held that neutral, generally applicable laws did not trigger heightened scrutiny in the context of Free Exercise challenges,<sup>109</sup> and thus would generally be constitutional if they appeared to serve a legitimate state purpose. The proposal is for states to enact neutral, generally applicable laws to serve the states' interest in an educated citizenry which has repeatedly been recognized by the U.S. Supreme Court.

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<sup>107</sup>Id. at 298.

<sup>108</sup>Compare, e.g., *State v. Faith Baptist Church of Louisville*, 301 N.W.2d 571 (Neb. 1981) (in state enforcement of compulsory education statute against school using ACE curriculum, state of list of required subjects and specific goals for each subject, and state teacher qualification requirements did not violate parent *Pierce* rights) with *State v. Wishner*, 351 N.E.2d 750 (Ohio 1976) (striking down state regulation which prescribed how much time would be spent on each course, leaving no time for religious training, required a minimum number of pupils, and required that "all [private school] activities shall conform to policies adopted by the board of education"). See generally Dale Agthe, *Validity of State Regulation of Curriculum and Instruction in Private and Parochial Schools*, 18 A.L.R. 4h 649 (2005). Some cases have been decided under state laws which provide enhanced rights for private schools. See, e.g., *Kentucky St. Bd. for Elem. and Sec'y Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979) (state constitutional provision prohibiting state from requiring parent to send his child to a school "to which he may be conscientiously opposed" violated by state statute requiring textbook approval for private schools, but is not offended by requiring instruction in a list of subjects).

<sup>109</sup>494 U.S. 872, 876-90 (1990).

The *Smith* Court distinguished its precedent in *Wisconsin v. Yoder* (“*Yoder*”),<sup>110</sup> in which the Court had applied more rigorous scrutiny, as involving “hybrid” constitutional claims (specifically *Pierce* parenting rights and Free Exercise rights). Since *Smith*, the Court has not had a “hybrid” rights case to test whether such a scenario would trigger more rigorous scrutiny.<sup>111</sup> Lower courts which have decided “hybrid” rights cases appear either to treat the *Smith* hybrid rights language as dicta which they decide not to apply, or to require that the other right be meritorious.<sup>112</sup> Under this approach, since as described immediately above the “other” *Pierce* parenting rights claim is not meritorious, more rigorous scrutiny would not be triggered.

Even if the pre-*Smith* heightened scrutiny is somehow triggered, *Yoder* is the only case in which the Court has found that education regulation violates parents’ Free Exercise rights, and is considered by some courts to be a unique case, and thereby limited to its facts, rather than offering a true precedent that compulsory education statutes and related state regulation can violate Free Exercise rights.<sup>113</sup> The *Yoder* Court itself noted that the case presented by the Amish plaintiffs is “one that probably few other religious groups or sects could make.”

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<sup>110</sup>406 U.S. 205 (1972).

<sup>111</sup>In a concurring opinion, Justice Souter has criticized the hybrid rights concept. *Church of Lukumi Babalu Aye Inc. v. Hialeah*, 508 U.S. 520, 567 (1999) (Souter, J., concurring).

<sup>112</sup>See *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2<sup>nd</sup> Cir. 2003) (hybrid rights statement in *Smith* is dictum which the court declines to apply); *Kissinger v. Bd. of Trustees*, 5 F.3d 177, 180 (6<sup>th</sup> Cir. 1993) (same); *Miller v. Reed*, 176 F.3d 1202, 1208 (9<sup>th</sup> Cir. 1999) (hybrid rights claim triggering strict scrutiny only applies where the other (non-free exercise) claim is meritorious). A more extensive examination of hybrid rights cases post-*Smith* is Michael Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 Mich. L. Rev. 2209 (2005) (arguing for strict scrutiny of such claims).

<sup>113</sup>See *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1067 (6<sup>th</sup> Cir.1987) (“*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule”), cert. denied, 484 U.S. 1066 (1988); *Blackwelder v. Safnauer*, 689 F.Supp. 106, 135 (N.D.N.Y. 1988), appeal dismissed, 866 F.2d 548 (2<sup>nd</sup> Cir. 1989) (“the holding in *Yoder* must be limited to its unique facts [in which a child will live in] a successful [religious] community separate and apart from American society in general”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8<sup>th</sup> Cir. 1987) (*Yoder* is limited to centuries-old, insulated, isolated lifestyle of unique sect and did not extend to exception to compulsory education statute sought by fundamentalist Baptist church schools).

2. Establishment Clause. Private schools may claim that states enacting nondiscrimination laws violate the current version of the Lemon test<sup>114</sup> by doing so for a nonsecular purpose of hostility toward religion, which will be easily overcome by an articulated secular legislative purpose of preventing discrimination against students. Private schools may also claim that such laws have the primary effect of hurting religion, citing data that the vast majority of regulated private schools are religiously affiliated. Just as this data was insufficient to amount to a primary effect of advancing religion in the context of government subsidy, specifically vouchers, for private schools,<sup>115</sup> it must be insufficient to amount to a primary effect of hurting religion. More generally, and again just like the voucher program upheld by the Court, state nondiscrimination laws applied to all schools are a general, religiously neutral program. They do not bar the private choice by parents to select a private school for their children. Finally, the level of state involvement in private schools under the proposal is modest; no blanket review of instructional materials or other micro management is involved and thus the proposal would not necessitate excessive entanglement between religion and government.

Private schools may also claim that state nondiscrimination laws amount to the government establishment of the religion of secular humanism in violation of the Establishment Clause. Courts have routinely rejected similar claims in the context of public school instructional materials which allegedly amounted to the establishment of the religion of secular humanism.<sup>116</sup>

C. Free speech issues: Academic Freedom/Free Association/Compelled Speech/Constitutional Conditions

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<sup>114</sup>See *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (Establishment Clause is satisfied if the practice in question has a valid secular purpose and its primary effect is neither to advance nor inhibit religion, entanglement prong is part of primary effect prong and mere administrative cooperation does not amount to excessive entanglement, though required pervasive monitoring likely would).

<sup>115</sup>*Zelman v. Simmons-Harris*, 536 U.S. 639, 657-659 (2002) (fact that 96% of voucher recipients enrolled in religious schools did not render voucher program other than neutral toward religion and was not of “constitutional significance”).

<sup>116</sup>See, e.g., *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7<sup>th</sup> Cir. 1994).

1. Higher ed v. K-12 academic freedom. In higher education, academic freedom, including the “four freedoms,” specifically including what to teach, enjoy broad judicial First Amendment protection.<sup>117</sup> Moreover, in higher education, academic freedom exists at both the institutional level and the individual teacher level. The Supreme Court has indicated, however, that academic freedom does not extend to noncompliance with discrimination laws, noting that while it generally defers to academic judgments, this “principle of respect [is] for *legitimate* academic decision making,” which the Court indicated would not include illegal discrimination.<sup>118</sup> Lower courts have specifically held that academic freedom does not protect the selection of discriminatory curricular materials.<sup>119</sup>

In contrast, academic freedom at the preK-12 level is much more narrowly circumscribed. For example, in cases where public school employees asserted a constitutional speech (academic freedom) right to teach what they chose, courts rejected a constitutional speech right to do so, holding that the curriculum is the province of the state (through its public school district) and teacher academic freedom does not encompass curricular choice.<sup>120</sup> As one appeals court noted, “There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.”<sup>121</sup> Thus while private colleges and universities enjoy broad and constitutionally protected academic freedom, it does not include illegal discrimination. Public and private K-12 schools’ and employees’ academic freedom is even more narrowly circumscribed because they are subject to the state’s right and responsibility to determine the general curriculum.

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<sup>117</sup>A prior case identified these four “essential freedoms” of a university: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study.*” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

<sup>118</sup>*University of Penn. v. Equal Empl. Opp’y Comm’n*, 493 U.S. 182, 199 (1990) (private university’s academic freedom does not include right to keep peer review documents from EEOC in connection with a tenure applicant’s discrimination claim); *id.* at 199 n.7 (defendant university does not assert race or gender are “academic grounds” for academic freedom purposes); *id.* at 198 (precedent cases on academic freedom involve “direct infringements on the asserted right to determine for itself on academic grounds who may teach”).

<sup>119</sup>See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10<sup>th</sup> Cir. 2004); cf. *Grimes v. Sobol*, 832 F.Supp. 704 (while instructional materials selected despite their discriminatory content are not actionable under Title VI, materials selected because of their discriminatory content are actionable).

<sup>120</sup>*Pelozo v Capistrano Unif. Sch. Dist.*, 37 F.3d 517 (9<sup>th</sup> Cir. 1994) (public school science teacher has no academic freedom nor other constitutional right to teach creationism).

<sup>121</sup>*Palmer v. Board of Education of the City of Chicago*, 603 F.2d 1271, 1274 (7<sup>th</sup> Cir.1979), cert. denied, 444 U.S. 1026 (1980).

2. Expressive association/compelled speech/constitutional conditions and the pending Solomon Amendment case. In its most recent decision on the issue, *Boy Scouts of America v. Dale* (“*Dale*”),<sup>122</sup> the Court set up a 3-part analytic framework in which it determined 1) whether the challenger was an expressive association, 2) whether application of the law would significantly affect the challenger’s expression, and 3) balanced the associational interest in free expression with the state’s interest.<sup>123</sup> In that case, the Court deferred to the Boy Scouts’ claim that a gay scoutmaster would significantly interfere with its expressive activities and found with little explanation that the Boy Scouts’ interest in expression outweighed the state interest in eliminating discrimination in public accommodations.<sup>124</sup>

Assuming that private schools are expressive associations and that application of nondiscrimination laws to them would significantly affect their expression, what is left is the balancing of interests. The *Dale* Court held that states have a compelling interest in eliminating discrimination,<sup>125</sup> and presumably states’ interests in ensuring their children receive adequate educations is also compelling. As described above, the state’s interest in eliminating discrimination against minor students compelled to attend school by state law whose parents have chosen the school for them, as against the private schools which engage in a public function (purport to meet state compulsory education obligations), is far greater<sup>126</sup> than that in the previous cases and so the situation in *Dale* is distinguishable and the balance should be struck in favor of the state. However, if the Court continues to apply the analysis in *Dale*, and does so broadly, any private school may be able to successfully claim that application of nondiscrimination laws (whether federal Title VI, Title IX, the ADA, and Section 504 or state laws) violates their expressive association rights. It seems unlikely the Court wishes such a result.

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<sup>122</sup>530 U.S. 640 (2000).

<sup>123</sup>Id. at 656-659.

<sup>124</sup>Id. at 658-59.

<sup>125</sup>Id. at 657 (state has a compelling interest in eliminating discrimination against women in places of public accommodation).

<sup>126</sup>Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (in Free Exercise context, state interests "of the highest order and those not otherwise served can overbalance legitimate claims").

The direction of the Court’s jurisprudence on expressive association and private schools will likely become clearer soon. As is well known, the Court recently heard arguments in a pending case that the Solomon Amendment, which requires higher education institutions to permit on-site recruiting by the U.S. military as a condition of receipt of federal funds, violates law schools’ free association rights to ban on-campus recruiting by employers which engage in sexual orientation discrimination.<sup>127</sup> The appeals court in the case, applying strict scrutiny,<sup>128</sup> found the Solomon Amendment unconstitutionally infringed on the plaintiff law schools’ expressive association rights and directed the district court to enter an injunction against enforcement of the Solomon Amendment.<sup>129</sup> The appeals court presumed a compelling interest “attracting talented military lawyers,”<sup>130</sup> but found the Solomon Amendment was not narrowly tailored since the military had other options such as loan forgiveness programs for attracting lawyers and the government had not shown the Solomon Amendment to be an effective means of meeting its goal.<sup>131</sup> The appeals court also found the Solomon Amendment to amount to unconstitutionally compelled speech and an unconstitutional condition.<sup>132</sup>

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<sup>127</sup>Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3<sup>rd</sup> Cir. 2004), certiorari granted, 125 S.Ct. 1977 (2005).

<sup>128</sup>Id. at 230. The same appeals court applied strict scrutiny to an expressive association claim by private schools challenging a state requirement that they lead students in the Pledge of Allegiance daily. *The Circle School v. Pappert*, 381 F.3d 172, 182-83 (3<sup>rd</sup> Cir. 2004) (holding the state law, which also required notifying the state of the names of nonparticipating students, unconstitutional; the state had other less restrictive means of achieving its compelling interest in “teaching patriotism and civics in all schools”). In contrast, while the proposal in this paper serves a compelling state interest in eliminating discrimination against private school students, there does not appear to be any less restrictive way of achieving this goal. Thus, the proposal may well survive even strict scrutiny.

<sup>129</sup>Id. at 246.

<sup>130</sup>Id. at 234.

<sup>131</sup>Id. at 235.

<sup>132</sup>Id. at 243.

The final decision in this case may of course become the basis for claims by private schools that application of discrimination laws to them violates their expressive association rights. Application of nondiscrimination laws to private groups has been found before to violate constitutional free association and compelled rights.<sup>133</sup> Application of other requirements to private groups has been held to constitute an unconstitutional condition.<sup>134</sup> However, in these cases, the private plaintiffs were not performing any function for the government; they were performing purely private activities of running youth groups, organizing a parade, and creating an extracurricular college student group publication. Similarly, the law schools in the pending Solomon Amendment case enjoy academic freedom to operate with discretion. Moreover, even publicly operated law schools provide higher education which of course is not encompassed within compulsory education statutes. These groups thus have a significantly different and greater free speech interest in operating free of government regulation than do private schools which do not enjoy the same level of academic freedom (which academic freedom does not in any event include illegal discrimination), are performing a public function which is the “most important function of state and local government,” and who perform this function for minors who attend as a result of their parents’ choice. Application of the free speech analysis to the proposal as applied to private schools should thus be quite different than for the private groups in the precedent and pending cases. For example, in terms of narrow tailoring, the proposal would not prevent religious organizations which operate private schools from expressing discriminatory messages in other fora, for example at worship services.

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<sup>133</sup>See *Boy Scouts of America v. Dale* (“Dale”), 530 U.S. 640 (2000) (state public accommodations law forbidding sexual orientation discrimination applied to private Boy Scouts organization violates free association rights); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (application of state nondiscrimination statute to require parade organizers to include a group of gay marchers was unconstitutional compelled speech).

<sup>134</sup>See *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819 (1995) (public university cannot limit funding for student publications to those with a secular perspective).