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RELIGION LAW

Is 'Substantial Equivalency' The Next Religious Freedom Fight?

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The New York State Education Law generally requires that children ages six to 16 attend "full time instruction" and sets forth minimum standards for the quality of instruction in public schools. See N.Y. Educ. L. §§3204, 3205(1), (3). Public schools must teach particular subjects at various grade levels, including English language, reading, writing, mathematics, geography, U.S. history, science, music, visual arts, and physical education. See N.Y. Educ. L. §3204(3)(a); 8 N.Y.C.R.R. §§100.2-100.5, 135.4. The state also requires instruction in specialized topics including mental health, alcohol and drug abuse, patriotism, citizenship, and human rights, among others. See N.Y. Educ. L. §§801, 801-a, 803, 804, 806, 808, 809, 810; 8 N.Y.C.R.R. §§100.2(c), 135.3.

Education Law §3204(2)(1) provides that students in private schools, including in private religious schools, must receive instruction that is "at least substantially equivalent" to the instruction given at public schools in the city or district where they reside.

The Education Law does not define what it means for private school instruction to be "substantially equivalent." For years, the New York State Education Department (NYSED) maintained guidelines that seemingly incorporated most of the statutory and regulatory requirements applicable to public schools, See N.Y. Educ. L., Title I, Art. 17; id. §3204(3)(a); 8 N.Y.C.R.R. §§100.2-100.5.

The NYSED issued updated substantial equivalency guidance on Nov. 20, 2018. After an April 2019 court ruling struck down that guidance for failing to follow the process detailed in the State Administrative Procedure Act, *Matter of N.Y.S. Ass'n of Independent Schools v. Elia*, 65 Misc. 3d 824 (Sup. Ct. Albany Cnty. 2019), the NYSED proposed a regulation relating to substantial equivalence of instruction in nonpublic schools. See Letter From Elizabeth R. Berlin to P-12 Education Committee, May 30, 2019.

Last October, the NYSED announced that it would hold regional stakeholder engagement meetings to gather input from the religious and independent school community, as well as their counterparts in public schools, on the proposed regulation. See Substantial Equivalency of Instruction in Nonpublic Schools, NYSED.gov (updated Oct. 27, 2020). The regulation appears poised to be finalized in the near term.

The Proposed Regulation

The proposed regulation is quite detailed. It provides, among other things, that the following criteria must be considered to make a "substantial equivalency" determination for a nonpublic school:

- Whether instruction is given only by a competent teacher;
- Whether English is the language of instruction for common branch subjects;
- Whether appropriate programs exist for students who have limited English proficiency; and

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• Whether the nonpublic school's instructional program incorporates instruction in the following subjects:

- During grades one through six, mathematics, including arithmetic, science, and technology; English language arts; social studies; the arts; career development and occupational studies; and health education, physical education, and family and consumer sciences;
- During grades seven and eight, mathematics; English language arts; social studies; science; career and technical education; physical education; health education; visual arts; music; library and information skills; and career development and occupational studies; and
- During grades nine through 12, instruction in English; social studies; mathematics; science; health; physical education; and the arts.

For elementary and middle nonpublic schools, the proposed regulation also requires consideration of whether the curriculum provides:

• Academically rigorous instruction that develops critical thinking skills;

• English that will prepare students to read fiction and nonfiction text for information and to use that information to construct written essays that state a point of view or support an argument;

• Math that will prepare students to solve real world problems using both number sense and fluency with mathematical functions and operations; and

• Science by learning how to gather, analyze, and interpret observable data to make informed decisions and solve problems mathematically, using deductive and inductive reasoning to support a hypothesis and differentiating between correlational and causal relationships.

The test for nonpublic high schools also requires consideration of whether the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education.

The Conflict

Suppose the proposed regulation is adopted in essentially its current form. Suppose, too, that private schools organized and operating under the auspices of religious leaders and worshippers with deeply held religious beliefs object to having to teach one or more of the secular courses required by the proposed regulation—or to any of the other aspects of the proposed regulation. They may be concerned that the mandated courses would distract students from concentrating on what is important to them, or that they would entangle the students in a secular world from which they seek to be isolated.

> The right of parents to oversee and participate in their child's education is entitled to, and indeed has been recognized as having, special status, as demonstrated by the court's decisions in 'Meyer', 'Pierce', and especially 'Yoder'.

Suppose a court case is filed, relying on the First Amendment's command against laws "respecting an establishment of religion, or prohibiting the free exercise thereof." How might the courts—especially the U.S. Supreme Court—decide such a challenge?

Supreme Court Education Cases

Just about a century ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the court reversed a ruling by the Supreme Court of Nebraska affirming the criminal conviction of a religious-school teacher for violating a state law against the teaching of foreign languages to young children in schools. The court declared that the teacher's right to teach "and the right of parents to engage him so to instruct their children" were constitutionally protected rights.

The court acknowledged that a state "may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally," but it declared that "the individual has certain fundamental rights which must be respected." Significantly, the court also highlighted "the power of parents to control the education of their own."

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the court cited to *Meyer* and held that a law requiring parents to send their children to public school was unconstitutional. According to the court, the law "unreasonably" interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."

Then, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the court, citing repeatedly to *Meyer* and *Pierce*, decided that Wisconsin could not require the Amish to send their children to public school after the eighth grade. In finding an impermissible burden on free

exercise, the court examined Amish life and culture in some detail, ultimately concluding that what was at issue were longstanding beliefs shared by an organized group, that the beliefs related to religious principles and pervaded and regulated Amish daily life, and that the state law threatened the continuing existence of the Old Order Amish church community.

Judicial Scrutiny

Wisconsin v. Yoder relied heavily on the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), which held that the government can only burden the free exercise of religion if the regulation satisfies strict scrutiny. This exacting standard requires that the regulation be the least restrictive means of furthering a compelling government interest.

More specifically, in *Sherbert*, the court held that a member of the Seventh-day Adventist Church who had been discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith, could not constitutionally be barred from collecting unemployment insurance benefits. The court decided that the disqualification from benefits imposed an improper burden on the woman's right to freely exercise her religion. The court also stated that it was not, by its ruling, fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, reasoning that Sunday worshippers were not at risk of losing benefits for refusing to work on Sundays and that the extension of unemployment benefits to Saturday worshippers reflected "nothing more than the governmental obligation of neutrality in the face of religious differences."

A split court, however, seemingly abandoned blanket application of strict scrutiny in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), another unemployment compensation case, when it decided that Oregon would not need to state a "compelling government interest" to justify its inclusion of religiously inspired peyote use within the reach of its neutral and generally applicable criminal prohibition on the use of that drug and, therefore, could deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. The import of this decision was that neutral laws of general applicability are valid even if they incidentally burden religious exercise.

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The Road Ahead

The court in *Smith* stated that an individual's religious beliefs did not necessarily discharge compliance "with an otherwise valid law" that the state was free to regulate. Extending that principle to the sphere of education, municipalities certainly may claim they have a valid interest in prescribing minimum requirements for the curricula provided at private schools within their jurisdiction. See *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Yet the right of parents to oversee and participate in their child's education is entitled to, and indeed has been recognized as having, special status, as demonstrated by the court's decisions in *Meyer*, *Pierce*, and especially *Yoder*. The question then becomes whether a court analyzing whether the NYSED's proposed regulation (if and when it becomes final) imposes a burden on free exercise will take *Smith*'s pro-regulation approach or will follow the pro-conscience analysis in *Sherbert* and *Yoder*, the latter of which may be analogous in many respects.

Could that result in a successful challenge to a substantial equivalency regulation? It would seem that the current Supreme Court—which in its last term strongly supported religious freedom, See Barry Black and Jonathan Robert Nelson, "U.S. Supreme Court Expands Religious Freedom in Key Rulings," NYLJ (Aug. 31, 2020)—has never been more ready to entertain such a case and to strike down burdens on religious freedom, whether or not they arise from otherwise valid laws. Stay tuned.