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Professor Hayes has noted that some of the following suggestions need not be taken seriously — some readers may differ.

RACIAL DISCRIMINATION AND PRIVATE SCHOOLS*

ARTHUR S. MILLER†

The Private School System

LARGELY NEGLECTED IN THE swirl of controversy which has developed since the May 17, 1954 decision of the Supreme Court in the *Segregation Cases*¹ is the private school and its position in the pattern of educational racial discrimination. Attention has been focused almost exclusively upon the public school systems and their administration, and, to a lesser extent, upon the announced plans of some states to establish a subsidized system of private schools as a means of avoiding the impact of the segregation decision. But the privately operated school in the Southeastern United States, whether denominational or otherwise, has not escaped difficulty; it has not been able to avoid dealing with the same type of problems besetting the public school administrator. The specific manner in which the problems have arisen may differ but the broad pattern is basically similar. These difficulties, revolving around the admission practices of the non-public school, are both complex and important; they merit comprehensive development and exposition. It is my purpose here to attempt such a development and exposition; particular emphasis will be placed upon the legal problems which are involved.

Required first of all is a preliminary inquiry into the social and legal context in which the private school administrator operates. What place does the private school occupy in American education today? What is the legal status of the private school? It is to these questions that our attention

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¹ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954). Of the many discussions of these cases, both in and out of legal periodicals, the following is recommended for an up-to-date study of what has transpired since the decisions were rendered: McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U.L. REV. 991 (1956).

will first be directed. The discussion will be concerned with the bona fide private school as it has been known, and not with the so-called private school plans announced by some Southern government officials during the past two years.² The term "private school" will be used generically to indicate both the denominational (parochial) school and the non-sectarian school.

A. The Place of Nonpublic Education

Private, *i.e.*, nonpublic, education has long held an important place in the overall scheme of American education. This is particularly true of higher education. The private colleges and universities have always enrolled a high percentage, usually a majority, of the nation's youth who have gone on beyond high school. And it is also true of elementary and secondary education, although here the public schools have for many years educated a much greater number. With education itself being considered to be a matter of vital societal importance, perhaps crucial to the survival of the democratic system, the private schools have ably performed significant functions. The belief structure of the American people includes the notion that education has importance beyond the individual being educated. The public weal itself is considered to be dependent upon education conducted upon the broadest possible base. Disagreement with education is only over the details: *how* it is to be accomplished, not *if* it is. As the

² Some preliminary discussions of these plans have appeared. See PAUL, *THE SCHOOL SEGREGATION DECISION* (1954); J. Murphy, *Can Public Schools Be "Private"?*, 7 ALA. L. REV. 48 (1954); Murphy, *Desegregation in Public Education - A Generation of Future Litigation*, 15 MD. L. REV. 221 (1955); Nicholson, *The Legal Standing of the South's School Resistance Proposals*, 7 S.C.L.Q. 1 (1954).

late Senator Robert Taft once remarked, we have "socialized education" in this country.

This is, it should be remembered, a belief relatively new in history. Universal education, like universal suffrage, is apparently a creature of the new world, one which came rather late even there.³ It exists, so the theory goes, to promote the general intelligence of the people and thus to increase their usefulness and efficiency. The aim is to provide a reasonably adequate grasp of the relevant facts important in the making of societal decisions together with a reasonably adequate training in thinking about and evaluating those facts.⁴ With a minor exception no longer of consequence, the American people have consistently believed that the ends to be achieved by mass education could be accomplished through the medium of school systems both publicly and privately controlled. However, as will be shown below, the people generally have reserved the right to insure that private schools maintain standards similar to those established for the public schools. This right has not always been exercised; nevertheless, it is available for use should the need arise.⁵

³ General discussions of education, its history and development may be found in the encyclopedias. See, *e.g.*, 3 ENCYC. SOC. SCI. 403 (1931). See also Carr, *The Federal Government and National Interest in Education*, NATIONAL POLICIES FOR EDUCATION, HEALTH AND SOCIAL SERVICES 3 (Russell ed. 1955).

⁴ Whether the theoretical justifications of some of the beliefs in mass education, particularly with regard to those dealing with asserted abilities of all people to make wise political decisions, can withstand rigorous analysis is questionable, but beyond the scope of the present study. Compare LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955), with DALD, *A PREFACE TO DEMOCRATIC THEORY* (1956).

⁵ See RESEARCH DIVISION, NATIONAL EDUCATION

Statistically, of course, the public school today greatly overwhelms the nonpublic. Of the 163,673 schools in existence in the academic year 1951-52 only 15,216 were private. Of this total, there were 10,666 elementary schools, 3,322 secondary schools, 137 residential schools for exceptional children, and 1,191 higher educational schools controlled privately. Compare those figures to the public schools for the same year: 123,763 elementary schools, 23,746 secondary, 307 residential for exceptional children, and 641 colleges and universities. Only in the higher educational bracket does the private school outnumber the public.

The same ratio holds true for enrollment. Out of a total school enrollment of 32,934,748 in 1951-52, about 15 percent (4,994,116) of the students attended private schools. This figure breaks down in this manner: about 13 percent (1,593,852 out of a total of 23,958,113) at the elementary level, 10 percent (678,967 out of a total of 6,596,351) at the secondary level, and 50 percent (1,146,327 out of a total of 2,380,284) in higher education.⁶ It is of particular interest to note a significant increase in private school enrollment, both absolutely and in comparison to the public schools, since the academic year of 1939-40. At that time, 25,433,542 pupils were enrolled in public elementary and secondary

schools and 2,611,047 in private schools — roughly one student in a private school to nine in the public schools. The figures for 1951-52 are 26,706,675 and 3,847,789 — about one to eight. In 1955-56 it is estimated that the figures are 32,026,000 and 4,469,900 — about one to seven. In absolute figures, private school enrollments since 1939-40 have increased 1,857,853 or about 72 percent, while public school enrollments have increased from 25,433,542 to 32,026,000 or about 22 percent. Thus, although the public school still greatly overshadows the private school quantitatively, the clear trend at the elementary and secondary school level is toward greater use by parents of the nonpublic school. As noted above, the private school already is used by almost as many students as the public at the level of higher education. While the trend is clear, the reasons for this change are not so readily apparent, and are probably multiple rather than single. Increased prosperity among people generally would allow more parents to send their children to the private school; also, the disquietude with the educational standards of many public schools which is evident among many people would tend to explain some of the increase in enrollment of the private schools. It is yet too early to determine whether racial integration since the Supreme Court's decision will cause any significant exodus from the newly-desegregated public schools to the private schools.⁷

In the sixteen states and District of Columbia which can be considered as mak-

ASSOCIATION, STATE AUTHORITY WITH RESPECT TO THE ESTABLISHMENT AND SUPERVISION OF NON-PUBLIC SCHOOLS AND COLLEGES (2d rev. ed. Aug. 1951); McLAUGHLIN, A HISTORY OF STATE LEGISLATION AFFECTING PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES, 1870-1945 (1946); Note, 4 N.Y.U. INTRA. L. REV. 35 (1948).

⁶ Statistical data in these paragraphs is taken from DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, STATISTICAL SUMMARY OF EDUCATION, 1951-52 (1955). See SWANSON AND GRIFFIN, PUBLIC EDUCATION IN THE SOUTH (1955).

⁷ It has been reported, however, that desegregation has caused a number of parents in the District of Columbia either to move their residences outside the District or to send their children to an available private school.

ing up the South, there were in 1951-52 53,568 public schools (43,259 elementary, 9,971 secondary, 115 for exceptional children, and 223 colleges and universities) and 2,950 private schools (1,786 elementary, 766 secondary, 22 for exceptional children, and 376 colleges and universities). Comparative enrollment statistics for Southern schools were unobtainable.

One other statistic is of interest: income in the academic year 1951-52 was as follows. For all schools, public and private, and at all levels, there was an income of \$11.7 billion. Of this figure, \$9.3 billion (79 percent) went to the public school systems, \$2.4 billion (21 percent) to the private. Thus, 21 percent of school income went to educate 15 percent of the nation's students. To the extent that monetary expenditures reflect a higher quality of education, the student at the private school is getting a better education than the public school pupil.

B. The Legal Status of Nonpublic Education

Relatively rare, but nevertheless important, have been the cases decided by the United States Supreme Court in the field of education.⁸ A handful have dealt with the admission practices of public schools, in another few the Court has made pronouncements on the relationship of religion to the public school systems, and there have been other educational matters which have raised questions relating to the Federal Constitution. Similarly, Congress has made but few interventions into education, and these have been in aid of local education rather than

attempts to control the details of educational administration. It can be said that the educational system has, by and large, satisfied national, as distinguished from purely local, requirements. If not, substantial federal intervention would doubtless have taken place long ago. One of the reasons for the current increased congressional concern in education, manifested in the proposed massive school building program, is the belief that national ends are not being achieved under the present system. The shortage of engineers and other technicians is one item of this federal concern, the belief being that our national security is imperilled by such a shortage.

Because of the lack of substantial federal intervention into education, a comprehensive inquiry into the legal status of private education must, perforce, be directed for the most part to state statutes and state court decisions. The United States Supreme Court has made only two decisions of any real importance to private schools, *Pierce v. Society of Sisters*⁹ and *Meyer v. Nebraska*.¹⁰ Of the two the *Pierce* case is probably the more significant. Since that decision was rendered in 1925 it has been clear that parents may fulfill a state's educational requirements without use of the public school system. In other words, the right to send children to private schools was given constitutional protection.

Little else is settled regarding the extent of state authority over the nonpublic school. That the state may exercise some control is clear. However, the line between permissible control and that which is constitutionally proscribed is not yet drawn. This lack of settlement may be traced, in part at

⁸ The cases are collected and discussed in SPURLOCK, *EDUCATION AND THE SUPREME COURT* (1955) (extensively treating thirty-nine cases).

⁹ 268 U.S. 510 (1925).

¹⁰ 262 U.S. 390 (1923).

least, to a fundamental disagreement over the theory of child control. The difference of opinion has its roots in antiquity. It can be traced at least as far back as Platonic times. The relevant question is this: Who, parent or state, has primary power over the education of the child? The question receives differing answers. While there are isolated judicial statements to the contrary in addition to a great deal of opinion from church groups (chiefly Roman Catholic), it has generally been held by American courts that it is the state, not the parents, which is pre-eminent. From this basic view courts have adhered to the position that the wishes of society, operating through the state governments, can control in basic educational matters even in those situations where the parents are in direct opposition. This, and the reasons for it, was succinctly put by the Supreme Court of New Hampshire:

The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so. . . . While most people regard the public schools as the means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship.¹¹

But even so, as the *Pierce* case demonstrates, the state may not require attendance at public schools if parents wish to

send their children to private schools. The state may not, in other words, legislate the private school out of existence. The language used by Mr. Justice McReynolds in *Pierce* bears striking resemblance to that of religious organizations, and illustrates, when compared to the New Hampshire case, the conflict in basic theory. In an opinion which invalidated, because it was considered to be violative of due process of law, an Oregon statute which required children of the ages of eight to sixteen to attend public schools, Justice McReynolds said:

. . . [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . 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.¹²

Similar statements may be quoted to indicate the position of the Roman Catholic Church. For example, in 1946 it was said that the state's "role in education is in reality secondary and supplementary to that of the home," and further that

the concept of the primary rights of parents in education is not only legally basic to the American system of schools, but fundamentally vital to the existence of our democracy.

According to this view,

the function of the state in education is, not to monopolize and control the schools, but

¹¹ *Fogg v. Board of Education*, 76 N.H. 296, 299, 82 Atl. 173, 174-75 (1912).

¹² *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

to protect and assist the parents in the fulfillment of their obligation to provide adequate educational opportunities for their children.¹³

However, it seems to be generally accepted, in statute and decision, by legislature and court alike, that the language of Justice McReynolds is not to be considered as stating the predominant theory of child control and education. It is society generally, operating through the state governments, which has primary control, that is to say, which has the right to prescribe the minimum standards of education which the child should have. Education of all the youthful is a matter of vital public concern. The very foundations of the democratic system of government are believed to depend, in substantial measure at least, upon the existence of a literate, knowledgeable citizenry. More than that, the very survival of the United States as a nation is thought to be keyed to the availability of a continuing flow of trained technical specialists from the nation's school systems to places in industry and related areas. Known shortages of trained engineers, for example, are matters of great concern today. Other areas exist in which the demand for competent manpower exceeds the supply.¹⁴

Thus it is for two reasons that education is of major public concern and cannot be left to the individual choice of the parents of the child. Whereas, when viewed his-

¹³ The statements quoted are taken from McLAUGHLIN, *A HISTORY OF STATE LEGISLATION AFFECTING PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES, 1870-1945*, 188 (1946). See Gardiner, *Liberty, the State and the School*, 1 CATHOLIC LAWYER 285 (Oct. 1955).

¹⁴ Recently, a number of pronouncements have been made on the urgent need for more technicians and scientists. See, e.g., N.Y. Times, May 21, 1956, p.1.

torically, mass education has been the ideal and the goal, today it has become a necessity. The time is past when the nation can afford a large group of partial or complete illiterates. We have entered a period in which the machine has either replaced or is replacing the untrained human being, both in the manual tasks and in the menial mental tasks. An incredibly rapid technological change has, in the space of a few years, done away with the need for the untrained and unskilled and has left scarcely any place for the slightly trained. At the same time, an enormous demand has been created for the technician, for the person of technical ability, for the "sliderule operator" who can handle and perhaps even understand the machines he manipulates. All of this means that education has become more than a luxury for the betterment of the individual by providing a means to improve his status; it has become a necessity without which the economy would falter, the national security would be imperilled and the democratic system repudiated.

So, education there must be — and there will be. The point is important in any scrutiny of the private school system of the United States. It can thus be said with some degree of certainty that, even with the doctrine of the *Pierce* case, the private school will be allowed to remain in operation only so long as it continues to fulfill what society, *i.e.*, the people generally, has set forth as minimum educational requirements and as the type and degree of training considered desirable or necessary. How does this notion fit in with the legal doctrine?

State Control Over Private Education

There seems to be considerable uncertainty in the legal doctrine regarding the

extent to which a state may go in controlling the administration of private schools. It may be, however, that this uncertainty is more apparent than real; its basis could well be the relative paucity of court decisions as compared to legislative enactments and the tendency of lawyers trained in the common-law tradition to emphasize the case over the statute in finding authoritative doctrine. As mentioned above, there are few United States Supreme Court decisions directly in point. In addition to the *Pierce* and *Meyer* cases only the *Dartmouth College* case¹⁵ and *Berea College v. Kentucky*¹⁶ are relevant. And both of the latter are, in essence, of minor importance to the present inquiry. In the *Dartmouth College* case the Supreme Court ruled that a charter granted to a private institution is in the nature of a contract and cannot be revoked or altered without the consent of those to whom it was granted. The basis for the decision, which was rendered in 1816, was that part of the Constitution prohibiting state legislation which impairs the obligation of contracts. The force of this decision has been greatly reduced, however, through widespread use of reservations in the charters granted to corporations, including those of private schools. The *Berea College* case involved a Kentucky statute making it unlawful to intermingle white and Negro students in a private school. . . . [T]he Supreme Court reached its decision without finding it necessary to rule on the constitutionality of such statute.

The litigation which has taken place in state courts does serve to establish, in conjunction with the state legislation, certain

¹⁵ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

¹⁶ 211 U.S. 45 (1908).

fairly clear, albeit still uncertain, lines of doctrine concerning the private school and state authority. Speaking generally, there is no doubt that substantial intervention by state authority into the administration of private schools is permissible. This intervention, widely practiced throughout the nation, may be classified into three groups, curriculum, instruction, and administration, with some overlap existing.

a. Curriculum

In *Meyer v. Nebraska*,¹⁷ the Supreme Court held that a state may not prohibit the teaching of the German language and other subjects which "cannot reasonably be regarded as harmful."¹⁸ Nevertheless, it is true that English is the required medium of instruction in many states. In addition, certain subjects are frequently required to be taught in all the schools of a state. Examples of such subjects are the Constitution, history, and American government. In other states, such subjects as physical training, traffic regulation, and the effects upon the human system of alcoholic stimulants, narcotics, and poisonous substances must be given. Some states have extremely detailed curriculum requirements. An example is Pennsylvania, which by statute requires that:

In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught, in the English language and from English texts: English, including spelling, reading, and writing, arithmetic, geography, the history of the United States and of Pennsylvania, civics, including loyalty to the State and National Government, safety education, and the humane treatment of

¹⁷ 262 U.S. 390 (1923).

¹⁸ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

birds and animals, health, including physical education and physiology, music, and art.¹⁹

As a general proposition, it may thus be said that a state may prescribe certain minimum curriculum requirements to which private schools must adhere. However, it probably cannot prevent the teaching of other subjects, provided that these other subjects are not subversive in nature or inimical to the public order. So far as the latter is concerned, no doubt exists that a state may prohibit any type of educational activity which threatens its own safety or which is otherwise not in consonance with the generalized requirements of the state's police powers. The outward limits of the power of state authority to control private school curricula have never been drawn by the United States Supreme Court. There have, however, been some attempts by state courts to do so. *People ex rel. Vollmar v. Stanley*²⁰ is an example. There, the Colorado Supreme Court stated that the right to conduct a private school and the right of parents to have their children taught in such schools are liberties guaranteed by the Fourteenth Amendment, subject, however, to the following qualifications: (a) the state may enact compulsory education laws, (b) certain subjects clearly essential to good citizenship may be required, and (c) teachers and the physical location of the schools must be reputable, and the subjects taught must neither be immoral nor inimical to the public welfare.

¹⁹ PA. STAT. ANN. tit. 24 §15-1511 (Purdon 1950). See, for a collection of such statutes, Note, 4 N.Y.U. INTRA. L. REV. 35 (1948); McLAUGHLIN, A HISTORY OF STATE LEGISLATION AFFECTING PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES, 1870-1945.

²⁰ 81 Colo. 276, 255 Pac. 610 (1927).

b. Instruction

In addition to the actual subjects taught, a state also exercises a measure of control over those who teach private school pupils. The private school teacher must meet standards of competency established by the state. Statutes in many states require that teachers in private schools must obtain and possess the same certification as public school teachers. In other states, teachers in both private and public schools are required to take an oath to support the state and federal constitutions.²¹

c. Administration

The third general type of state control over private schools relates to the administration of the schools. As in the other types, such control follows as a natural concomitant of the fact that a state may compel attendance in a school and that private schools may be substituted by parents for the public schools as the medium through which this societal duty is fulfilled. Control over administration runs from the trivial to the important. For instance, some states have prescribed that fire drills must be carried out periodically while others have established certain sanitary standards to be met. More important, other states provide for supervision and inspection of the private schools, the keeping of certain records and the rendering of reports to state officials. Length of the school terms have, in like manner, been the subject of regulation.²²

²¹ See, e.g., N.Y. EDUC. LAW §3002; COLO. REV. STAT. ANN. 123-17-15 (1949); S.D. CODE §15.3804 (1939).

²² The relevant statutes are collected in McLAUGHLIN, *op. cit. supra* note 19.