

A Trend Analysis of Ohio's State Funding for
Public and Nonpublic School Students:

by

Jennifer Sughrue

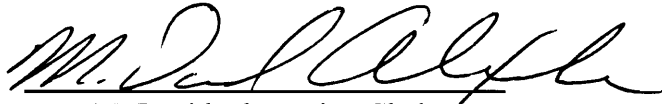
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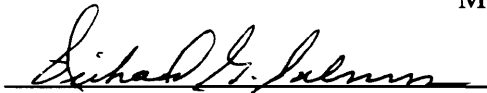
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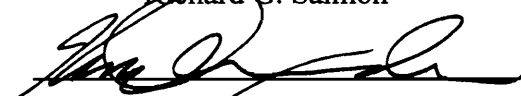
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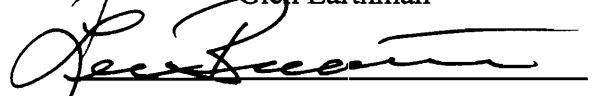
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(ABSTRACT)

The flow of taxpayer money to public and private schools in today's atmosphere of scarce and highly contested fiscal resources heavily influences the debate over school choice. While there is considerable information on disparate funding among public school systems across the nation there is little empirical data on the cost of publicly financed nonpublic school programs.

In an effort to advance the debate on public funding of school choice from the theoretical to the empirical, this study was constructed to quantify and analyze state funding patterns for public and nonpublic education. It was devised to ascertain the amount of money one state, Ohio, expended on public and nonpublic education over a six-year period in order to elucidate the actual costs of current policies that aid nonpublic school students and to compute the state's true fiscal effort for public education.

Ohio was elected for study because its educational system comprises all elements of the debate on school choice. It has an extensive history of legislation that provides *nonfinancial* and *indirect* to nonpublic schools as well as recent school choice enactments,

such as intradistrict and interdistrict open enrollment policies and a pilot scholarship program for low income children in the city of Cleveland. It has also been judged as maintaining an unconstitutional school funding system which has resulted in highly disparate educational opportunity for K-12 students across the state.

The data indicate a level funding pattern over the six-year period of the study, from FY 1990 through FY 1995, with very little variation in the percent allocated to education from the general state budget. The proportions allocated to public and to nonpublic schools have remained steady as well. The evidence indicated that an average 97.4 percent of the state's education budget went to public schools and an average 2.6 percent supported nonpublic school students. Over the six years under study, the amount of money that was allocated in support of nonpublic school students totaled approximately \$683.7 million. If the portion localities pay for bus transportation for nonpublic school students is included, the amount increases to \$836.3 million.

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CHAPTER ONE: INTRODUCTION

Public opinion to be correct must be enlightened.
[Otherwise] tyrants would govern the ignorant.¹

The Public and Private School Funding Debate

Conflict between the state and its citizens over the education of children permeates the annals of American history and jurisprudence. Controversy and contention have emanated from various segments of the American population over such issues as compulsory attendance, curriculum content, student assessment, textbook selection, school prayer and the flag salute.² Public funding of education has summoned an even broader, more acrimonious debate. Perhaps this is because it requires every taxpayer's participation and the revenues are viewed as distributed for the benefit of others. Perhaps it is the result of the tension created as individual states, localities and parents continue to wrestle with the responsibility and capacity to educate children.

A Historical Perspective

It is appropriate to elaborate briefly on the development of American public and private education and the relationship of each to both church and state. This history provides a perspective and a foundation to many of the arguments advanced in support of and in opposition to public funding of nonpublic education. This is particularly true for insight into the debate over funding sectarian schools; that is, educational institutions

strongly associated with a religious denomination or dogma. For instance, opponents of public funding of sectarian education remind us that the Bill of Rights, in particular the two religious clauses of the First Amendment, was in response to experience with powerful government-church alliances in Europe and in an effort to protect against trespass of an individual's right to follow his own conscience in matter of faith.

Proponents of school choice argue that America was founded on Christian religious principles; principles that were accommodated, if not integrated, into government and its several agencies, including education. They argue that attempts to extricate these principles from public schools have driven families to seek private education.

The earliest settlers in the New World, the Puritans, fled England to escape religious persecution. They came from the rank and file of English society, but, unlike the majority of their countrymen, they believed fervently in Calvinist principles, three of which are particularly relevant to the discussion of government support of education. First, literacy was valued because reading the Bible was a necessary element in the practice of their faith. Secondly, as Calvinists, they believed public welfare was jeopardized if other religious views were tolerated. Thirdly, Calvinism viewed government as an arm of the church whose primary function was support of the one *true* religion.³ These three characteristics could be described as the first fibers from which the fabrics of American public education and the eventual necessity for separation of church and state in the new republic were woven.

The Massachusetts Bay Colony enacted two laws, one in 1642 and the other in 1647, directing parents to meet their obligations to their children's education. The 1642 act is often cited as evidence of the New England colonies' commitment to education and as the one from which other colonies modeled their own education legislation. This law is important to understand for two reasons. It underlined the responsibility of the parents to educate their children and it was the earliest manifestation of a government body assuming a more paternalistic stance in relation to the family. As historian Harris Good explains, it was the first exercise in what would become "the tendency of the state to enter the family and to assert a public interest in the upbringing of the children" with the purpose "to promote not only the welfare of the children but also the welfare of the colony and people."⁴

Dissatisfied with the lack of response to the 1642 Act the Massachusetts Bay Colony enacted the second piece of legislation, commonly referred to as the "ye ould deluder Satan" act, which required communities to institute more formal educational practices and to establish schoolhouses to facilitate meeting the law.⁵ The colorful rhetoric evinces the clear intent to conquer illiteracy and, subsequently, to inculcate religious faith.

These two laws illustrate the early interrelationship among religion, education, and government. The Puritan communities were the first of the several European colonists to mandate education for their children, using civil government to advance the doctrine of the

Church (in this instance, through scriptural literacy) and, in doing so, protecting the religious integrity of the colony.

The Puritans of Massachusetts, even more so than the Pilgrims from Plymouth, were responsible for the formation and establishment of the major religious influence, Congregationalism, in New England. The Church enjoyed official status with tax support and was a source of religious discrimination toward those who did not share its beliefs. Although the clergy could not hold public office, only members of the church could. This assured the Church that government officials would look kindly on the Church and enforce religious doctrine.

In the southern colonies Anglican Establishment was conceived along a different trajectory than Puritan Establishment, but the effects were virtually indistinguishable. The Church of England enjoyed exclusivity in the eyes of the colonial government, which provided financial support and enforcement of church attendance and practices. During most of the Anglican's domination of the region, other religious sects were persecuted or scorned, as they were in other regions as well. ⁶

Unlike New England, whose colonies were founded as religious settlements, Anglican communities, including Virginia, were commercial ventures. The educational and governance traditions more closely followed those of English aristocracy. Wealthy landowners hired private tutors or sent their children to private academies while the Anglican church assumed the responsibility for educating the poor.

It was this southern region, coupled with the more pluralistic mid-Atlantic colonies, which first sought religious freedom and complete separation between church and state. Virginia was one of the first to adopt these concepts into law by enacting Jefferson's *Bill for Establishing Religious Freedom* in 1779. It would take most New England states considerably longer. Massachusetts was the last to relinquish religious establishment with the ratification of the 1833 constitutional amendment that separated church and state. Yet, Massachusetts was instrumental in fostering public education by creating the first state board of education and hiring Horace Mann as its secretary. Horace Mann was perhaps the most notable of the school reformers who vigorously labored to establish a state-regulated system of free common schools - publicly financed schools intended to provide an elementary education to all children.

State legislatures thus severed ties with established religions and the federal government secured an individual's right to religious freedom. However, religion remained closely, if not directly, associated with public education. Up until the mid-20th century it was not uncommon to have state statutes that required religious services, prayer, and Bible reading lessons in public schools. While courts have since struck down most of these practices as unconstitutional, the traditions and associations they created with religion, especially with Christianity and specifically with Protestantism, are not forgotten.

In the early to mid 1800s urban public schools were often administered by free school societies which professed secularity but were pervasively Protestant both in the composition of their membership and their message.⁷ The New York Public School Society was one such educational organization. It was a privately administered entity but enjoyed government sponsorship. The New York Public School Society and others like it ministered to the educational needs of the cities' children while endorsing the use of the King James version of the Bible and of textbooks that unabashedly degraded Catholics. Their thinly veiled animosity toward Catholics as well as their condescending attitude toward the newly immigrated Irish, who also were Catholic, inspired Catholic dioceses to re-invigorate their policy to establish parochial schools in each of their parishes and to entreat civil government for financial support for parochial schools. It seemed the reasonable response to a school system such as that operated by the Public School Society and described by New York's Bishop John Hughes and John Spencer, Governor William Seward's Secretary of State and ex officio State Superintendent of Schools, as "an inefficient and improper monopoly."⁸

The first significant effort to lobby for public funds on behalf of Catholic schools was in 1840 in New York City. A petition was submitted by Catholic schools to the Board of Aldermen requesting a representative portion of the common school funds.⁹ A spokesman for the petitioning Catholics advised the aldermen that Catholics "bear, and are willing to bear, the portion of every common burden; and feel themselves entitled to a

participation of every common benefit.”¹⁰ The Catholic Church did not believe there was any significant difference between its parochial school system and that of the Public School Society. Both served a public purpose by providing elementary education. According to Diane Ravitch, “[the Church hierarchy] held that Catholic schools were an integral part of the state common school system” such that “the schools of the Public School Society were Protestant public schools, while their own schools were ‘Catholic public schools,’ equally entitled to public support.”¹¹ Claiming parochial schools meet a legitimate public purpose by rendering educational services has continued to be the hallmark of all subsequent efforts to obtain funds to support the Catholic educational mission.

The request was denied, but the ferocity of the debate eventually led the Public School Society to lose much of its popular support and to sell its holdings to New York. These holdings were used to establish a modest beginning to a system of free and common schools, one owned and operated by civil government.

New York’s experience was representative of other states. Many states with large urban settings struggled with the transition from what had been culturally and religiously homogeneous populations to increasingly diverse ethnic and religiously pluralistic communities. The overtly Protestant nativist tone of community education had become socially divisive as the nation absorbed immigrants from an array of colors and cultures. Educational leaders, such as Horace Mann, Henry Bernard, Calvin Stowe and John Pierce,

crusaded for the establishment of a centralized system of schools that would provide universal secular education. This would provide a means through which the conglomerate citizenry could be exposed to: “moral education to produce obedient children, reduce crime, and discourage vice; citizenship training to protect republican government; literacy for effective economic and political participation; and cultural education for assimilation and unity.”¹²

To accomplish its purposes a system of common schools had to be publicly funded so that all children, independent of their financial resources, could attend. General taxation in support of a centralized system of free common schools was not popularly supported. Even in colonial New England, general taxation in support of education had not been a common practice. Most opponents to taxation supported education under parental control and charitable contributions for poor children but inveighed against governments usurping the parental right to decide how much education was necessary and how to finance it.¹³

Such conventional views and entrenched practices encumbered school reformers' efforts to convince state legislatures to create property taxes in support of common schools. As Henry Bernard explained, the general property tax was “the cardinal idea of the free school system.”¹⁴ He and his colleagues endeavored to promote fully financed schools with public funds and to abolish such practices as rate bills met with mixed results. Some states levied taxes in partial support, leaving it to communities to decide

what more they wanted to generate. Other states created the mechanism by which communities could establish and finance schools, yet made the system voluntary. In some instances, free school systems were established only to be abolished a few years later then recreated once again. It was not until the 1870s, when the last of the rate bills were eradicated, that school reformers could allege success in establishing free common schools for the elementary education of all children.¹⁵

By the latter decades of the 19th century, most of the themes one hears today in the polemic over educational finance and school choice had emerged: parental versus state responsibility for education; religious versus secular instruction, general taxation and the relative contributions of state and local revenues toward public education; the state interest in promoting unity and commonality juxtaposed to familial or communal integrity of culture, religion and language; and equal education opportunity for all children. Today these contrary points of view continue to act like flint to steel, sparking impetus for and enflaming responses to changes in educational policy. The issue of school choice is one example of such combustion.

School Choice

The issue of freedom of choice in American elementary and secondary education and its potential repercussions on society-at-large span political, economic and social contexts. Public education is considered essential in perpetuating American democracy and unifying diverse groups, boosting productivity and maintaining a competitive market edge, and diminishing social maladies, such as crime and poverty. Increasingly, there is

dispute over the validity of these as public education objectives. Some groups question whether public education should subjugate cultural plurality to achieve assimilation, whether the mission of education is to train a workforce or create an enlightened citizenry, and whether public schools should and do perpetuate a particular set of values, perhaps usurping those of the family and churches. Of course, these contrasting issues need not be viewed as diametrically opposed, but often the debate addresses them as such.

School choice, to its advocates, represents the ideal resolution to the disagreements represented above - allow parents to choose the school environment which embraces the educational objectives and values most approximate to those of the parents. Critics are concerned that choice would only serve to exaggerate social disunity by putting self-interest above common interest.

There is considerable variety in proposed choice options. On one end of the spectrum are very modest choice programs that allow parents to choose from among public schools within their attendance district, with little or no financial penalty to schools which lose students. On the other end of the continuum are proposals that would give parents both unrestricted choice and a financial subsidy which may be redeemed at either public or private schools, theoretically allowing market pressures to improve the delivery of educational services. Although most of the philosophical questions about school choice are applicable to any choice plan, what concerns most choice activists on all

sides of the debate are those proposals which include participation of private schools and public money.

Endeavors to radically redefine the role public education and to shift more of the responsibility for education to nonpublic school entities require close examination. The myriad justifications and rebuttals are best discussed categorically. Although not an all inclusive list, these three classifications are most appropriate to this synopsis: democracy and diversity, competition and market analogy, and funding and equity.

Democracy and Diversity:

School choice advocates argue that public education is a government monopoly that stifles educational diversity and limits parental control over the upbringing and education of children.¹⁶ Proponents agree universal education is essential, but debate the specific character it should assume. Illustrating their point by referring to the diversity in educational regulations from state to state, they suggest that pluralistic parameters could be established for all schools that would satisfy the state's compelling interests while maximizing choice options for parents.¹⁷

They also believe sectarian schools should be a part of the choice matrix for some parents sense an obligation to seek an educational program in which religious instruction accompanies academic study.¹⁸ Choice, they contend, would empower greater numbers of parents to implement their educational preferences, which would increase parental

involvement, address students' diverse interests and talents, and lead to higher student achievement.¹⁹

Opponents to unrestricted school choice are concerned that choice programs that include nonpublic schools may mask the efforts of those who would like to segregate their children from the cultural, religious, and racial plurality that defines America.²⁰ They base their accusations on precedent, citing what followed the *Brown v. Board of Education* ruling.²¹ In the aftermath of the *Brown* decision, southern states connived legal devices that maintained segregated public schools or offered funding to white families who sent their children to segregationist academies.²² As Philip Daniels explains it, "Parental choice in the 1950s and 1960s...came to be linked to the perpetuation of segregation."²³ Even today, there is little evidence that urban minority children are readily accepted into private or suburban schools, even when choice exists. On the other hand, white children seem to use choice to transfer from integrated systems into all-white schools.²⁴

There are convincing arguments that unrestricted school choice will further exaggerate the educational, economic and social stratification already present in American society.²⁵ A demographic study of private school enrollments indicate that attendance is positively linked to income and that there is a disproportionately higher number of white children.²⁶ Minority populations matriculated in private schools tend to be from the upper income ranges.²⁷ The author of the study, James Catterall, concludes that choice

programs will tend to favor existing private school populations, maintaining the class and social distinctions currently representative of private schools.²⁸

Opponents of choice assert that alleging poor families will have greater access to quality education is predicated on a wide variety of assumptions. First of all, families would have to learn there is a choice, to understand the nature of the choice, and then to exercise it. There is a body of research that suggests that these prerequisite events do not necessarily occur and, if they do, the choice does not necessarily bring the desired result, such as higher achievement or graduation rates.²⁹

Secondly, a family may want to choose but discovers instead it must be chosen. Better schools would select students who would enhance the existing school profiles, strengthen their achievement statistics, and maintain their distinctive school “culture.”³⁰

Lastly, there are indications that urban public school choice programs favor middle class students who utilize open enrollment policies to move to better public schools. This further widens the social and educational spans between low income and middle income families.³¹

Competition and Market Analogy:

Many proponents of school choice assert that public schools have lost their capacity to respond to students’ or society’s needs because they function as ineffectual monopolies. They are guaranteed funds and have a captive audience whether or not they serve the best interests of the students.³²

Chubb and Moe argue that democracy requires bureaucracy, a fact which has made public schools lethargic, inefficient, and unresponsive to the needs of children. They propose deregulating public schools, releasing them to differentiate their programs in order to provide a more varied educational marketplace for families. Freedom from bureaucracy and legislative fiat would improve efficiency and promote greater efficacy.³³ In their words, “Our guiding principle...is this: public authority must be put to use in creating a system that is almost entirely beyond the reach of public authority.”³⁴

Opponents consider the premise of the market theory for education fallacious and illustrate their arguments using existing services provided by private enterprise. Alex Molnar, professor of education at the University of Wisconsin, Milwaukee, argues that the marketplace has not provided adequate, much less high quality, health care to the approximately 35 million Americans who are without health insurance. As a result the public picks up the rather considerable expense for health care of the poorest and sickest citizens as well as the associated social costs that ensue when so many people do not have access to basic medical care. He contends that “compared to our competitive, privatized health care system, public education is a model of cost-effectiveness, responsiveness, equity, and high performance.”³⁵

Mary Anne Raywid disputes market theorists’ call for competition and accountability. She asserts that choice in education is prompted by need, not by quality, and is more aligned with a family’s values, not test scores.³⁶ She reasons, using the

analogy of a car and truck, that selection between these two vehicles would be based on function or other attributes rather than quality. Likewise, a student might choose one school over another because it offers a unique program suited to his talents and interests, not because its test scores are higher.³⁷

Another aspect of school choice is the educational environment. Parents are concerned with methodology, philosophical orientation, moral or religious instruction, discipline and other distinguishing characteristics. Generally, people prefer to associate with others of similar background and culture and feel a sense of community. Raywid parallels this to a family searching for a religious affiliation. They are interested in finding a doctrine or spiritual orientation compatible with their own values. Choosing one denomination over another does not signify that one religion is of higher quality than the other.³⁸ This selection process functions similarly for education as well.

Funding and Equity:

Families of nonpublic school students argue that vouchers and tax credits or deductions are equitable means for relieving them of the “double burden” they carry - paying taxes and tuition. They also assert that the number of children in private schools spares public school systems the expense of educating them.³⁹ Families who provide a religious education for their children contend they should not have to forego the benefit of a publicly subsidized education to accommodate their religious beliefs.⁴⁰

School choice proponents claim that publicly funded choice will give poor families greater access to high quality education. They assert that poor students are victims of public schools: uneven public school funding, watered down curriculums, and inadequate facilities.⁴¹ They also contend private schools, particularly parochial schools, provide good education more cost-effectively than public schools.

Critics of publicly funded school choice remind us that all people do not benefit from every government service. Public transportation is an example. Individuals who choose to purchase services from the private sector should not expect to be reimbursed because they exercise their right to choose and have the resources to do so.⁴²

Opponents warn that choice programs will serve primarily families who have access to information, transportation and the additional resources that may be required to pay any differences that exist between a government subsidy and the actual costs of tuition and other fees.⁴³ Rather than choosing the school they want, poor families would be forced to choose a school they could afford, effectively keeping them at the same level of educational disadvantage where they have always been relative to others with greater financial resources. Furthermore, if previous experience in education funding is any indicator, subsidies would be lowered or eliminated eventually, requiring low income families once again to transfer their children, most likely to public schools.⁴⁴

Adversaries of school choice do not agree that nonpublic schools provide a better education at a fraction of the cost of a public education. John Witte has conducted an

analysis of student achievement at Milwaukee choice schools and public schools over the five years the Milwaukee Parental Choice Program has been operational. He reported no significant differences in student achievement and found high rates of attrition from the program - rates similar to public schools.⁴⁵

Public school educators accuse private schools, particularly parochial schools, of keeping costs down by receiving government aid,⁴⁶ benefiting from church subsidies and private endowments,⁴⁷ and paying lower teacher salaries.⁴⁸ Jay Chambers conducted a study comparing public and private school teacher salaries. He concluded that “nonpublic school teachers give up between 10 percent and 40 percent of the public school teacher salary to work in the non-public sector, and they were aware of their sacrifice.”⁴⁹ He reported that parochial schools paid the lowest salaries and non-sectarian private schools paid the highest salaries among nonpublic schools.⁵⁰

Concerned public educators fear government subsidies for private education will further impoverish inner city and small rural schools which are already struggling to provide education and other services to a population whose needs extend beyond academic learning.⁵¹ They argue that public school districts already suffer under state funding formulas that rely substantially on localities to generate funds for their schools. Wealthier districts can finance a higher quality education program than poorer districts because they have greater fiscal capacity. Fiscal capacity is defined as the measure of wealth (e.g., income, real property) that serves as the tax base for a government unit.⁵²

School districts located in areas of low fiscal capacity depend on their communities to tax themselves at a higher rate in order to produce an equivalent amount of revenue.

Requiring localities to fund a larger percentage of their education budgets results in pupil and taxpayer inequities. Geographic location and local wealth, rather than community preferences, determine the education program and the level of fiscal effort necessary to fund it. This creates widely disparate education opportunities for children in the state (pupil inequity) and places a heavier tax burden on citizens in low income areas (taxpayer inequity).⁵³

Public educators and concerned citizens worry that publicly funded choice programs that include private schools would further exacerbate the disparity in educational opportunity for those students who remain in public schools. If states redirect funds from public schools to private schools, localities will be left to find additional funding for their schools or to reduce educational programs in existence.

Choice is not new to the relationship Americans have with education, although its proponents have grown in numbers and diversity as the conversation about school reform has grown in intensity. Parents are demanding a greater role in site-based decision-making; low income families are seeking equity; politicians are calling for cost efficiency and accountability, and educators are requesting more funding, flexibility and autonomy. No one, though, is really advocating abdication of public funding of education; the controversy is primarily over access to those funds. Increasingly, some degree of

education is beneficial and necessary to society and should be financed by all who share in its benefits directly or indirectly. Since the task of collecting money has already been delegated, all that remains is the question of distribution.

Purpose of the Study

This study was devised to formulate an analysis of the state funding patterns for public and nonpublic education in Ohio and to assess the amount of money being allocated to both public and nonpublic education in the state. This was developed to ascertain the actual costs of current educational policies that aid nonpublic school students and to extrapolate from the funding patterns what might be the future direction of education funding in Ohio.

Funding is a major determinant in access to quality education. How to direct funding to achieve this access bifurcates the debate on school choice. One viewpoint insists that increased access to quality educational opportunity can be achieved by investing more equitably in poorer school districts where most disadvantaged families are served and by allowing more districts to implement site-based management.⁵⁴ The opposing viewpoint maintains that diverting funds to nonpublic schools through choice programs enhances access to quality education for all groups, at a lower cost per pupil than that expended in public schools, and brings added value in the forms of increased parental involvement and diversity in educational programs.⁵⁵

Statement of the Problem

- The flow of taxpayer money to public and private schools in today's atmosphere of scarce and highly contested fiscal resources heavily influences the dispute over school choice. While there is considerable information on disparate funding among public school systems across the nation there is little empirical data on the potential cost of publicly financed choice programs.⁵⁶ Choice programs, specifically those that include private schools, are few and new and, thus, have not generated sufficient data for extensive study.⁵⁷

Many states have a lengthy history of funding items such as textbooks, bus transportation, diagnostic services, testing, and guidance and counseling services for nonpublic school students. There has been scant research on the fiscal impact of such aid on public and private school budgets. In the absence of such studies, legislators formulate educational policy with little notion of the long term fiscal effect on public education or of the accumulating cost of increased aid to nonpublic education through choice programs.

In an effort to advance the debate on public funding of school choice from the theoretical to the empirical, this study was constructed to quantify and analyze state funding patterns for public and nonpublic education. It was devised to ascertain the amount of money one state, Ohio, expended on public and nonpublic education over a six-year period in order to elucidate the actual costs of current policies that aid nonpublic school students and to compute the state's true fiscal effort for public education.

The primary objectives of this study were to:

- 1) conduct a financial study of Ohio's education expenditures over a six-year period for public school and nonpublic school students;
- 2) analyze the funding trend for a) education in general, b) public education, and c) nonpublic school students;
- 3) calculate the "pure" state effort for public education for each of the 6 years under study. ("Pure" state effort refers to the state's fiscal effort made on behalf of public education, exclusive of any funds expended for nonpublic school students.)

Ohio was elected for study because its educational system comprises all elements of the debate on school choice. It has an extensive history of legislation that provides *nonfinancial or indirect*⁵⁸ aid to nonpublic schools as well as recent school choice enactments, such as intradistrict and interdistrict open enrollment policies and a pilot scholarship program for low income children in the city of Cleveland. It is also accused of maintaining a disparate school funding system and is awaiting a State Supreme Court ruling on a case brought by the Ohio Coalition for Equity and Adequacy of School Funding.⁵⁹ Additionally, Ohio has a public school district, Cleveland City Schools, that is nearly insolvent and under court order to desegregate.⁶⁰ There have been court battles over

public regulation of private schools,⁶¹ public aid to private schools,⁶² and more recently, legal action by parents who have been refused transfers under the interdistrict open enrollment policy.⁶³

Most importantly, Ohio made an excellent subject for study because the Department of Education of Ohio has a comprehensive demographic and financial reporting mechanism, named the Education Management Information System (EMIS), that facilitated access to data relevant to this study. The Department of Education also maintains a web site that has considerable student, staff and financial information on public and, to a lesser degree, private schools.

Research Hypothesis

The study's hypothesis was that the trend in education funding in Ohio has shifted in recent years to the detriment of public school funding and in favor of private education students. Of interest in this study was the impact of state educational policy changes on public school funding. The process of the study has been to disaggregate the fiscal data available on public and private education expenditures and compare these figures over time. An analysis of these data was utilized to evaluate the validity of the hypothesis and to respond to the question.

Rationale for the Study

The centrality of education in elevating the quality of each individual's life, as well as in advancing essential characteristics of American society and democracy, should

require legislators to be vigilant when drafting policies that govern schooling. State and federal education policies and funding should not be formulated solely on political expediency but upon empirical research and carefully considered objectives to ensure measurable outcomes and equitable educational opportunity for children.

Taxpayers are often ignorant of funding policies that effect education. They usually make a simple linear association between paying property taxes and supporting public schools. Few understand that many states have been providing indirect aid to nonpublic school students for several years. Examples of this aid are pupil transportation, testing, counseling and diagnostic services, and purchasing textbooks. Eligible disabled and disadvantaged nonpublic school students also receive special education or remedial instruction which is paid for by federal and state governments.

It can be reasonably argued that even knowledgeable educators and legislators in those states that have such subsidies do not fully appreciate how much money is collectively financing nonpublic school students.⁶⁴ The fear of many and the hope of others are that states are increasing the sums of money being allocated in support of nonpublic education and inventing new avenues through which to channel these funds to them with disregard of the long term effects.⁶⁵

Virtually no empirical evidence exists to account for the amount of dollars going into private schools or to determine if those dollars are being siphoned from general funds that ordinarily would be allocated to public education. Most published data on nonpublic

education funding are incidental to the body of the work. Sometimes figures are projected as an estimation of theoretical costs of a proposed program.

E.G. West reported on a revenue reduction study conducted by the Joint Committee on Taxation at the request of Congress as it studied a bill submitted by Senators Bob Packwood and Daniel Moynihan in the first years of the 1980s. Their proposed legislation would have given families a tax credit of fifty percent of their tuition costs, up to \$500, for each child. This credit would have been refundable to families who may not have had a tax liability for the full amount. The Joint Committee on Taxation estimated that the legislation would have resulted in a potential revenue loss of \$4.7 billion for 1980.⁶⁶

James Catterall, in his paper, "Tuition Tax Credits: Fact and Fiction," did not put his estimates quite that high, reminding the reader that the amount depended on the number of participants. He suggested that the revenue loss would be closer to \$1.1 billion per year if calculated using private school enrollments figures at the time while assuming the enrollment would remain stable. In either scenario the figures were significant, and it was conjectured that the revenue loss would be compensated by diminishing the level of federal education expenditures.

Linda Darling-Hammond and Sheila Kirby present one of two comprehensive studies on the cost of state aid to nonpublic school students. They were interested in the expense of Minnesota's tuition tax deduction program and in the effect the subsidy had

on parental choices. The cost analysis indicated that deductions grew from an estimated \$2.5 million in 1978 to \$6.1 million in 1983, the result of higher utilization rates rather than increases in the size of the claims. Utilization increased 150 percent between 1978 and 1980. This is despite the fact that, as of 1980, only 16 percent of eligible households claimed tuition deductions.⁶⁷ Darling-Hamond's and Kirby's findings also suggested that "the tax deduction, by itself, appears to have little or no effect on parental choice, while disproportionately benefiting parents with higher incomes and educational levels. Other policies, like free bus transportation, appear to have greater influence on parental choice, particularly for parents at the choice margin."⁶⁸ The researchers explain that tax deductions favor upper income families because they have the fiscal resources to pay for schooling costs up front and can afford to recapture just a portion of the expense through the tax deduction mechanism. In their words, the "tax deduction is perhaps the most regressive and inefficient form of subsidy for parents' educational expenses if the goal is to expand choice-making ability."⁶⁹

In his 1989 legal commentary, "Constitutional Analysis of Education Vouchers In Minnesota," Robert Bruno summarized the costs of Minnesota's support for nonpublic school students for fiscal year 1988. Minnesota provides transportation, textbooks, and selected other educational services to nonpublic school students as well as tuition tax deductions for families who incur tuition, textbook and transportation costs, the result of tax deduction legislation that was litigated but ruled constitutional in *Mueller v. Allen*.⁷⁰

Bruno indicated that state subsidies for Minnesota's nonpublic students cost almost \$20 million for 1988. Of that sum, \$4.4 million was attributed to state income tax revenue reductions. Federal subsidies to nonpublic school students in that state came to \$3,612,098, bringing the total expenditure to \$23,587,425.⁷¹ Minnesota spends in excess of \$1 billion per year for education, so it might be argued that \$23.6 million is not a significant amount. A longitudinal study, one based on more recent information, would show the accumulative effect and could be compared to long term funding of public education for more conclusive evidence of its significance or insignificance.

The second comprehensive study is a dissertation authored by Susan Elaine Mittereder in which she examined the legal and financial status of public aid for transportation for K-12 nonpublic school students in the United States.⁷² Her study demonstrated that, as of 1982, thirty states were providing transportation services to nonpublic pupils. Only ten had complete fiscal data of the cost of said transportation, and another five states had partial data. Mittereder calculated that the combined costs of transporting students to be \$148.6 million in those states with complete data and \$25.5 million in those with partial data. She concluded that as a result of the poor record keeping on transportation expenditures for nonpublic school students, "educators and the public in general are unaware of the cost of private school transportation in one-half the states that provide such aid, and they are certainly uninformed about the total cost of transportation aid nationally."⁷³

The dearth of financial studies in the area of public support of nonpublic school students leaves a vacuum for rational policy making in the current charged atmosphere of school choice rhetoric. There are people who believe that poor record keeping is by design in order to keep the public uninformed. What is needed is accurate and detailed information about state expenditure patterns for public and private schools and an analysis of the relationship of these patterns to the general funding of education.

Design of the Study

The research followed two trajectories, one legal and the other fiscal. The legal research was necessary to establish the statutory foundation for public aid to Ohio's private school students. The second component of the study required compiling financial data for descriptive analysis.

The legal research comprised two parts, judicial precedent and legislative mandate. It began with a broad sweep of federal and state jurisprudence to uncover what legislation and litigation gave precedent to the issue in general of public aid for private schools. Landmark cases - United States Supreme Court decisions - were listed chronologically and accompanied by a brief hermeneutic description. West Law's online databank and its hard copy publications as well as numerous legal commentaries and law books were consulted, employing legal research methodology.

The focus then narrowed to the legislative mandate in Ohio that gave rise to public aid for nonpublic school students. Ohio's constitution and revised code were researched to establish the statutory basis for public aid to nonpublic education and related matters. Again, West Law's online database proved invaluable.

The financial study entailed a thorough examination of the online EMIS database and considerable correspondence and conversations with various individuals at the Ohio Department of Education. This included contact with the Assistant Director for Policy, Research, and Analysis, the overseer for nonpublic school charters in Evaluation and Assessment, analysts within Information Management Services, and staff from School Finance. The financial data collected, from Fiscal Year 1990 through Fiscal Year 1995, were:

- 1) the total state general fund and lottery fund expenditures for education,
- 2) the expenditures in support of nonpublic school students for those years, itemized by the authorizing statute, and
- 3) the assessed property valuation for the state.

The funds expended exclusively for public education were computed from the collected data on total and nonpublic education expenditures, then used in a ratio with the assessed property valuation to calculate the state's fiscal effort for each of the six years surveyed. The financial data were converted to constant dollars, compiled in tables and displayed graphically to facilitate descriptive analysis.

Limitations of the Study

The financial research was limited to state general funds, whose base includes general revenue funds (GRF) and lottery profit education funds (LPEF), allocated for K - 12 public and private education. Categorical funds, both state and federal, were excluded in order to achieve a more accurate assessment of K-12 education funding without regard to federally mandated special programs.

The study includes aggregated statewide public and private school student demographic information. While demographic information about public school students were available by individual district, equivalent data on nonpublic school students were unpublished. The absence of published nonpublic school data limited the demographic analysis to simple general description rather than to something that could be correlated with the financial study.

Coverage and Organization of the Issues

A discussion of the principal issues that embody the debate on unrestricted school choice comprise the first chapter. A brief historical account of the people, perceptions, and circumstances that contributed to the evolution of an American system of state-supported schools and to the controversy that accompanies them yet today is presented. This is followed by the reasoning and evidence in support of the need for this study, as well as the formulation of the study problem and the hypothesis it is to test.

Chapter Two is an overview of the legal parameters of school choice and public funding of nonpublic education. Included are landmark cases and other relevant litigation that uphold the parental right to choose the educational environment one considers appropriate for one's child. The legal criteria that define the extent to which public funds may finance such choices are described.

This is followed in Chapter Three by a description of the educational demographics of Ohio, its system of public schools, and the legislation and litigation that have shaped its current education policies. It also introduces Ohio's most urgent public education funding issues that compete with nonpublic education for state resources.

Chapter Four is the description and presentation of the financial data collected for the six-year period, from 1990 through 1995. It traces the funding trends for education and describes variations in the patterns. This is followed by the computation of "pure" state fiscal effort for each of the six years under study.

Conclusions about the school funding patterns are summarized in Chapter Five. Also included are suggestions for further study.

Chapter One Endnotes

¹ Governor Return Jonathan Meigs, Inaugural Address, Ohio, 1810. This comment was made in support of creating a system of common schools in Ohio in "Inaugural Address of Return Jonathan Meigs," December 4, 1810, as quoted in Andrew R.L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825*, (Kent: The Kent State Press, 1986), 143.

² Examples of litigation related to these issues: *State of Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which it was ruled that Amish children did not have to attend public school after the 8th grade; *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987), challenged the constitutionality of a Louisiana statute requiring a balanced treatment of creation and evolutionary sciences in the public school curriculum; *Debra P. v. Turlington*, 564 F.Supp. 177 (1983), in which the constitutionality of an exit literacy test required of high school students was questioned; *Mozert v. Hawkins County Bd. of Ed.*, 827 F.2d 1058 (1987), litigated the constitutionality of requiring students to study from a basic reading series that may contain themes contrary to their religious beliefs; *Wallace v. Jaffree*, 472 U.S. 38 (1985), struck down two of three Alabama statutes that encouraged prayer and meditation in public schools; and *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), ruled that it was unconstitutional to require students to recite the flag salute. A more thorough examination of similar cases and their consequences for public education can be found in Kern Alexander and M. David Alexander's *American Public School Law* (St. Paul: West Publishing Company, 1992).

³ Harris Good, *A History of American Education* (New York: MacMillan Company, 1956).

⁴ Good, p. 29-30.

⁵ The 1647 act states: "It being one chiefe proiect of ye ould deluder, Satan, to keepe men from the knowledge of ye Scriptures, as in formr times by keeping ym in an unknowne tongue, so in these latter times by perswading from ye use of tongues, yt so at least ye true sence & meaning of ye originall might be clouded by false glosses of saint seeming deceivers, yt learning may not be buried in ye grave of or fathrs in ye church an commonwealth, ...It is therefore ordred, yt evry towneship in this iurisdiction, aftr ye Lord hath increased ym number to 50 householdrs, shall appoint one wth in their towne to teach all such children as shall resort to him to write & reade...yt where any towne shall increase to ye numbr of 100 families or households, they shall set up a grammar schoole...if any towne neglect ye performance hereof above one yeare, yt every towne shall pay 5£ to ye next schoole till they shall performe this order." Quoted in: Edgar

Knight and Clifton L. Hall, eds., *Reading in American Educational History* (NY: Greenwood Press, 1951), 62.

⁶R. Freeman Butts, *American Tradition in Religion and Education* (Westport: Greenwood Press, 1950), 11-30.

⁷ Diane Ravitch, *The Great School Wars, New York City, 1805-1973* (New York: Basic Books, 1974).

⁸ Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (New York: Hill and Wang, 1983), 169.

⁹ Neil G. McCluskey, ed., *Catholic Education in America: A Documentary History* (New York: Bureau of Publications, Teachers College, 1964), 65.

¹⁰ The full text of the document, "Petition of the Catholics of New York for a Portion of the Common-School Fund" is quoted in Neil G. McCluskey, ed., *Catholic Education in America* (New York: Teachers College Bureau of Publications, 1964), 65-77.

¹¹ Ravitch, p. 41.

¹² Kaestle, p. 101.

¹³ Kaestle, p. 148-49.

¹⁴ As quoted in Kaestle, p. 149.

¹⁵ Kaestle, p. 151.

¹⁶ See generally Quentin L. Quade, "Catholics and Educational Choice: Motive. Warrant. Will?" Paper prepared for the annual meeting of the National Catholic Education Association, April, 1994; E. Vance Randall, *Private Schools, Public Power: A Case for Pluralism* (New York: Teachers College Press, 1994); John Coons, "Of Family Choice and 'Public' Education," *Phi Delta Kappan* 61(September, 1979):10-13; James Coleman, "Public Schools, Private Schools and the Public Interest," *Policy Studies Review Annual* 6(1983):643-654; David Harner, *School Choice: Why You Need It - How You Get It* (Washington, D.C.: Cato Institute, 1994).

¹⁷ Vance, p. 2.

¹⁸ Anthony Cardinal Bevilacqua, Archbishop of Philadelphia, "Constitutionality of Tuition Vouchers: Address Delivered to Marquette University Law School, October 7, 1992," *Marquette Law Review* 76(1993):487; Peter K. Rofes, "Public Law, Private School: Choice, The Constitution, and Some Emerging Issues," *J. of Law and Educ.* 21(Fall 1992):512.

¹⁹ John E. Coons and Stephen D. Sugarman, "The Scholarship Initiative: A Model State Law for Elementary and Secondary School Choice," *J. of Law and Educ.* 21(Fall 1992):529-567.

²⁰ See generally Virginia Davis Nordin and William Lloyd Turner, "More Than Segregation Academies: The Growing Protestant Fundamentalists," *Phi Delta Kappan* 61(February 1980):391-395; James S. Catterall, *Education Vouchers*, Fastback (Bloomington: Phi Delta Kappa Educational Foundation, 1983).

²¹ 347 U.S. 483 (1954) (Brown I).

²² Philip T.K. Daniel, "A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?" *DePaul Law Rev.* 43(1993):1-96; *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); Alexander and Alexander, p. 409-430.

²³ Daniel, p. 4.

²⁴ Daniel, p. 31-32.

²⁵ In Peter W. Cookson, Jr., *School Choice: The Struggle for the Soul of American Education* (New Haven: Yale Univ. Press, 1994), 12-13, he makes the following observations: "At the same time that America is becoming more multicultural, it is also becoming more polarized by wealth and income. We are reaching a point when we can speak of a divided society in which rich and poor are separated by grand canyons of inequity. The top 20 percent of American families earn 47 percent of all income and own at least three-quarters of all wealth, while the bottom 20 percent earn only 3.6 percent of all income and own virtually nothing." Also see Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st-Century Capitalism* (New York: Vintage Books, 1992) which illustrates the growing stratification, using "symbolic analysts," "in-person

servers,” and “routine producers” as metaphors for three distinct classes in American society, chapter 23, “The New Community,” p. 268-281.

²⁶ James S. Catterall, “Private School Participation and Public Policy,” in Thomas James and Henry M. Levin, eds., *Comparing Public and Private Schools* (New York: The Falmer Press, 1988) 1:57-58.

²⁷ Catterall, “Private School Participation,” p. 58-60.

²⁸ Catterall, “Private School Participation,” p. 64-65.

²⁹ Richard Murnane, “Family Choice in Public Education: The Roles of Students, Teachers, and System Designers,” *Teachers College Record* 88(Winter 1986):186-87; Amy Stuart Wells and Robert L. Crain, “Do Parents Choose School Quality or School Status? A Sociological Theory of Free Market Education,” in Peter W. Cookson, Jr., ed., *The Choice Controversy* (Newbury Park: Corwin Press, Inc., 1992), 70; John F. Witte et al., “Report. 1990-1995. Milwaukee Parental Choice Program,” Robert M. LaFollette Institute of Public Affairs, University of Wisconsin, Madison. Online: <http://www.lafollette.wisc.edu/departamental/papers&pubs/research.htm>.

³⁰ T.H. Bell, et al., “Private Elementary and Secondary Education. Congressionally Mandated Study of School Finance. A Final Report to Congress from the Secretary of Education,” (Dept. of Educ., Washington, D.C., 1983), 2(July 1983):44-45.

³¹ Daniel, p. 32.

³² Daniel, p. 25; also, see generally Coons and Sugarman.

³³ John E. Chubb and Terry M. Moe, *Politics, Markets and America's Schools* (Washington, D.C.: Brookings Institution, 1990), 216-217.

³⁴ Chubb and Moe, p. 218.

³⁵ Alex Molnar, “What Are Our Choices,” *Educational Leadership* 50(November 1992):85.

³⁶ Mary Anne Raywid, “Public School Choice, Yes; Vouchers, No!” *Phi Delta Kappan* 68(June 1987):762-769.

³⁷ Raywid, p. 765.

³⁸ Raywid, p. 765.

³⁹ Bell, p. 43.

⁴⁰ See Bevilacqua; also, *Miller v. Benson*, 878 F.Supp. 1209 (E.D. Wis 1995).

⁴¹ Daniel, p. 30-31.

⁴² Bell, p. 44.

⁴³ See generally Willis D. Hawley, "The False Premises and False Promises of the Movement to Privatize Public Education," *Teachers College Record* 96(Summer 1995):735-742; Valerie Martinez, Kay Thomas and Frank R. Kemerer, "Who Chooses and Why: A Look at Five School Choice Plans," *Phi Delta Kappan* 75(May 1994):678-681; Ronald G. Corwin and Marcella R. Dianda, "What Can We Really Expect from Large School Voucher Programs?" *Phi Delta Kappan* 75(September 1993):68-72; Melissa Melendez, "Choice: Who Benefits, Who Doesn't," *Thrust for Educational Leadership* 21(May/June 1992):14-16.

⁴⁴ Linda Darling-Hammond, Sheila Nataraj Kirby, *Tuition Tax Deductions and Parent School Choice: A Case Study of Minnesota* (Santa Monica: Rand, 1985), 83: "[T]he price of private school alternatives does influence choice...When price and tastes for different types of education are taken into account, income becomes more important in determining private school choice. Also, our survey indicates that many lower-income parents of private school children might switch them to public schools if their tuition costs increased."

⁴⁵ *Supra*, note 29.

⁴⁶ Encarnation, Dennis, "Public Finance and Regulation of Nonpublic Education: Retrospect and Prospect," in Thomas James and Henry M. Levin, eds., *Public Dollars for Private Schools*, (Philadelphia: Temple Univ. Press, 1983), 175-195. Several states provide nonpublic school students services such as free transportation, textbooks, guidance and diagnostic services and standardized testing; The federal government provides categorical funding for Title I and IDEA services.

⁴⁷ Terence McLaughlin, "Catholic School Finance and Church-State Relations," National Catholic Education Association Keynote Series No. 5 (1985), 28.

⁴⁸ Jay Chambers, "Patterns of Compensation of Public and Private School Teachers," in Thomas James and Henry S. Levin, eds., *Comparing Public and Private Schools* (New York: The Falmer Press, 1988) 1:190-217.

⁴⁹ Chambers, p. 215.

⁵⁰ Chambers, p. 215.

⁵¹ Stephen K. Green, "The Legal Argument Against Private School Choice," *University of Cincinnati Law Rev* 62(Summer 1993):37-73.

⁵² Kern Alexander and Richard G. Salmon, *Public School Finance* (Boston: Allyn and Bacon, 1995), 158.

⁵³ Alexander and Salmon, p. 211-212.

⁵⁴ Raywid, p. 762-769.

⁵⁵ See generally Chubb and Moe, Coons and Sugarman, and Harmer.

⁵⁶ Alexander and Salmon, p. 41-45, cites thirty-nine states in which there has been litigation over state school finance issues; p. 232-245 provide explanations of equity statistics.

⁵⁷ Wisconsin and Ohio are the only two states that currently have publicly funded scholarship (voucher) programs that allow students to apply their scholarships to private as well as public schools of choice. (Refer to Wisconsin Statute § 119.23 and Ohio Rev. Code § 3313.975.) These programs are restricted to Milwaukee and Cleveland, respectively, and to low-income students. Students in Milwaukee may not opt for sectarian schools while Cleveland students may. Minnesota has provided tuition tax deductions for students who attend private and public school for a number of years. Families may claim tax deductions for tuition, transportation and textbooks. All three of these programs will be discussed later in this study.

⁵⁸ In evaluating the constitutionality of statutes that provide support to nonpublic education, the U.S. Supreme Court has distinguished between *direct* aid, such as vouchers,

and *indirect* or *nonfinancial* aid, such as reimbursing parents of the cost of bus transportation. The researcher contends that *nonfinancial* aid is an artificial distinction. Any form of support, whether it be the purchase of textbooks or provision of certain educational services, saves the receiving institution the cost of such items.

⁵⁹ *DeRolph v. State of Ohio*, 1995 WL 557316 (Ohio App. 5 Dist 1995).

⁶⁰ *Reed v. Rhodes*, 500 F.Supp. 404 (1980).

⁶¹ *Bartels v. Ohio*, 262 U.S. 404 (1923); *State of Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); *Nagle v. Olin*, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980); *OAIS v. Goff*, 92 F.3d 419 (6 Cir 1996).

⁶² *Wolman v. Walter*, 433 U.S. 229 (1977); *Gatton v. Goff*, 1996 WL 466499 (Ohio Com.Pl.).

⁶³ Recently, a group of 13 white families, calling themselves the Equal Open Enrollment Association, filed a § 1983 suit in U.S. District Court claiming the Akron school district unfairly prohibited their children from transferring to other districts. The school district justified its decision under a provision in the law that allows a school district to maintain racial balance. It insisted that these transfers would skew the racial make-up of the district. The court held in favor of the families, ruling that: 1) students showed that race-based policy was not narrowly tailored to achieve compelling state interest...and (2) constitutional deprivation under equal protection created irreparable harm to white students, but allowing transfer did not harm public interest. *Equal Open Enrollment Association v. Board of Education*, 937 F.Supp. 700 (1996).

⁶⁴ Darling-Hammond and Kirby recommend further studies addressing the empirical study of the cost of Minnesota's subsidies; Frank R. Kemerer, "Constitutionality of School Vouchers," *Education Law Rep.* 101(1995):17-36; Richard M. Jaegar, "World Class Standards, Choice and Privatization: Weak Measurement Serving Presumptive Policy," *Phi Delta Kappan* 74(March 1993):723-725.

⁶⁵ Peter W. Cookson, Jr. describes the process of focusing on short-term objectives as the "garbage-can theory of organizational decision-making," a theory proposed originally by James March and later employed by Kevin Dougherty and Lizabeth Sostre to reason how school choice became so popular. Cookson explains the model in this way: "[It] makes the commonsensical point that people choose policies for conflicting reasons and because policies are available. Organizational leaders have short-term objectives and do not

actually know what the consequences of their decisions will be.” Quoted in Cookson, p. 8-9. -

⁶⁶ E.G. West, “Tuition Tax Credit Proposal,” *Policy Studies Review Annual* 3(1979):664.

⁶⁷ Darling-Hammond and Kirby, p. 29.

⁶⁸ Darling-Hammond and Kirby, p. x.

⁶⁹ Darling-Hammond and Kirby, p. xi.

⁷⁰ 463 U.S. 388 (1983).

⁷¹ Robert J. Bruno, “Constitutional Analysis of Education Vouchers in Minnesota,” *Ed. Law Rep.* 53(June 1989):9.

⁷² Susan Elaine Mettereder, *Public Aid for the Transportation of Private Elementary and Secondary School Pupils in the United States*, unpublished, May, 1984.

⁷³ Mettereder, p. 240.

CHAPTER TWO: LEGAL AUTHORITY

For educational purposes, the State may with propriety be regarded as one great School District, and the population as constituting but one family, charged with the parental duty of educating all its youth.¹

Overview of Constitutional Issues

It is estimated that public money accounts for nearly 25 percent of private school incomes nationwide, largely in the form of entitlements, such as Title I and the Individuals with Disabilities Education Act, and in the form of indirect aid for services, such as bus transportation and textbook purchases.² The accumulation of statutory funding, particularly state funding, for nonpublic education has been a protracted and litigious process. Lawmakers have learned that there are two mediating principles they must consider when drafting nonpublic school funding legislation: what kinds of state aid can be allocated in support of nonpublic school students and how that aid can be conveyed legally to private school coffers.

These two issues have been defined largely by several decades of United States Supreme Court and individual state supreme court jurisprudence, most of which has been adjudicated under the antiestablishment clauses of both federal and state constitutions. The United States Supreme Court evaluates the federal constitutionality of legislation and applies it to the state through the Fourteenth Amendment under the doctrine of “selective

incorporation.”³ If the Supreme Court does not find the statute infirm under the federal constitution, it leaves the state to measure the legislation’s validity against its own constitution.⁴

Federal Constitutionality

The Court has shaped a tripartite test by which it determines the First Amendment constitutionality of legislation that may impinge on church-state separation. This test is actually three tests under which a statute, to withstand a constitutional challenge, must not fail any one. First, the legislation must have secular (public) purpose. Secondly, the statute must not have the primary effect of either advancing or prohibiting religion. Thirdly, the law must not create excessive entanglement between the state and religion.

The *Lemon* test,⁵ as they are collectively referred to, remains an enigma to state and federal legislators and to public and private school educators. As Patricia Lines explains it, the development of the three prongs followed a “haphazard path...with major shifts introduced without clear adherence to precedent.”⁶ She emphasizes that “the Court has been willing to make exceptions to the tests, but without clear precedent guiding these exceptions.”⁷

There are ample citations to illustrate this point. The Court has allowed the purchase of textbooks⁸ but not of instructional materials.⁹ It has struck down tax law granting deductions to private school parents,¹⁰ yet has upheld similar legislation if both

public and private school parents are eligible.¹¹ Bus transportation to school¹² can be provided nonpublic school students but transportation for field trips cannot.¹³ Public school teachers may not provide remedial instruction in parochial schools,¹⁴ but they may do so in mobile units across the street.¹⁵ As William Marshall observes, “Any jurisprudence suggesting that a constitutional difference exists between providing certain services to parochial school children on school grounds and providing those same services to them in a mobile home across the street from the school is not a jurisprudence that easily evokes intellectual respect.”¹⁶

The accumulated nuances of these decisions have left legislators and lobbyists on both sides of the funding issue without a clear vision of what new kinds of new aid will pass constitutional muster. The results are twofold: costly litigation for plaintiffs and defendants as well as the appearance that the Court acts out of personal preferences.¹⁷

State Constitutionality

States that have come to rely heavily on private schools to educate their young people, particularly in urban areas, have been the most aggressive in searching for methods to provide aid to those schools. The results of such efforts are mixed, largely due to the range of language used and to the presence or absence of specific strictures in a state constitution.

The legitimacy of statutory aid must be determined ultimately by state constitutional hermeneutics. There are state antiestablishment clauses which are more

explicit and considered more prohibitive than that of the First Amendment of the United States Constitution.¹⁸ Some state constitutions have provisions that specifically forbid public funding, direct or indirect, for any religious institution including sectarian schools.¹⁹ Due to the diversity in phrasing of the antiestablishment clauses among state constitutions, a statute which may stand up under the scrutiny of the United States Supreme Court may fail under review by the state supreme court.²⁰ Likewise, legislation in one state may be judged infirm while a similar statute in another state will be upheld.²¹

Political and fiscal pressures and judicial interpretation have conspired to undermine the restrictions placed in some state constitutions.²² State constitutions are mutable, being sensitive to and changing with the political environment over time. State jurists, cognizant of local sentiment and not immune to political pressure, may choose to interpret antiestablishment clauses or other related provisos in liberal terms.²³

Courts as Barometers of Discontent

The number of appellate cases dealing with private schools has mushroomed in recent decades. E. Vance Randall tabulated by category the number of cases that were reviewed by state and federal appellate courts between 1658 to 1986.²⁴ In his analysis, he found that of the 639 cases documented during that period of time 349 cases, nearly 55 percent, occurred in the last 20 years.

With the exception of the first time span in which Randall collapsed all the years proceeding 1907 together, he charted the number of cases in ten-year blocks. The number

of cases remained fairly level from 1916 to 1946, ranging from 27 to 32 for each ten-year span. In the period 1946 to 1956, however, the number of cases doubled to 62, the majority of which fell into three of his eight categories: *public aid, regulation and supervision, and pupils, tuition, and discipline*.²⁵

The number of lawsuits increased drastically again in the period from 1966 to 1976. There were 150 cases recorded, 101 of which sorted into two categories *public aid* and *pupils, tuition, and discipline*. In the last ten-year block, 1976-1986, there were 199 cases listed, 87 of which were related to *pupils, tuition, and discipline*, 39 to *regulation and supervision*, and 36 to *public aid*.²⁶

Randall calculated the ratio of cases per million of population to see if the notable increase in lawsuits was simply the result of population growth. He reported that the average number of cases per million of population for each decade in the 19th century was 0.17. From 1907 through 1946, the averages ranged from 0.20 to 0.26 for each ten-year block. By the last decennial period, 1976-1986, the average number of cases per million of population leapt to 0.88.

Litigation is a typically American form of redress. It has become a more expedient process than participatory democracy (as evinced by the increased number of lawsuits and decreased voter turnout) through which to express dissatisfaction with or intolerance of public policies. Concurrently, the judiciary has assumed a more assertive attitude in refining and defining laws that come before it.²⁷ The synergetic effect with regard to

education has been to escalate the debate on school reform and to propagate a new generation of funding options to encourage school choice.

Non-Funding Litigation Related to Nonpublic School Students

While funding of nonpublic schools, especially religious institutions, has been the source of controversy since before the inception of state systems of free common schools in the United States, the right of private schools to exist and to operate independently has not been in dispute until relatively recently. Parents have had to defend their right to place their children in private schools only since the creation of compulsory attendance laws. As a matter of establishing the legal precedent for school choice it is important to begin with retrospectives of the government action and subsequent judicial review which challenged and safeguarded, respectively, the lawful right of a parent to choose private education and which contrasted the state's interest in providing an appropriate education against a private school's right to administrative and instructional autonomy.

Where Regulation and Choice Intersect

Regulation by government is a manifestation of majoritarian rule, a basic tenet of republican democracy. The protection of minority rights is an equally fundamental principle of American political ideology. These two democratic constructs do not always exist in consonance. Herein lies the essence of the polemic over state regulation of private schools.²⁸

State governments have attempted to exert regulatory authority over private schools by asserting *public purpose* or *compelling state interest*. Regulation usually implies conformity. This conflicts with the basic concept of private schools - that is, they exist as philosophical alternatives to public education. These philosophical differences may be expressed through differences in teaching methodology, curriculum, discipline, and emphasis placed on a particular set of values. Government regulation may diminish these differences, effectively destroying the niche private schools occupy in the educational community and extinguishing parental choice.

The state's warrant for regulating private schools is multifarious. It bears the responsibility for and has an interest in ensuring that children receive an adequate education, one that prepares them for a productive life and for knowledgeable participation in the American political process. The state is accountable for the health and safety of children. It is not unreasonable, the state argues, to monitor the conditions under which children learn to assure their welfare. The state also has legitimate claim to protect against unlawful discrimination.

Sometimes regulatory legislation is reactionary, composed in a heightened state of civic unrest, social conflict or national paranoia. While the law may serve the state's interest in promoting a social or political agenda, it may have the effect of trampling on the rights of insular minorities who have little political recourse. Conversely, individual interests or values cannot be defended at the expense of civic order or social justice.

Judicial review must serve as the fulcrum on which majoritarian governance and minority protection establish an unsteady balance.²⁹

The Fourteenth Amendment

There are examples of legislative excess in which there was perceivable prejudice. In these instances courts have had to exercise greater scrutiny in order to protect against discrimination of minorities. Such was the case in *Meyer v. Nebraska*.³⁰

In the early 1900s Nebraska passed a statute prohibiting all private and public schools from teaching modern languages other than English to children who had not passed the eighth grade. The state claimed that young children of immigrants must be exposed to English and inculcated with American ideals and principles.

When the statute came before the Nebraska Supreme Court the first time, in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*,³¹ the tribunal attempted to finesse the interpretation of the legislature's intent so as to avert conflict with the Constitution. As David Smolin describes it, "the court upheld the statute but held that the statute required only the exclusive use of English in fulfilling the requirements of Nebraska's compulsory education law."³² The court ruled that instruction in other languages could occur as long as it did not conflict with required studies. Private schools which catered to small foreign and immigrant populations by providing native language instruction responded to the ruling by adapting their school schedule. They continued to teach foreign language but outside normal school hours.

Not pleased with the court's liberal interpretation of its intent, the Nebraska legislature amended the statute to remove "the possibility for legal evasion [of the] prohibition against teaching in schools of foreign languages to children who have not passed the eighth grade."³³ As a result of this amendment Mr. Meyer, a foreign language teacher, was prosecuted for teaching German for a half hour each day during a period when classes were not in session.

When the appeal reached the Nebraska Supreme Court, as *Meyer v. State*,³⁴ the court, now certain of the legislature's intent, upheld the conviction.³⁵ This time Judge Letton, who authored the majority opinion in *McKelvie*, dissented. He had come to realize that the law had been fashioned in an atmosphere of acute xenophobia, the "result of crowd psychology" and "passions engendered by the World War, which had not yet had time to cool."³⁶

Upon appeal the United States Supreme Court overturned the lower court's decision.³⁷ While agreeing that disseminating American ideals and language and promoting unity were justifiable state interests, the Court stated that teaching a foreign language was not "inherently immoral or inimical to the public welfare."³⁸ The Court, in a split decision, ruled the law "attempted materially to interfere with the calling of modern language teachers, with opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."³⁹ These were, in the Court's

constitutional analysis, fundamental liberties protected by the due process clause of the Fourteenth Amendment.

Within the context of this single case the Supreme Court conserved majoritarian governance while safekeeping minority rights. The Court acknowledged the right of the state to regulate private schools by establishing minimum curricular and instructional standards but defended parental rights to maximize educational opportunity for children.

Two years later *Pierce v. Society of Sisters*⁴⁰ came before the Supreme Court. In Oregon there had been a proliferation of private schools, many of them parochial. Some of the private schools delivered instruction in foreign languages. In response to a referendum lobbied for heavily by the Ku Klux Klan and the Oregon Scottish Rite Masons, the state legislature amended the Oregon Compulsory Education Act to compel children between the ages of eight and sixteen years old to attend only public schools. The campaign to win the amendment was distinctly anti-Catholic, although it claimed its legitimate purpose was to “Americanize” schools.⁴¹

Randall explains Oregon’s two reasons for targeting private schools. “One was that they were not under the control of the state and thus constituted a potential breeding ground for socially divisive and unpatriotic ideas...The second reason was that most of the children who had not enrolled in public schools...were immigrants or their parents were.”⁴² The state feared that its inability to control what was taught in private schools hindered the assimilation of immigrant children into American culture. They believed

these children to be the most susceptible to dangerous ideas and in the most need of exposure to appropriate social and political values.

The private schools countervailed the state's rationale by arguing that the statute deprived the operators of the schools of the right to engage in a lawful business and that their property would be lost without due process. They also argued that the statute was a reprehensible trespass on parental authority over their children. As appellant, the Society of Sisters alleged that "the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void."⁴³

The Supreme Court agreed unanimously and declared that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁴⁴ The Court re-emphasized its interpretation of liberty under the Fourteenth Amendment to preclude "any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only."⁴⁵

The Court did note that "no question [was] raised concerning the power of the State reasonably to regulate all schools."⁴⁶ The Court included within that power the right of the state to inspect schools, to supervise and examine their teachers and students, to

set certain curricular criteria, to ensure that teachers were of good character, and to require all school age children to attend school.⁴⁷ The Supreme Court, however, declared the statute impinged on the rights of those responsible for the private schools and was an abuse of police power by the state.⁴⁸

After another two-year interval, the Supreme Court further circumscribed state regulation of private schools in *Farrington v. Tokushige*.⁴⁹ In 1920 Hawaii passed the Foreign Language School Act which handed to the Department of Public Instruction the authority to prescribe texts, curriculum, and admissions and attendance requirements in schools that did not teach in either English or Hawaiian.⁵⁰ This legislation affected 163 private schools that provided instruction in Chinese, Korean, and Japanese, the latter being the principle medium. The law touched private primary and secondary schools as well as foreign language schools and required proprietors and teachers to obtain annual permits and to sign an oath pledging to follow the legislation's provisos and to report student attendance. To subsidize the cost of enforcing the statute, a fee of one dollar per pupil was assessed of every school that fell under the regulatory power of this law.

Hawaii's territorial government justified its claim of legitimate purpose on three points. First, the statute was regulatory not prohibitory, differentiating it from *Pierce* and *Meyer*.⁵¹ Secondly, the statute was a legitimate use of police power because of the territory's "interest in the quality of its citizenship" and the doctrine of *parens patriae*.⁵² Lastly, the territory had a vested interest in assuring that children were not being

inculcated with “loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of their own language.”⁵³

The Supreme Court did not agree. It ruled that the scope of the statute far exceeded that of other laws that had been ruled constitutionally infirm. The Court claimed the government had not demonstrated that a problem of American socialization existed to the extent that it would prevail over the liberties of parents and children protected under the Fourteenth Amendment. The justices agreed that the law went “far beyond mere regulation” and gave “affirmative direction concerning the intimate and essential details of such schools, intrust[ed] their control to public officers, and den[ied] both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books.”⁵⁴

In each of the three actions summarized above, the Supreme Court broadly applied the liberties protected under the Fourteenth Amendment. Although the decisions reached in *Meyer*, *Pierce*, and *Farrington* confirmed the state’s authority to regulate private schools, they shaped the contours of what constituted permissible regulation. They enfranchised parents with the right to choose private education and acknowledged the distinctive role nonpublic schools play in inculcating a belief system compatible with that of the family. Parental choice, though, was not accompanied by any reference to public funding of that right.

Funding Litigation Related to Nonpublic School Students

- The struggle for the right of private schools to exist and function autonomously and for the right of parents to choose the proper educational setting for their children was arbitrated under the Fourteenth Amendment. Most legal battles over public assistance to private education, however, have been waged under the umbrella of the Establishment and Free Exercise Clauses of the First Amendment.

Critics of public aid to private schools point out that such assistance raises issues of church-state separation because private schools are predominantly sectarian. According to the *Private School Universe Survey, 1993-94*, published by the National Center for Education Statistics in 1996, 78.7 percent of all elementary and secondary private schools are religiously affiliated.⁵⁵ Of all nonpublic schools, nearly 32 percent are associated with the Catholic Church and 46.8 percent are categorized as “other religious” schools. It is noteworthy that 17.4 percent of nonpublic schools are governed by Christian conservatives.⁵⁶ The Lutheran Church (Missouri Synod), and the Seven-day Adventists each sponsor about 4 percent of nonpublic schools in the United States. The Amish have about 2 percent of all private schools.

Of the more than 4.8 million students enrolled in private schools in 1993-94, almost 2.5 million of them, or 51.4 percent, attend Catholic schools. In other words, Catholic schools, which represent 32 percent of all nonpublic schools, have 51.4 percent of all nonpublic school enrollment.

Over 1.6 million children, or 33.7 percent of private school enrollment, attend the other 46.8 percent of nonpublic schools with religious associations.⁵⁷ That clearly establishes as fact that the vast majority, 85.1 percent of private school children, are receiving instruction in sectarian schools.

Policies that allow an unrestricted flow of public funds to private schools are perceived by *separationists*, those who believe in the impermeability of the constitutional metaphor, the *wall of separation between church and state*,⁵⁸ as impermissible government sponsorship of religious activities, which would violate the Establishment Clause of the First Amendment.⁵⁹ They also contend that investing tax dollars in sectarian education conflicts with the Free Exercise Clause because it requires nonmembers to finance religious institutions.⁶⁰

On the other side of the debate are the *accommodationists* or *nonpreferentialists*, who believe the intent of the Framers of the United States Bill of Rights has not been properly reflected in court decisions over the past fifty years. They contend that the Establishment Clause was not conceived to prohibit financial assistance to religion but rather to prevent *preferential* aid to a single or to a group of religious sects.⁶¹ In their minds the matter of incidental or indirect aid to religion in pursuit of secular purpose is not contrary to the concept of religious freedom as envisioned by the First Congress.

While the debate on the precise application of the clauses rages on, the *Lemon* test remains the collection of standards on which all funding legislation has been adjudicated.

Although individual Supreme Court justices have expressed discontent with different aspects of the test, the Court has not yet overturned its own precedent or developed a new standard.⁶²

A review of relevant case law will reveal the characteristics of statutory aid that have successfully survived scrutiny under the *Lemon* test. Each of the landmark decisions summarized below has contributed some navigational element to guide the next piece of legislation through a constitutional challenge. Although the course shifts occasionally, the aggregation of jurisprudence in the area of nonpublic school funding largely has charted a route that has led to diversified and increased aid.

Child Benefit Theory

In 1930, in *Cochran v. Louisiana State Board of Education*,⁶³ the United States Supreme Court affirmed a state supreme court ruling upholding two state acts, No. 100 and No. 143 of 1928, that provided severance tax funds for the purchase of school books and for supplying them free of charge to all school children regardless where they were attending school. Taxpayers in the state argued that the Fourteenth Amendment forbid the government from taking private property and using it for the benefit of private individuals - in this case, private schools. The Supreme Court justices held that a public purpose was served because the textbooks were for loan to and use by the children. In the Court's judgment private schools did not benefit in any manner.

- The schools...are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relived of a single obligation, because of them.
- The school children and the state alone are the beneficiaries.⁶⁴

This decision created a precedent that was to become known as the *child benefit doctrine* and would be used as the judicial standard for future nonpublic school funding litigation. It would be applied when questions arose as to who directly benefited from funding policies that included nonpublic school students.

Transportation

The first case to challenge a funding statute under the First Amendment as well as the Fourteenth Amendment was *Everson v. Board of Education*⁶⁵ in 1947. The lawsuit was in response to a New Jersey law which reimbursed parents for money expended on bus fares to send their children to parochial schools. The appellants claimed the reimbursement was the equivalent of public funds being used for private benefit, a violation of the Fourteenth Amendment. They argued that the statute also conflicted with the Establishment Clause of the First Amendment because it authorized the use of taxes in support of religion.⁶⁶

In a split decision the Supreme Court upheld the constitutionality of the law. While the Court agreed that the state could not aid religion, individual justices disagreed whether bus fares constituted aid.

Writing for the majority Justice Black argued that the New Jersey statute aided the general welfare of children, not religion. He analogized the funding to that of other public welfare services, when he wrote:

[S]tate-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare.⁶⁷

In defending the statute against the First Amendment challenge, Justice Black narrowly defined the application of the Establishment Clause to impermissible taxation in *direct* support of religion. After reflecting extensively on the history and people that engendered the Bill of Rights, he interpreted the clause to mean:

Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another...No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion...In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."⁶⁸

Black also balanced the language of the Establishment Clause with that of Free Exercise. He warned that New Jersey cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church," but must not "hamper its citizens in the free exercise of their own religion."⁶⁹

Justice Jackson, in his dissent, stated he was sympathetic to parents who were following their conscience and providing a religious education for their children, but he did

not believe the statute qualified under the doctrine of *child benefit*.⁷⁰ He argued that the Court's rationale of general welfare fails because the reimbursements were not universally applied.

The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement. The act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit.⁷¹

Justice Rutledge, another dissenter, contested Black's conclusion that New Jersey public funds did not aid religion. He reasoned that the funds were generated through taxes and, although not considered "support in law," such funds did indeed "give aid and encouragement to religious instruction."⁷² He also declared that transportation was as important a factor in education as textbooks and other instructional materials. As such, its cost could not be separated from the total expenditure for education and would be regarded as contributing to the religious training of students attending parochial schools.⁷³

The significance of the majority decision rests with the issue of child welfare and the indirect nature of the aid. The reimbursement did not go to the private schools but rather to the parents on behalf of their children. The religious schools only benefited incidentally, hence in the opinion of the Court, the law did not breach the wall of separation.

Textbooks

In *Board of Education v. Allen*⁷⁴ the Supreme Court once again stepped into the fray over government assistance to sectarian education. In a six-to-three decision, it

affirmed a New York program in which textbooks were loaned to public and nonpublic school students in grades 7-12. The case differed considerably from an earlier case, *Cochran*,⁷⁵ in two respects. First, *Allen* was being challenged under the First Amendment prohibition of establishment whereas *Cochran* was judged under the Fourteenth Amendment.⁷⁶ Secondly, it supplanted the *child benefit* doctrine established in *Cochran* with a new two-part constitutionality test formulated in *Abington School District v. Schempp*.⁷⁷

Abington School District v. Schempp...fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvement of the State with religion and those contacts which the Establishment clause permits: "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁷⁸

Also relying on *Everson*, the Court upheld the New York textbook program because it loaned books on secular subjects to *all* children. This advanced the state's *public purpose*, "furtherance of the educational opportunities available to the young."⁷⁹ The statute satisfied both elements of the new test of constitutionality because the intended recipient of the benefit was the child and not the school.

Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.⁸⁰

An engaging aspect of this decision is Justice Black's objection to the Court's reliance on *Everson* as judicial precedent. Black, author of the majority opinion in *Everson*, dissented in *Allen*. He argued that the relative contributions of bus fares and textbooks to education could not be compared.

Books are the most essential tool of education since they contain the resources of knowledge which the education process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.⁸¹

Again, a fine distinction was drawn between acceptable indirect aid and impermissible direct support. A pattern emerges, one that identifies successful legislation as law that provides financial assistance to private schools through the parents and students who patronize them. Additionally, the first two parts of what would come to be known as the *Lemon* test have been introduced to evaluate the constitutionality of funding legislation under the First Amendment. The two elements, *purpose* and *effect*, were articulated in earlier litigation involving school prayer in *Schempp*.

Salary Supplements and Purchase of Services

In 1971 a pair of cases came before the United States Supreme Court as *Lemon v. Kurtzman*.⁸² These cases involved Rhode Island and Pennsylvania statutes designed to provide extensive assistance to religious schools in the form of salary supplements and, in the case of Pennsylvania, textbooks and instructional materials for secular subjects. In order to diminish any possibility that these subsidies would have the effect of advancing

religion, both states developed extensive measures to monitor the parochial schools' expenditures. They required the schools to maintain financial records that discriminated secular from religious educational costs and to open those records to state audit. Both states also required teachers of secular subjects to refrain from promoting the religious mission of the schools.

Both laws were ruled infirm under a new standard, a third prong, developed in *Walz v. Tax Commission*.⁸³ The new test addressed the potential for *excessive entanglement* of government and religion as the result of administrative supervision of religious activities or institutions.

In *Walz*, the Court upheld a New York law exempting properties used exclusively for religious purposes from taxation. Chief Justice Burger, author of the majority opinion in *Walz*, believed that government neutrality toward religion required minimum interference in the affairs of the church.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result - the effect - is not an excessive government entanglement with religion. The test is inescapably one of degree...the questions are whether the involvement is excessive, and whether it is a continuing surveillance leading to an impermissible degree of entanglement.⁸⁴

This third prong, excessive entanglement, was the last of the tests to be incorporated into *Lemon* test. From this point forward, federal and state courts would apply all three standards - purpose, effect, and entanglement - to future school finance cases.

In an effort to meet the purpose and effect tests, the Rhode Island and Pennsylvania statutes had erred on the side of caution by incorporating administrative procedures to isolate and identify secular expenditures of public funds. The Court struck down both laws because these measures had the potential of promoting excessive entanglement. In condemning the Rhode Island statute Justice Burger explained the inevitable government intrusion on church sovereignty that might result.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.⁸⁵

The Pennsylvania statute was ruled unconstitutional on two counts. First, as described above, excessive entanglement would be required to enforce the restraints placed on religious schools. Secondly, this act provided funding directly to the schools, a distinct and impermissible departure from previous aid programs.

The Pennsylvania statute...has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents - not to the church-related school.⁸⁶

The decision clearly determined direct aid to religious institutions as violative of the Establishment Clause. If states were to attempt to assist private schools financially, they would have to do so circuitously. The decision also became the preeminent judicial precedent by which other Establishment cases would have to be adjudicated.

Financial Grants and Tax Relief

- Pennsylvania, undeterred by the *Lemon* decision, passed a new bill, the “parent reimbursement” statute just two months later. This was yet another creative bid to subsidize private education, this time by reimbursing tuition payments to parents whose children were matriculated in nonpublic schools. In 1973 the justices invalidated the statute in *Sloan v. Lemon*,⁸⁷ opining that while the stated intent of the legislation was secular, its *substantive* effect was to bestow state economic benefit on a single class of citizens and to funnel public funds into religiously affiliated schools.

The Court also ruled a companion case to *Sloan*, *Committee for Public Education and Religious Liberty (PEARL) v. Nyquist*⁸⁸ unconstitutional. This New York statute contained three provisions for indirect and direct aid to nonpublic schools: tuition grants for low-income parents, tax deductions for middle-income parents with children in private schools, and financial grants to nonpublic schools for the maintenance and repair of facilities. The legislature developed this plan of assistance to parents rather than schools to avoid failing the excessive entanglement prong of the tripartite test.

Nonetheless, all three provisions were judged infirm. The scheme to provide tuition grant and tax deductions to nonpublic school families was considered defective on the premise that its primary effect was to advance religion. The tuition grants were reimbursements for tuition already paid, which, in the Court’s mind, could act to encourage parents to enroll their children in sectarian schools. The tax deductions were, in

effect, tax credits because their value was unrelated to the actual cost of tuition. The result was a “predetermined amount of tax forgiveness,” which was unconstitutional.⁸⁹ Judge Powell delivered the opinion of the Court:

[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions...and in light of the practical similarity between New York’s tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.⁹⁰

The “maintenance and repair” provision was struck down for similarly failing the primary effect standard.

No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. What we have said demonstrates that New York’s maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools.⁹¹

It is appropriate to note here that Justice Rehnquist concurred with the majority decision on the “maintenance and repair” provisions but dissented from the majority ruling on the grant and tax deduction provisions. He believed the two provisions were not inconsistent with the kinds of aid approved under *Everson* and *Allen*.

Both *Everson* and *Allen* gave significant recognition to the “benevolent neutrality” concept, and the Court was guided by the fact that any effect from state aid to parents has a necessarily attenuated impact on religious institutions when compared to direct aid to such institutions. The reimbursement and tax benefit plans today struck down, no less than the plans in *Everson* and *Allen*, are consistent with the principles of neutrality...As in *Everson* and *Allen*, the impact,

if any, on religious education from the aid granted is significantly diminished by the fact that the benefits go to the parents rather than to the institutions.⁹²

In his dissent, Rehnquist described the New York parents who sent their children to nonpublic schools as “rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system.”⁹³ He also equated the grants and tax deductions as equitable alternatives to offset the financial “double burden” parents of nonpublic school children carry. New York was not “offering an incentive to parents to send their children to sectarian schools” but rather was “effectuating a secular purpose of the equalization of the costs of educating New York children that are borne of parents who send their children to nonpublic schools.”⁹⁴

As is discernible in analyses of subsequent decisions, Rehnquist’s dissent in *Nyquist* would foretell his championing of similar statutes and of his influence as Chief Justice in moving the Court to a more *accommodationist* stance. For instance, in a 1983 decision, *Mueller v. Allen*,⁹⁵ the Court upheld a tax deduction plan developed by the Minnesota legislature that allowed parents to deduct tuition, textbook, and transportation costs when calculating their state income taxes. In a split decision the Rehnquist Court ruled the statute was constitutionally different from *Nyquist* because the benefit was theoretically available to public *and* private school parents.

Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools, and those whose children attend non-sectarian private schools or sectarian private schools.⁹⁶

This lawsuit provided a platform from which Rehnquist could argue the merits of both sectarian and nonsectarian private schools. As he claimed in *Nyquist*, Rehnquist noted that “there is a strong public interest in assuring the continued financial health of private schools” because they educated a substantial number of students, relieving “public schools of a correspondingly great burden - to the benefit of all taxpayers.”⁹⁷

Citing Justice Powell’s opinion in *Wolman v. Walter*,⁹⁸ Rehnquist exalted private schools and the contribution they make to education generally.

[P]rivate educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. “Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states they relieve substantially the tax burden incident to the operation of public schools.”⁹⁹

There are several significant elements to cull from the *Sloan*, *Nyquist*, and *Mueller* decisions. Tax deductions for elementary and secondary school tuition are constitutionally sound if 1) they are available to both public and private school parents, 2) the amount of the deductions allowable is related to the actual cost of tuition, and 3) there is no worry of excessive entanglement in administering the tax program.¹⁰⁰ Tax or grant legislation that is perceived as providing an incentive for parents to place their children in private schools will fail under the *Lemon* test.

Testing and Record Keeping

In 1973 the Supreme Court overturned a New York statute designed to reimburse nonpublic schools for expenditures associated with grading and reporting tests and other

related data requested by the state. The state required no special accounting procedures nor did it demand excess funds be returned to the state. In *Levitt v. PEARL*,¹⁰¹ it was noted that the tests covered under statute included teacher-generated exams, implying that public funds might be used to further the religious mission of the teacher and the schools through the application of such tests. As a result of the lack of even minimal financial controls and because of the possibility of advancing religion, the Court ruled the statute violative of the first Amendment.

New York remedied the constitutional questions iterated in *Levitt* by drafting new legislation with the necessary financial safeguards and with restrictions on the kinds of tests and reporting procedures that would be covered. When challenged in *PEARL v. Regan*,¹⁰² the new statute successfully withstood constitutional scrutiny.

New York had proved skillful in paving another funding avenue to private schools. This time it was able to directly infuse funds into private schools by creating a rationale that the state should reimburse for expenses incurred as a result of state-mandated testing and reporting. Within the context of these two decisions, the Supreme Court determined that states were not obliged to reimburse expenses but could do so under a narrowly tailored statute.

Auxiliary Services, Direct Loans, and Shared Time

Pennsylvania passed a series of statutes that authorized public school officials to lend textbooks and instructional materials (e.g., maps, charts, films, laboratory

equipment) and to arrange for professional staff and materials to provide auxiliary services (e.g., guidance counseling, remedial and accelerated instruction, and speech and hearing services) to nonpublic school students. In *Meek v. Pittenger*, six justices agreed that all provisions but the loan of textbooks were unconstitutional.¹⁰³

The loan of textbooks was acceptable because the books were going to the students. The instructional materials, however, were loaned directly to qualifying nonpublic elementary and secondary schools. Justice Stewart, author of the majority opinion, explained why the direct loan of instructional materials (Act 195) was impermissible.

Substantial aid to the educational function of [religious] schools...necessarily results in aid to the sectarian school enterprise as a whole...For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity.¹⁰⁴

As for funding of personnel and materials for auxiliary services, the Court found the essence of this provision indistinguishable from *Lemon v. Kurtzman*.¹⁰⁵ Pennsylvania argued that funding was authorized only for teachers of exceptional and remedial children. The Court responded that the distinction was artificial because "a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."¹⁰⁶

The Court drew one more conclusion as it brought its decision to a close. It referred to the possibility for excessive entanglement in the larger arena of state

appropriations, citing the “potential for divisive conflict.”¹⁰⁷ The Court referred to previous concerns expressed in *Lemon* and *Nyquist* when it wrote

The recurrent nature of the appropriations process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect.¹⁰⁸

Ohio took a lesson from *Meek* and crafted a statute incorporating several provisions. Each part addressed a different funding scheme in support of nonpublic schools. It was reasoned that if the law were challenged and one or more provisions were ruled unconstitutional, it would not condemn the entire statute.

The statute contained provisions for textbooks, diagnostic and therapeutic services, testing and scoring services, instructional materials and field trips. The latter two provisos, for instructional materials and field trips, were ruled unconstitutional in the well known 1977 United States Supreme Court case, *Wolman v. Walter*.¹⁰⁹ It was noted in the decision that § 3317.06 of the O.R.C. was developed following the 1975 *Meek v. Pittenger*¹¹⁰ ruling by the Supreme Court and was “obviously...an attempt to conform to the teachings of that decision.”¹¹¹

In striking down the provision that allowed expenditures for the purchase and loan to pupils of secular instructional materials and equipment, the Court dismissed the state’s attempt to overcome *Meek* by loaning the material and equipment to the students and not

directly to the nonpublic schools. Justice Blackmun, writing for the majority, rebuked the state when he noted:

In our view...it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before...¹¹²

The District Court, when trying the *Wolman* case, had held the provision for field trips as constitutionally indistinguishable from *Everson*.¹¹³ The Supreme Court did not concur, saying that in *Everson* the schools had no control over the expenditures of the funds. Within the Ohio statute, there were no limitations placed on the number or location of trips other than those that paralleled restrictions placed on public schools. This meant the nonpublic school or the teacher controlled the frequency and the destinations of the trips, so the school and teacher were the true recipients of the services and not the child. Additionally, the substantive nature of the field trip was being guided by the teacher, hence religious purpose could be injected.

This decision was one of those in which the justices were in as much disagreement as they were in agreement. The statute was complex with a number of provisos, each requiring close constitutional scrutiny. Joseph Bryson and Samuel Houston, in *The Supreme Court and Public Funds for Religious Schools: The Burger Years, 1969-1986*, created a table which clearly charts the voting patterns of each justice on each of the eight parts of the decision.¹¹⁴ Part I, the general review of history concerning church-state

received the only unanimous vote. Part II, the vote on the discussion of the Establishment Clause and the secular purpose of the statute was 6-3. The justices split on three parts of the statute: textbooks, testing and scoring services, and field trips. Diagnostic services and therapeutic services (sect. G) each received a vote of 8-1. Finally, therapeutic services (sect. H, I and J) received a 7-2 vote.

The dissenting opinions were revealing. Justice Marshall expressed deep concern over the direction of the Court in matters of sectarian school funding and was prepared to overrule *Allen*¹¹⁵ so that “we would free ourselves to draw a line between acceptable and unacceptable forms of aid.” He reminded the Court that, under the rationale of *Meek*, textbooks “should not be provided by the State to sectarian schools because ‘[s]ubstantial aid to the educational function of such schools...necessarily results in aid to the sectarian school enterprise as a whole.’”¹¹⁶

Justice Stevens believed there to be no substantial difference between direct and indirect aid and wanted neither for religious schools. Justices White and Rehnquist, by contrast, voted to uphold all parts of the Ohio statute.

In 1985 *Grand Rapids v. Ball*¹¹⁷ provided another example, one closely resembling *Meek*,¹¹⁸ of an attempt to fund teachers in private schools. A Michigan public school district adopted two programs, Shared Time and Community Education, that provided instruction for nonpublic school students at public expense. Under the Shared Time program, the district leased classroom space from nonpublic schools and provided public

school instructors to teach courses supplemental to the required core curriculum. These classes were held on nonpublic school grounds during and after school hours.

The Community Education program offered voluntary courses after school hours. The teachers were part-time public schools employees, most of whom were also full-time employees of the nonpublic schools hosting the Community Education classes.

Justice Brennan filed the majority opinion that ruled both programs constitutionally defective. He stated that because 40 of the 41 nonpublic schools involved in these programs were religious schools, the effect of the legislation was to advance religion.

[T]he challenged public-school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting - at least in the eyes of impressionable youngsters - the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.¹¹⁹

On the same day as the Court handed down the *Grand Rapids* decision, it also ruled on *Aguilar v. Felton*.¹²⁰ New York attempted to use federal funds to pay public school teachers who provided remedial instruction to nonpublic school children who qualified under the Title I program of the Elementary and Secondary Education Act of 1965. As a means by which to meet the *primary effect* standard of the tripartite constitutional test precautionary measures were taken to ensure the secular nature of the

instruction. Supervisors made at least one unannounced visit each month and program coordinators made occasional site visits.

The monitoring that was to aid the statute in adhering to constitutional criteria resulted in the statute's demise. In the law's attempt to comply with the *primary effect* prong of the *Lemon* test, the legislation failed constitutional scrutiny under the third prong, *excessive entanglement*. Justice Brennan explained the problem of the supervision when he remarked:

[T]he religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and student in an attempt to guard against the infiltration of religious thought.¹²¹

The court also noted the potential for infringement on religious freedom when government must be present in religiously affiliated schools to supervise any aspect of the educational program.

When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose...is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.¹²²

It should be noted that this landmark decision is under siege. In "an unusual legal strategy designed to give the high court a chance to reconsider its ruling,"¹²³ the Clinton administration, with a group of Roman Catholic parents and the New York City public schools, has asked the United States Supreme Court to reverse the *Felton* decision.¹²⁴ A brief filed on behalf of the Secretary of Education argues that the present delivery of

remedial instruction to nonpublic school students is costlier and less effective due to the First Amendment strictures defined in the *Felton* decision. New York City claims it spends about \$14 million each year on mobile units in which to provide the required remedial services. The appellants argue that nonpublic school students would be better served and the money better spent if public school teachers could provide instruction in the parochial schools.

The National Committee for Public Education and Religious Liberty (PEARL) argues that it would be more cost efficient for the district to transport eligible nonpublic school students to public schools where such remediation is already offered. This solution would leave intact the general premise of the earlier *Felton* ruling that declared public school teachers working in sectarian schools a First Amendment violation.

These decisions summarized above did not offer new precedent *per se*. The *Grand Rapids* decision pointed to the distinction often made between K-12 nonpublic school and private higher education funding decisions. The Court believes that young children are not capable of distinguishing the secular purpose of government from the religious mission of the school and, therefore, care must be taken when sanctioning government aid to elementary and secondary nonpublic schools.

Vouchers and Scholarships

One of the most recent innovations in nonpublic school funding has been the advent of public vouchers or scholarships. Although vouchers have been on the minds of

both federal and state legislators for a number of years, only two states have successfully implemented them.

Wisconsin introduced the Milwaukee Parental Choice Program (MPCP), an experimental, narrowly defined funding program in which a limited number of low-income children would be given vouchers they could redeem at participating nonpublic, *nonsectarian* schools. In a 1992 case, *Davis v. Grover*,¹²⁵ action was initiated against the Superintendent of Public Instruction to compel him to comply with the state program. The case was not a First Amendment issue because religious schools did not qualify for the choice program. It did come under state constitutional scrutiny on three issues: 1) whether the act was a private or local bill that was improperly ushered through the legislature, 2) whether MPCP schools were to conform to the “uniform schools district” clause of the state constitution, and 3) whether the funds expended for the MPCP satisfactorily met the public purpose doctrine. The court ruled the program constitutionally sound on all three points.

Litigation did not stop there, however. In *Miller v. Benson*¹²⁶ the plaintiffs asserted that once the state authorized financial support for low-income families to select the school of their choice, it became incumbent upon the state to include sectarian schools under the Free Exercise Clause of the First Amendment and under the Fourteenth Amendment guarantee of equal protection. The United States District Court ruled that

since the money went directly to the participating schools, the program would become constitutionally infirm if it were to include sectarian schools.

The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit Choice Program school children would violate the Establishment Clause.¹²⁷

Both these cases are highlighted because they have a bearing on recent litigation contesting a modification to the Choice Program. Governor Tommy Thompson signed into law an amendment which expanded the program to provide as many as 7,000 vouchers, considerably more than the original 1,000, and to allow sectarian schools to participate.¹²⁸ Following a state supreme court deadlock,¹²⁹ Judge Higginbotham struck down the expansion because it violated the Wisconsin constitution. In his opinion, Judge Higginbotham said the expansion moved the voucher program from an experiment with statewide purpose to an unconstitutional "local or private bill."¹³⁰

The second state to implement a voucher program, or scholarship program as it is referred to under the law, is Ohio. The nature and scope of the Cleveland Pilot Project Scholarship Program will be examined later in this study.

The matter of *incidental* or *nonpreferential* aid has been thus the hallmark of successful funding legislation. A review of the case law related to nonpublic school funding reveals that state legislatures can always make the argument that financial assistance to promote education has secular purpose, therefore clearing one of the barriers created by the three-pronged *Lemon* test. To satisfy the requirement that the law may not

advance nor inhibit religion, aid should be awarded to parents or children and not to the schools they patronize. For the aid to qualify as neutral, the beneficiaries must belong to a broad class of citizens. Finally, there must be no potential for excessive entanglement. This can be avoided by minimizing the administrative features of any assistance program. Monitoring of funding that may require interference of the government into the religious affairs of the private schools will not survive constitutional scrutiny.

There has been a subtle but concerted move from an emphasis on the Establishment Clause to one more considerate of Free Exercise. Although most majority opinions have based their conclusions on the Establishment Clause, the decisions have narrowed the scrutiny under Establishment. Due to the unique relationship between the Establishment and Free Exercise Clauses, a shift away from one affects a move toward to the other.

Justice Rehnquist stated his preference for Free Exercise early in his career on the Supreme Court bench. In *Nyquist*, he was quite explicit on the issue. If there were a constitutional question regarding funding sectarian education, especially in the form of indirect aid, and if it were a matter of weighing establishment concerns with those of free exercise, then free exercise must prevail.

The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families.¹³¹

The United States Supreme Court is the gatekeeper of the Constitution, but it has been clearly remiss in maintaining the *wall of separation* between church and state as provided for in the First Amendment. Judge Rutledge aptly described the delicate balance between the Establishment and Free Exercise Clauses when *Everson*, the first funding case to come before the Court under a First Amendment, held up under challenge. Fifty years ago he warned:

“Religion” appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid “an establishment” and another, much broader, for securing “the free exercise thereof.” “Thereof” brings down “religion” with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.¹³²

Few would abjure individual religious freedom. It is equally important to recognize that within the religious plurality that exists in the United States there are sects more heavily represented in education and who therefore stand to benefit substantially if their schools are publicly funded. Whether this would create political and religious divisiveness nationally is an important issue.

No less important are the educational issues. Just as there exists a precarious balance between the two religious clauses, there exists an equally critical balance between public and private education. Any shift in the direction of one will be to the detriment of the other. It is important to recognize that public schools will continue to serve that vast majority of children who won't find their way into private schools. Unfortunately,

substantial precedent is accumulating in favor of public funding of nonpublic school students. Justice Rutledge foresaw the consequences of the *Everson* decision when he said:

New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still other will be attempted, we may be sure. For just as *Cochran*...has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.¹³³

Chapter Two Endnotes

¹ Hiram Barney, Ohio School Commissioner, 1854. Hiram Barney held the opinion common to school reformers of the day that the state responsibility took precedence over parental responsibility for educating children. Quoted in Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (NY: Hill and Wang, 1983), 158.

² Carol Blue Muller, "The Social and Political Consequences of Increased Support for Private Schools," in Thomas James and Henry M. Levin, eds., *Public Dollars for Private Schools* (Philadelphia: Temple Univ. Press, 1983), 46; Dennis J. Encarnation, "Public Finance and Regulation of Nonpublic Education: Retrospect and Prospect," in James and Levin, *Public Dollars*, 177-79. Forty-three states have enacted statutes that provide some form of public assistance to religious schools. The seven states which have not legislated public assistance to nonpublic school students are: Wyoming, Oklahoma, Arkansas, Tennessee, Alabama, Georgia, and Virginia. Joseph E. Bryson and Samuel H. Houston, Jr., *The Supreme Court and Public Funds for Religious Schools: The Burger Years, 1969-1986* (Jefferson: McFarland and Company, 1990), 51.

³ Philip T.K. Daniel, "A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?" *DePaul Law Rev.* 43(1993):59; in Alexander and Alexander's *American Public School Law*, the authors explain that the United States Supreme Court decided in *Cantwell v. Connecticut* [310 U.S. 296, (1940)] "the religious liberties of the First Amendment not only provided protection against actions by the Congress but, when applied through the Fourteenth Amendment, protected the individual from arbitrary acts of the states," p. 122.

⁴ In *Witters v. Washington Department of Services* [474 U.S. 481 (1986)], the U.S. Supreme Court ruled that vocational rehabilitation services aid to a blind student who wanted to pursue studies at a Christian college did not violate the First Amendment. They reasoned that the aid went to the student who then redeemed it at whatever college he chose to attend. The Court remanded the case to the Washington State Supreme Court, saying that it was free to judge the provision against the more stringent religious clause in the state constitution.

⁵ The Lemon test was articulated by the U.S. Supreme Court in *Lemon v. Kurtzman* [403 U.S. 602 (1971)], although it represented an accumulation of precedent established in *Abington School District v. Schempp*, 374 U.S. 203 (1963), *Board of Educ. v. Allen*, 392 U.S. 236 (1968) and *Walz v. Tax Commission*, 397 U.S. 644 (1970).

⁶ Patricia Lines, "The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?" *J. of Law and Ed.* 17(Winter 1988):11.

⁷ Lines, p. 11.

⁸ *Allen*, 392 U.S. 236 (1968).

⁹ *Wolman v. Walter*, 433 U.S. 229 (1977).

¹⁰ *Public Funds for Public Schools v. Byrne*, 442 U.S. 907 (1978).

¹¹ *Mueller v. Allen*, 463 U.S. 388 (1983).

¹² *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹³ *Wolman*, 433 U.S. 229.

¹⁴ *Aguilar v. Felton*, 105 S.Ct. 3232 (1985).

¹⁵ William P. Marshall, "Unprecedented Analysis and Original Intent," *Wm. & Mary Law Rev.*, 27(1986):926. He suggests comparing *Meek v. Pittenger*, 421 U.S. 349 (1975), at 370-73, and *Wolman v. Walter*, 433 U.S. 229 (1977), at 244-48.

¹⁶ Marshall, p. 925-26.

¹⁷ Lines, p. 11. Also see David N. Jensen, "Constitutional and Legal Implications of Tuition Tax Credits," in James and Levin, *Public Dollars*, p. 171.

¹⁸ Frank R. Kemerer, "The Constitutionality of School Vouchers," *Education Law Rep.* 101(August 1995):24.

¹⁹ Kemerer, p. 24; Alexander and Alexander, p. 159-60. Both give several examples of antiestablishment clauses that are more restrictive than that of the First Amendment and of provisions that expressly prohibit any form of public aid to nonpublic schools. Alexander and Alexander quoted the rather succinct but explicit antiestablishment clause of the Wyoming Constitution: "No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." Wyoming Constitution Art. I § 19; Kemerer cites the Michigan Constitution by way of example of a provision that forbids

funding of any nonpublic school: “No public moneies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public moneies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.” Michigan Constitution Art. III § 2.

²⁰ *Witters v. Washington Department of Services*, 474 U.S. 481.

²¹ The Milwaukee Parental Choice Program was amended to allow low-income students to redeem their vouchers in sectarian schools, beginning this school year, 1996-97. Recently, state judge Paul Higginbotham ruled the participation of religious schools in the choice program as unconstitutional. In Ohio, a new voucher program, the Cleveland Pilot Project Scholarship Program, included chartered sectarian schools among those that could participate. In *Gatton v. Goff* [1996 WL 466499 (Ohio Com.Pl.)], the Franklin County Court of Common Pleas upheld constitutionality of the statute. The ruling is being appealed.

²² See Alexander and Alexander, p. 157-59.

²³ Alexander and Alexander, p. 157-58. They illustrate several instances in which state courts either “erected a lower wall of separation” or adopted the U.S. Supreme Court’s tripartite test to determine the constitutionality of a law.

²⁴ E. Vance Randall, *Private Schools, Public Power: A Case for Pluralism* (New York: Teachers College Press, 1994), 52-54. Randall devised eight categories: 1) Establishment and status in general, 2) Incorporation and organization, 3) Public aid, 4) Regulation and supervision, 5) Property, fund, contract, and liabilities, 6) Governing board and officers, 7) Teachers and other instructors, and 8) Pupils, tuition, and discipline.

²⁵ Randall, p. 53.

²⁶ Randall, p. 53.

²⁷ Randall, p. 51.

²⁸ David M. Smolin, "State Regulation of Private Education: Ohio Law in the Shadow of the United States Supreme Court Decisions," *Univ. of Cincinnati Law Rev.* 54(1986):1003.

²⁹ *Ibid.*, 1003.

³⁰ 262 U.S. 390 (1923).

³¹ 104 Neb. 93, 175 N.W. 531 (1919).

³² Smolin, p. 1005.

³³ Smolin, p. 1006, FN 19.

³⁴ 187 N.W. 100 (1922).

³⁵ Smolin, p. 1006.

³⁶ These phrases come from Nebraska Supreme Court Justice Letton's dissent. Although he had written the majority opinion upholding the statute in the original suit, *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, he had changed his mind when Meyer's case came before the court. The quotes and background can be found in David M. Smolin, "State Regulation of Private Education: Ohio Law in the Shadow of the United States Supreme Court Decisions," *Univ. of Cincinnati Law Rev.* 54(1986):1005-6.

³⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁸ *Ibid.*, at 391.

³⁹ *Ibid.*, at 401.

⁴⁰ 268 U.S. 510 (1925).

⁴¹ Michael A. Rebell, "Values Inculcation and the Schools: A Need for a New *Pierce* Compromise," in Neal E. Devins, ed., *Public Values, Private Schools* (London: The Falmer Press, 1989), 39; Cookson, *School Choice*, p. 22.

⁴² Randall, p. 60-61.

⁴³ 268 U.S. 510, at 532.

⁴⁴ *Ibid.*, at 535.

⁴⁵ *Ibid.*, at 535.

⁴⁶ *Ibid.*, at 534.

⁴⁷ *Ibid.*, at 534.

⁴⁸ *Ibid.*, at 535-6.

⁴⁹ 273 U.S. 284 (1927).

⁵⁰ *Ibid.*, at 291.

⁵¹ *Ibid.*, at 285.

⁵² *Ibid.*, at 286.

⁵³ *Ibid.*, at 286; See also Randall, p. 64-67 and Smolin, p. 1008-11. Randall and Smolin both amply describe the context in which the legislation was enacted and resulting litigation.

⁵⁴ 273 U.S. 284, at 298.

⁵⁵ It should be noted that all statistics on nonpublic school enrollment and religious affiliation are dependent on voluntary participation in the survey and self-reporting which may result in widely varying numbers among groups collecting such data.

⁵⁶ Stephen Broughman, *Private School Universe Survey, 1993-94*, National Center of Education Statistics (Washington, D.C.: U.S. Dept. of Education, 1996), 5.

⁵⁷ Broughman, p. 5.

⁵⁸ The phrase is attributed to Thomas Jefferson. It is believed that the expression was used in a letter President Jefferson wrote to the Danbury Baptist Association (Conn.) in January, 1802. The historical note is provided by Neil G. McCluskey, ed., *Catholic*

Education in America: A Documentary History (New York: Bureau of Publications, Teachers College, 1964), 144.

⁵⁹ Kemerer, "Constitutionality of Vouchers," p. 20-21; Amy Stuart Wells and Stuart Biegel, "Public Funds for Private Schools: Political and First Amendment Considerations," *Amer. J. of Educ.*, 101(May 1993):210; Marshall, p. 928-29; *Everson v. Board of Educ.*, 330 U.S. 1, at 16 (1947).

⁶⁰ McCluskey, p. 145.

⁶¹ See generally Robert L. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," *Harvard J. of Law and Public Policy* 9(1986):129-172; Kevin T. Baine, "Education Litigation: Prospects for Change," *Catholic Lawyer* 35:283-293; Donald N. Jensen, "Constitutional and Legal Implications of Tuition Tax Credits," in Thomas James and Henry M. Levin, eds., *Public Dollars for Private Schools* (Philadelphia: Temple University Press, 1983), 152-155.

⁶² In *Lynch v. Donnelly*, 465 U.S. 668 (1984), at 687-93, Justice O'Connor suggested a modification of the *Lemon* test to focus on the two evils she considers the Establishment Clause was constructed to prohibit: excessive entanglement and government endorsement or disapproval of religion. She has integrated her endorsement-disapproval standard with the both the *purpose* and *effect* prongs of the *Lemon* test. If the purpose of the legislation appears to give government endorsement to or disapproval of religion, then it fails. Likewise, if the effect of the statute is the communication of government endorsement or disapproval, it would fail. She is not concerned whether the action advances or inhibits religion nor would she invalidate it if it did. This modification has gained favor among the other justices and has been addressed in school related cases since *Lynch*. See *Lee v. Weisman*, 112 S.Ct. 2649 (1992) and *Wallace v. Jaffree*, 472 U.S. 38 (1985) as examples. For a broader discussion of the Supreme Court's move away from *Lemon*, see Anne Marlow Grabel, "Minnesota Public Money and Religious Schools: Clearing the Federal and State Hurdles," *Hamline Law Rev.* 17:203-242. For more discussion of the Court's inconsistent application of *Lemon*, see Michael Heise, "Public Funds, Private Schools, and the Court: Legal Issues and Policy Consequences," *Texas Tech Law Rev.* 25(1993):141-42.

⁶³ 281 U.S. 270 (1930).

⁶⁴ *Ibid.*, at 375.

⁶⁵ 330 U.S. 1 (1947).

⁶⁶ *Ibid.*, at 5.

⁶⁷ *Ibid.*, at 17-18.

⁶⁸ *Ibid.*, at 15-16.

⁶⁹ *Ibid.*, at 16.

⁷⁰ The “child benefit” doctrine was developed under *Cochran v. Louisiana Board of Education*, 281 U.S. 370 (1930).

⁷¹ 330 U.S. 1, at 20.

⁷² *Ibid.*, at 19-20.

⁷³ *Ibid.*, at 47,48.

⁷⁴ 392 U.S. 236 (1968).

⁷⁵ 281 U.S. 370 (1930).

⁷⁶ *Cochran v. Louisiana State Board of Education*, 281 U.S. 270 (1930).

⁷⁷ 374 U.S. 203 (1963).

⁷⁸ 392 U.S. 236, at 243.

⁷⁹ *Ibid.*, at 243.

⁸⁰ *Ibid.*, at 243-44.

⁸¹ *Ibid.*, at 253.

⁸² 403 U.S. 602 (1971).

⁸³ 397 U.S. 664 (1970).

⁸⁴ *Ibid.*, at 674-675.

⁸⁵ 403 U.S. 602, at 619.

⁸⁶ *Ibid.*, at 621.

⁸⁷ 413 U.S. 825 (1973).

⁸⁸ 413 U.S. 756 (1973).

⁸⁹ *Ibid.*, at 789.

⁹⁰ *Ibid.*, at 786.

⁹¹ *Ibid.*, at 774 and 779.

⁹² *Ibid.*, at 812.

⁹³ *Ibid.*, at 812.

⁹⁴ *Ibid.*, at 812.

⁹⁵ 103 S.Ct. 3062 (1983).

⁹⁶ *Ibid.*, at 3068.

⁹⁷ *Ibid.*, at 3067.

⁹⁸ 433 U.S. 229 (1977).

⁹⁹ 103 U.S. 3062, at 3070.

¹⁰⁰ *Luthens v. Bair*, 788 F.Supp. 1032 (S.D. Iowa 1992), an Iowa tax case similar to *Mueller* was brought before the United States District Court in 1992 and ruled constitutional. Parents of elementary and secondary school children who attended accredited schools, regardless if they were attending public or private schools, could claim tax deductions for tuition and textbooks.

¹⁰¹ 413 U.S. 472 (1973).

¹⁰² 444 U.S. 646 (1980).

¹⁰³ 421 U.S. 349 (1975).

¹⁰⁴ *Ibid.*, at 366.

¹⁰⁵ 430 U.S. 602 (1971).

¹⁰⁶ 421 U.S. 349, at 370.

¹⁰⁷ *Ibid.*, at 372.

¹⁰⁸ *Ibid.*, at 372.

¹⁰⁹ 433 U.S. 229 (1977).

¹¹⁰ 421 U.S. 349 (1975).

¹¹¹ 433 U.S. 229, at 233.

¹¹² *Ibid.*, at 250-51.

¹¹³ 330 U.S. 1 (1947).

¹¹⁴ Bryson and Houston, Table 5.2, p. 94.

¹¹⁵ 392 U.S. 236 (1968).

¹¹⁶ 421 U.S. 349, at 366.

¹¹⁷ 105 S.Ct. 3232 (1985).

¹¹⁸ 421 U.S. 349.

¹¹⁹ 105 S.Ct. 3216, at 3224.

¹²⁰ 105 S.Ct. 3232 (1985).

¹²¹ *Ibid.*, at 3239.

¹²² *Ibid.*, at 3237.

¹²³ Mark Walsh, “Reversal of Ban on Title I Services in Religious Schools Asked,” *Education Week* 16(November 6, 1996):6.

¹²⁴ The appeal is *Agostini v. Felton*, Case No. 96-553 (NY, 1995).

¹²⁵ 480 N.W.2d 460 (Wis. 1992).

¹²⁶ 878 F.Supp. 1209 (E.D. Wis. 1995).

¹²⁷ *Ibid.*, at 1216.

¹²⁸ Mark Walsh, “Religious School Vouchers Get Day in Court,” *Education Week* 15(March 6, 1996):1.

¹²⁹ 546 N.W.2d 140 (Wis 1996).

¹³⁰ Associated Press, “School Choice Plan Is Judged Unconstitutional,” *Roanoke Times* (January 16, 1997):A6.

¹³¹ 413 U.S. 756, at 802.

¹³² *Everson v. Board of Education*, 330 U.S. 1, at 32.

¹³³ *Ibid.*, at 29.

CHAPTER THREE: EDUCATION IN OHIO

In a free government, where the rights of people are in their own keeping, it is peculiarly necessary [that] they should have correct knowledge of these rights. ¹

A Brief History of Education in Ohio

The first settlements in the New World were established by homogeneous cohesive groups who shared language, culture, religion and motivation. The colonies matured into communities which mirrored the values and traditions of their founders and which expected newcomers to adopt and adapt to established practices.

In contrast, Ohio was born from a migration that drew settlers, both pioneers and businessmen, from a cross section of well established urban and rural communities in New England, the mid-Atlantic and southern states, and Europe. Anticipating such diversity, Congress placed the imprimatur of religious freedom and education within the provisions of the Northwest Ordinances of 1785 and 1787.

During the framing of the first ordinance, the United States Congress defeated an attempt by the New England faction to export its practice of setting aside a parcel of land for the support of the church when townships were established. The final version of the ordinance, however, retained another New England custom of securing the sixteenth section of each township for the maintenance of public schools.

James Madison anxiously campaigned against the concept of multiple establishment that lay embedded in the proposed use of land to support the ministry.² After the defeat of the establishment provision, he expressed his outrage in a letter to James Monroe.

How a regulation so unjust in itself, so foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly a matter of astonishment.³

The second ordinance, passed while many members were at the Constitutional Congress in Philadelphia, contained several civil liberties, such as trial by jury, habeas corpus, religious freedom and prohibition of slavery. The ordinance, largely the work of several members from Massachusetts, also reflected the New Englanders' view that government should encourage religion. The document's best known article reads: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁴

Although the principle of church and state separation had been articulated, the practice of separation took much longer to gain credibility. Despite the Free Exercise sentiments expressed in Congress, the organizers of the Ohio Company received tracts of public land for the support of religion as well as for schools under the auspices of the ordinance. Only after the adoption of the United States Constitution and the Bill of Rights did the allocation of public land for support of religion cease. Designating parcels of public lands to fund schools remained a popular practice for a number of decades.

Common Schools

Ohio occupies a unique position in the history of the United States as the first state to be organized from the Northwest Territory. As such it discharged its responsibilities of statehood and of those prescribed to it by the provisions of the Northwest Ordinances of 1785 and 1787 without benefit of a predecessor's experience. At times it floundered, and providing educational opportunity through common schools was one such instance.⁵

The Northwest Ordinance of 1787 proclaimed that "schools and the means of education shall forever be encouraged." Complying with the ordinance and generating sufficient funds from the Section 16 school land grant provided by the terms of the ordinance were among the challenges townships in Ohio faced.

The concept of land grants to support schools was an idea imported from Britain and adopted in the New England townships of colonial America.⁶ Normally such lands were rented and the revenues were applied to fund a school for the local children. Such a self-supporting system did not function readily to Ohio where inexpensive land was plentiful. What meager revenue garnered from rents accumulated slowly in a statehood fund but was not sufficient to generate the interest necessary to finance common schools.

Congress realized the futility of the arrangement and authorized the sale of the school lands, believing the receipts would serve as permanent school funds.⁷

Unfortunately, the lands were sold for too little money to support public schools and

over the years the education accounts were terribly mismanaged. As the state auditor reported to the Ohio legislature in 1843, "The lands have been squandered and the fund has been plundered until it is now merely nominal."⁸

Perhaps the greatest obstacle to the establishment of common schools in Ohio was apathy. Those who had come to the wilderness, particularly from regions other than New England, were more concerned with clearing land, building homes and starting crops or businesses. They were a diverse group who came from the older states as well as directly from Europe, and they brought the religious and educational traditions of their native states and countries with them. They shared no common educational philosophy or school concept and were content to perpetuate whatever educational system, if any, was familiar to them.⁹

There was one characteristic Ohio residents seemed to share that served to undermine state efforts to establish a system of free common schools - a common distaste for a distant central government. Ohio settlers were portrayed as independent thinkers, a self-sufficient group who had little regard for traditional governmental hierarchies.

To characterize the typical Ohio settler, historian Andrew Cayton borrowed from an essay written by Benjamin Rush in which Rush described the three kinds of people who, in succession, were attracted to and settled the frontier.¹⁰ Rush developed his thesis based on his observations of Pennsylvania's stages of development from savage frontier to civilized urbanization.

The earliest settlers usually adapted to the existing way of life of the wilderness, commonly following the ways of the Indians. The second generation of settlers were only slightly more civilized by Rush's standards. Cayton characterized Rush's description of the second stage settler as, "His world was more complicated, his property more extensive and encumbered with debts, his crops more diversified" and he was "seldom a good member of civil or religious society."¹¹ The third type of settler improved his lands, built proper housing, and supported institutions of social order, such as churches, schools, and government.

It was the second type of settler that best typified those in Ohio. They "lived in a relatively unorganized state, [were] lazy," and most importantly they possessed "high ideas of liberty." This was interpreted to mean that these settlers lacked "republican virtue" - no regard for the authority of government.¹²

The Federalists wanted to use education to civilize the frontiersmen whom they believed to be "in danger of losing their habits of government and allegiance to the United States"¹³ The national government's representatives, who were mostly propertied gentry from the East or ex-military loyal to George Washington, were concerned about the strong flavor of social egalitarianism that permeated the Ohio settlements, and about the allegiance to local political dominion to national authority.

Their intentions were met with resistance by both local and state entities. Ohio's first constitution was written in the wake of the political struggle between Jefferson and

Adams and in the shadow of power mongering from the territorial governor, Arthur St. Clair.¹⁴ These events turned the settlers' disregard for centralized government into distaste.

This antagonism toward centralization and distant control was manifest in decades of state educational legislation. Between the years 1803-1850 Ohio's educational policy can be distinguished by its lack of any significant or efficient system of central control and the absence of any compulsory features.¹⁵ It was only in 1838, at the behest of Ohio's first state superintendent Samuel Lewis, that the legislature enacted a bill that would impose limited state authority over education and would create a permanent position for state superintendent of schools. Its potency was diluted by subsequent amendments and eventually the abolishment of the state superintendency for a period.

The paucity of central organization and regulation was not indicative of a lack of interest on the part of the Ohio General Assembly. In this same time period there were 70 general school laws passed as well as a plethora of associated bills with provisions for apportioning, redistricting, incorporating, and appropriating on behalf of schools.¹⁶ None, though, attempted to exert state authority, only to assert state responsibility.

It was this deeply rooted deference to local authority that impeded the establishment of a state system of common schools during the first several decades of Ohio's statehood. State Superintendent Samuel Lewis, in describing the qualities of the

education law of 1838 in his *Third Annual Report* in 1839, acknowledged the state's compliance with local autonomy:

[The law] gives to the people the power to do their business whether in townships or districts, as the majority may think best. The widest latitude possible is given for popular action. The most the law does is to prescribe certain general rules within which the people can act under the sanction of law, and it gives to such popular action the aid of law to effect its purpose.¹⁷

In 1840 the position of state superintendent, established only two years prior as a permanent post, was abolished. In 1847 the legislature tried to create proximate central authority by enacting voluntary selection of superintendents at the county level, but in the end few such positions were created.

A revised constitution was adopted in 1851 in which it was stipulated that all funds "entrusted to this State for educational...purposes, shall forever be preserved inviolate, and undiminished."¹⁸ This was to ensure that such funds would not be fraudulently expended as had been the case in prior years.¹⁹

In 1853 the General Assembly passed an antebellum school-reform bill requiring free schools through local taxes, establishing a division of authority between town and district committees, mandating teacher examinations, founding separate schools for blacks, and creating the position of state commissioner of education.²⁰ A system of free common schools finally had been legislated fifty years after Ohio had become a state.

It took a number of years into the twentieth century to implement greater state authority. In 1904 the legislature enacted a general revision of the total body of school

law. The quantity and the diversity of legislation passed during the 19th century had created confusion throughout the state, with no one certain as to what was required or voluntary. The result was the adoption of a school code which brought uniformity to boards of education, redefined districts, granted more authority to localities to raise funds for school buildings and equipment, and encouraged consolidation.²¹

New constitutional provisions for education were adopted in 1921 which required the General Assembly to “secure a thorough and efficient system of common schools throughout the State” by making “such provisions, by taxation.”²² Also, a state superintendent of public instruction would replace the commissioner of education and be a member of the executive department appointed by the governor.

The economic depression that took hold in 1929 devastated the Ohio public school system. Localities were funding 96 percent of their school districts’ budgets through real property taxation while only four percent came from the state treasury. In 1932 the Ohio School Survey Commission recommended that the state “assume a greater responsibility in financing education” and relieve the overly burdened tax on real property. The state, in undertaking a large share of the funding, would “guarantee to every child equal educational opportunity up to certain prescribed standard.”²³

The legislature’s response to the Commission’s recommendation was to enact the School Foundation Law of 1935. Contained within the legislation was the acknowledgment that the state was responsible for establishing a minimum level of

educational services below which no district would be allowed to go and for a funding formula that would distribute the burden of the minimum program equally among the localities.

What remained obvious through the work of the School Survey Commission was that local control was still the rule and state authority the exception. In 1935 there were 1815 rural and village school districts, 109 city school districts, 62 exempted school districts, and 88 county school districts. Pursuant to the state's increased participation in financing school districts and to another constitutional amendment establishing a State Board of Education in 1953, the state edged its way into a position of centralized control over public schools. The State Board of Education Law of 1955 provided for a Department of Education which would function as the administrative unit through which all policies and powers of the state board and the duties of the state superintendent would be applied.

While Ohio is still known as a state in which local control of schools is evident, recent regulatory measures have brought a greater degree of uniformity in pupil, financial and staff reporting among the districts. Amended Substitute Senate Bill 140, enacted in 1989 and effective in 1990, required the development and implementation of a statewide Education Management Information System (EMIS).²⁴ The purpose of the legislation was "to assure better accountability for tax dollars and provide better policy understanding of school district programs and accomplishments to help improve the local educational

system.”²⁵ Since 1992 all school districts have been required to electronically submit the required data. The result has been the collection of coded and uniform data, much of which can be readily accessed through the Ohio Department of Education’s web pages.²⁶

Private Schools

The establishment of private schools, both academies and religiously affiliated institutions, and the role they assumed in providing education in Ohio followed much the same pattern as they did in older states. That should come as no surprise considering the hodgepodge of settlers to the Northwest Territory. They carried with them their religious and educational practices and rooted them into their new locations. Those who immigrated from the mid-Atlantic and southern states still believed that education was the responsibility of the parents or church, depending on one’s resources. New Englanders and New Yorkers, who tended to settle in what was to become the commercial and urban areas of Ohio, promoted common education, although they relied on Pan Protestant societies to organize their schools.

German and, to a lesser degree Scandinavian, immigration stimulated the establishment of Catholic and Lutheran churches and schools. The schools provided native language tutoring as well as religious instruction.²⁷ A few Presbyterian parochial schools appeared in Cincinnati but were short-lived. The strong support demonstrated by the transplanted New Englanders for and the distinctive Protestant character of the first common schools drew their members into the public schools.²⁸

Some amount of public funding for private schools was an early practice in Ohio as it had been in older states. There were parallel conflicts, too. As common schools increased in popularity and the principle of separation of church and state gained greater acceptance, struggles over public funding, parental rights, local control, and tacit establishment through the influence of Pan Protestantism in common schools emerged.

Separation of Religion and Education

By the mid to late 1800s separation of church and state and, thus, the separation of religion and public education were national issues. There were two means by which to achieve separation in education. One approach, disestablishment, required that no public funds be expended in sectarian institutions. The second plan, the secularization of public schools, obligated the extrication of religious instruction from public school curricula.

Both ideas were received in a conflux of criticism from advocates of sectarian schools, public school families, and community leaders who believed moral education was essential to a healthy society. Although they tried, common school leaders were not altogether successful in convincing their constituencies that moral training could be accomplished through secular instruction. Religious leaders, particularly the Catholic hierarchy, agreed that religious instruction in public schools would be partisan. They believed the solution was to consider sectarian schools as public schools and allow them to share the public school funds.

In light of the implementation of these two *separation* strategies by state legislatures both the religious and public school communities searched for methods to dull the effects of such laws and impose schemes that would meet their local needs. Ohio actively participated in the controversy and explored alternatives.

Some parents and school leaders believed Bible reading without comment would meet the secular criterion established for public schools. When the Board of Education for Cincinnati public schools enacted a resolution²⁹ to prohibit Bible reading in the school, a group of taxpayers went to court. In *Board of Education v. Minor*³⁰ the Ohio Superior Court ruled in favor of the taxpayers, but the Ohio State Supreme Court unanimously reversed the decision.

Article I of the Ohio constitution of 1851 contains a section adapted from the well known Northwest Ordinance provision encouraging religion and education. It reads:

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.³¹

The appellees argued that, in view of this section, there was an obligation to require religious instruction in public schools. The Court disagreed, taking the interpretation of the word *knowledge* to signify that knowledge advanced the purposes of religion and morality, so all that was required was the diffusion of general knowledge. The Court emphasized that the constitution did not prescribe how knowledge, religion, and morality were to be encouraged.

The justices went further and claimed that the defendants really were arguing for inclusion of Christian doctrine in schools, which is unconstitutional. Bible reading, even without comment, would compel Catholics, Jews and nonbelievers, both teachers and students, to participate in an activity incompatible with their belief systems.³²

Those responsible for providing a Catholic education searched for a more accommodating alternative for the strict adherence to “disestablishment” for sectarian schools. One such compromise was reached in 1873 between Catholic authorities and the Board of Education for the city of Poughkeepsie, New York. It is worth describing inasmuch as it was the antecedent to similar arrangements in other communities, including ones in Ohio, in subsequent decades.

Dubbed the Poughkeepsie Plan, a lease agreement was proposed by St. Peter’s Church under which its two elementary schools, one for girls and the other for boys, would function as public schools during regular school hours at a charge of one dollar for each building. They would be subject to all regulations and authority of the school board.³³ The teachers would be “selected, employed, paid and subject to dismissal by the board, in the same manner as the other teachers in its employ,” but it was “tacitly understood that Catholic teachers should be engaged for the Catholic schools, so long as they were found to be equally competent.”³⁴ Religious instruction and activities were restricted to hours before and after school, and no child was to be compelled by other than his parents to participate.

The point must be made that the arrangement was not universally supported, particularly in its last decade. Many non-Catholics began to question the contract and to draw public attention to it. Opposition, though, was not limited to non-Catholic factions.

There was a developing schism within the national Catholic community as a result of the *school controversy of 1890-1892*.³⁵ Many Catholics were concerned that such agreements were contrary to the sentiments expressed by the Second Plenary Council of Baltimore against civil government intrusion into ecclesiastical activities, which included parochial schools. They were wary that such arrangements would lead eventually to the demise of the parochial school system. On the other side of the issue, there were those who believed it an opportune time to compromise with civil authorities and advance public education without completely relinquishing daily religious instruction. Many Catholic schools served poor immigrants, so financial resources were scarce. Compromise meant survival.

The arrangement in Poughkeepsie functioned for more than 20 years until it was terminated by a new State Superintendent for Public Instruction, Charles Skinner. He believed the lease agreement to be “unwise as a matter of school policy, and a violation of the letter and spirit of the constitution.”³⁶ The combination of non-Catholic and Catholic opposition and his own objections created an opportunity for Superintendent Skinner to dissolve the contract in 1899. As a result the Catholic church was forced to close the boys’ school. Either in a show of support of the church or in defiance of the state

superintendent, depending on one's perspective, the local authorities then rented the facility for a sum of \$1,000 a year.

Similar versions of the Poughkeepsie Plan had been attempted in other communities but fell victim to political and religious divisiveness.³⁷ One such arrangement was attempted several decades later in North College Hill, Ohio.³⁸ In 1940 the school board, composed of three Protestants and two Catholics, incorporated the St. Margaret Mary parochial school into the local public school system. This was effected through a two-year agreement under which the building was leased by the school board and the teachers were placed on the public school payroll. The school functioned as a public school but with no changes in the existing personnel or curriculum.

People opposed to the arrangement within the non-Catholic community began to organize and to plan a political solution. A new board election was necessitated by a change of status for North College Hill from an exempted village to an incorporated city. This special school board election, which took place in 1941, was centered over the debate on the inclusion of parochial schools in the public school system. Both sides of the question were clearly delineated along the lines of religious affiliation. The newly elected five-member board was composed of four Protestants and one Catholic.

The new board promptly notified church authorities that St. Margaret Mary School would no longer be considered a public school when the contract-in-force expired in June 1942. This did not squelch the controversy. The 1945 biennial election focused on

the parochial school issue once again. There were those in the community who wanted St. Margaret Mary School reincorporated. This time three Catholics were elected to four-year terms.

The new board began to assert itself into what had been previously the domain of the local superintendent, namely in the appointment and promotion of teachers and administrators. The superintendent resisted their intrusion and was denied reappointment as a result. By now, religious tensions were taut within the community. The majority of teachers and students went on strike, mass meetings were organized, and eventually a riot ensued. Although the new controversy issued from the conflict between the board members and the superintendent, the matter of public funding of parochial schools garnered extensive attention and revealed the animosity that had been engendered among religious sects.

Pragmatically speaking, the educational arrangement probably made sense to the school board and church officials. The original board was comprised of three Protestants and two Catholics, so it would be difficult to charge they entered the agreement for religious purposes. Unfortunately, they sorely underestimated the reaction it would elicit from the community they represented.

Law and Litigation Governing Nonpublic Schools in Ohio

Today Ohio is a state with over 11 million inhabitants. Of its children 1.8 million are enrolled in public K-12 schools and nearly 240,000 are matriculated in chartered nonpublic schools. According to an unpublished report prepared by the office of Ohio's governor, George Voinovich, Ohio's nonpublic school students are the most generously funded among the 50 states, a point he likes to make when addressing the Catholic Education Association or other religious education group.³⁹ This assertion comes at a time of distressing reports that Ohio's public schools are in deplorable condition, state mandated deficit financing is required, funding inequities are rampant, and Cleveland's city school district is near insolvency.

The previous section broadly described the historical developments of common schools and private schools in Ohio as well as the process of secularizing public school education and disestablishing religious schools in the United States. Events of the past three decades would suggest that there has been a change of government attitude toward private schools, especially sectarian schools. Ohio is seeking actively to increase private school participation in education.

In the past, Ohio state legislatures tried to minimize the distinctiveness of private schools by highly regulating them. More recently, however, Rep. Michael Fox, Ohio's Republican Chair of the Education Committee, and Governor George Voinovich have extolled openly the virtues of private schools and the contributions they make to the

education of children and have lobbied for the voucher program that allows children to use public money to go to private sectarian schools in Cleveland.

Private schools and the choice movement have become escape valves for legislators unable or unwilling to face the challenges the Ohio public schools present them. There is large quantity of legislation that has been enacted to provide private schools, including sectarian institutions, with various forms of public assistance.

The following section summarizes Ohio's regulatory and funding legislation that govern nonpublic schools. Included is an overview of the pertinent litigation that helped shape current educational policy toward nonpublic schools. (Appendix B cites the relevant statutes from the Ohio Revised Code.)

Also discussed are some of the issues that confront public education. The condition of Ohio public schools, the inequities in funding and educational opportunity, and the precarious financial status of Cleveland's inner city schools are variables the state legislature must equate in its education policy and budget.

Right to Regulate

While it has been established already in the previous chapter that states have regulatory authority over private as well as public schools, the Supreme Court has been vague on the parameters of such regulations. It has established a parent's right to choose private education and a nonpublic school's right to exist. If the private school is sectarian, religious freedom is protected unless the state can overcome the burden of proving a

compelling state interest. Regulations cannot be so broad or intrusive as to cause the nonpublic school to lose its administrative and instructional autonomy and distinctive philosophical character, but those general guidelines still leave room for a great deal of variation.

Ohio has traveled the continuum in regulatory legislation. In the past, it had among the most restrictive laws governing private schools. Two key lawsuits and instructions from the Ohio Supreme Court have persuaded Ohio legislators to modify regulations so that they are now among the most liberal.

The current set of standards were adopted in 1983. To allow for the maximum latitude for the existence of private schools, the state recognizes two categories of private schools. The first group are chartered private schools. Of those, K-6 schools are expected to conform to the same program regulations and personnel qualifications as public schools.

Private junior and high schools have greater flexibility. In fact the only program requirements junior high schools are expected to meet are a minimum number of hours of scheduled instruction per day and supervised activities. Nonpublic high schools have curriculum latitude, though they must offer a minimum number of credits in a specified range of curriculum areas. They must meet similar resource requirements (e.g., libraries, certain health screening, and a guidance program) but do not have to staff all the auxiliary

staff positions required of public schools. There are minimum qualifications for teachers, though they are considerably less restrictive than those required of public schools.

The second group of private schools are those not chartered or not seeking a charter because of religious convictions. The standards set forth for these schools mandate a minimum school day and school year, require that attendance must be taken and reported to the appropriate educational authority, and state that teachers must have a bachelor's degree or equivalent. There are minimum curricular requirements (e.g., language arts, geography, American and Ohio history and government, mathematics), and as is necessary in all schools, there are requirements to observe all state and local health, fire, and safety codes.

Ohio created two classifications so that it could be substantiated that private schools are not required to obtain a charter. This allows Ohio to maintain a good level of elementary educational programs among those which choose to be chartered. The rewards for obtaining a charter are rich. Only students who attend chartered nonpublic schools are eligible for any and all public assistance available to them (e.g., transportation and textbooks). Chartered nonpublic schools can choose to participate in the pilot scholarship (voucher) program in Cleveland.

The charter process is rather extensive, taking at least one year to complete. It comprises two distinct phases. The first requires the candidate nonpublic school to

demonstrate compliance with the minimum educational standards developed by the State Board of Education.

The second phase is a set of five steps which the candidate school must complete before qualifying for the charter. (See Appendix C.) The objective of this second series of procedures is to “assure the equitable and non-discriminatory treatment of all students regardless of their race, color, gender or national origin.”⁴⁰ The five steps must be followed in order, the last of which is an *annual* report by the nonpublic school. This annual report provides details of the student body enrollment and ethnic and racial composition. Also included in the report is an ethnic and racial matrix of the certified and classified staff employed by the school.

Richard Fairchild, who works in the Equity Assurance and Compliance Section of the Division of Assessment and Evaluation, is one of those responsible for guiding private schools through the charter process. He explained in a telephone interview that the process also requires on-site visits by educational authorities. A representative from the Division of Equal Educational Opportunities visits candidate nonpublic schools to verify the reports filed by the nonpublic schools and to ensure compliance with all aspects of nondiscriminatory policies. The Division of Curriculum, Instruction, and Professional Development sends a designee to determine that candidate schools have met and maintained the minimum standards prescribed by the State Board. When asked if this did

not raise issues of excessive entanglement in religiously affiliated schools, Fairchild agreed that it did but indicated no action has been taken to challenge the practice.

Fairchild also revealed that in the last few years an average of 50 nonpublic schools per year have sought charters. According to the *Ohio Educational Directory, School Year 1995-96*, there are 877 chartered nonpublic elementary, middle and senior high schools compared with 3,610 K-12 public schools.⁴¹ That is nearly one in five schools (19.5%), which is below the national average of one in four (24.4%) reported in a 1993-94 schools and staffing report published by the National Center for Education Statistics.⁴² If the 285 nonchartered schools registered with the Ohio Department of Education as of the 1996-97 school year are included in the calculation the ratio of nonpublic schools to the total number of schools in Ohio equals the national average of one in four (24.4%).⁴³

The rather lax standards and optional charters are the products of strict instructions set forth by the Ohio Supreme Court in two cases involving regulation of private schools and compulsory education laws, *State of Ohio v. Whisner*⁴⁴ and *State ex rel. Nagle v. Olin*.⁴⁵ In the 1976 case, *State of Ohio v. Whisner*, a group of parents were appealing their conviction under the state's compulsory attendance laws for sending their children to a school which did not meet the minimum standards required by the State Board of Education. The Christian school in which their children were enrolled was able

to demonstrate that the educational program adequately prepared the children and that the students had performed well on standardized tests.

The parents and school complained that the minimum standards were so exhaustive that they left the school no opportunity to exercise discretion in providing religious instruction or in determining certain aspects of curriculum requirements as incompatible with their religious beliefs. The court agreed, commenting that the “minimum standards promulgated by the State Board of Education are so comprehensive in scope and effect as to eradicate the distinction between public and non-public education.”⁴⁶ The court reversed the conviction citing the parents’ right to religious freedom was excessively burdened by the pervasive state regulations. The court also specified what of the standards it felt were too restrictive or unnecessarily intrusive.⁴⁷

In 1980 another case involving private school regulation and religious freedom came before the Ohio Supreme Court. In *State ex rel. Nagle v. Olin*⁴⁸ a father was convicted of violating Ohio’s compulsory education laws by sending his daughter to a school that did not meet the state’s minimum standards. This appeal was distinctly different from *Whisner* because the private school to which Olin sent his daughter was a one-room Amish school. Olin was not Amish but a self-described fundamentalist who did not frequent any organized church. He believed it his responsibility to give his daughter a religious upbringing, something he felt he could not achieve if he placed her in a public school.

The Amish school, consistent with its proprietors' religious philosophy, was a simple structure with no artificial lighting or indoor plumbing. It did not meet the minimum health, fire, or safety codes required of all schools. Relying on *Wisconsin v. Yoder*⁴⁹ the court admitted that Olin would not have been prosecuted in the first place if he were Amish; however, it ruled that his religious beliefs were truly held and reversed his conviction.

The court's true objective in ruling in Mr. Olin's favor was to put the State Board of Education on notice. The Board had not yet revised its minimum standards though the *Whisner* decision had clearly stated the standards went beyond reasonable regulation. The *Olin* court advised the State Board of Education that until it modified its standards to "go no further than necessary to assure the state's legitimate interests in the education of children in private elementary schools,"⁵⁰ the court would continue to rule in favor of free exercise claims. It then provided some guidance to the State Board on what it would regard as reasonable standards. As described earlier in the section, the State Board has since revised its minimum standards which are now quite liberal.

Proficiency Tests

In 1987 the General Assembly directed the State Board of Education to develop and implement a statewide program of proficiency exams in Ohio. The Board responded and established the "Ninth Grade Proficiency Test" (NGPT) which is administered either in the spring semester of the eighth grade or the fall semester of ninth grade. It measures

student achievement in reading, writing, mathematics, and citizenship. Those who fail the tests have at least two more opportunities each year during high school.

When the proficiency tests were introduced to public schools in 1992 nonpublic schools were exempt. The tests were available to them if they chose to administer them voluntarily. In 1993, however, the state legislature made chartered nonpublic school participation mandatory. As of July 1995, any chartered nonpublic school not in compliance would lose its charter. Any student attending a nonpublic school and failing to pass the proficiency exams could not receive a diploma.

In response to the mandate, the Ohio Association of Independent Schools (OAIS) initiated legal action under the First and Fourteenth Amendments to enjoin the state from implementing the statute. In *OAIS v. Goff*⁶¹ the private school organization claimed the tests would place an excessive burden on its member schools, saying the tests “are intrusive, force unwarranted curriculum revisions, and take away the defining freedom of private schools.”⁵² John Raushenbush, executive director of OAIS, complained, “If we lose our independence, the quality of our programs is diminished.”⁵³

The plaintiffs did not allege violation of their free exercise rights, but suggested that “strict scrutiny should nonetheless apply where state standards are so intrusive that they effectively eradicate the distinction between private and public education.”⁵⁴ They supported their claim by citing *Whisner*.⁵⁵

The circuit court disagreed with the plaintiffs, explaining:

Despite the state court's holding in *Whisner*, no federal court has similarly suggested that wholly secular limitations on private school education implicate a fundamental right warranting strict scrutiny...Even assuming that *Whisner* states a correct proposition, we are not persuaded that the testing required by § 3301.16 effectively eradicates the difference between public and private schools...[T]he NGPT requirement places minimal limitations on private schools' latitude to operate independently...Moreover, the material tested is already required to be taught by state minimum standards which plaintiffs do not contest.⁵⁶

The First Amendment claim stated by the plaintiffs was not one of religious freedom or entanglement but of their right to freedom of speech and association. The plaintiffs argued the testing requirement impermissibly forced them to alter their school calendar and curricula. Again, the court disagreed, stating the First Amendment claim was without merit.

This ruling vindicated Ohio education officials. John Goff issued a written statement after the decision was handed down, stating: "Our ultimate goal is to ensure that every student graduates from high school and is ready to enter higher education or to get a job."⁵⁷

It was suggested that the nonpublic schools could solve their dilemma by relinquishing their charters, although they would also lose the funds and services provided them by the state. Mr. Raushenbush replied that giving up the charters was not a viable option but that "his member schools would gladly give up the funding if they could also get out of the tests."⁵⁸

Auxiliary Services

- The auxiliary services provision of the Ohio Revised Code authorizes various forms of public assistance to nonpublic school students. Among those services are loaning textbooks to eligible nonpublic school students, securing certain therapeutic and diagnostic services, and purchasing computer software and math and science materials. The state bears the full cost of these services up to a maximum allotment per pupil.

This statute has been providing assistance to chartered nonpublic schools for more than twenty years. It may be recalled that it was the focus of a 1977 United States Supreme Court decision in *Wolman v. Walter*.⁵⁹ Details of the lawsuit are provided in Chapter Two.

Administrative Cost Reimbursement

This statute reimburses each chartered nonpublic school for the actual service and clerical costs incurred while complying with mandated administrative duties. Examples of such duties include preparing, maintaining, and filing reports, forms, and records that may be required by state or local authorities. Each school completes a simple form attesting to its expenditures. There are no other provisions for verification of these expenditures.

This law is the only one that authorizes funds to be reimbursed directly to the nonpublic schools. All other reimbursements flow through the local public school districts in which the nonpublic schools are located.

Although public school districts are, in effect, delegated with the responsibility of overseeing the proper expenditure of public funds in support of nonpublic school students, they do not always do so. In 1993, the Ohio Department of Education discovered Youngstown School District was allowing some Catholic schools to use tax dollars to purchase copy machines, paper, and computers for church offices.⁶⁰ Expending public funds for sectarian purposes is a clear violation of all statutes that provide aid to nonpublic school students.

Mobile Unit Replacement Program

This program is administered by the Division of School Finance and is designed to replace mobile units that are in poor repair. These units are used by auxiliary service personnel who provide those guidance and therapeutic services that cannot be delivered on sectarian school grounds. The full cost of the unit is paid for by the state and the local educational authority acts as the fiscal agent.

Transportation Operations

Ohio began providing bus transportation for nonpublic school students in 1966. The state requires localities to provide transportation for all eligible nonpublic elementary school children who live beyond a certain radius from their schools. It is an optional service for private high school students. The state bears the cost of replacing old buses used in transporting nonpublic school children, but only reimburses about 30 percent of the actual operating costs. The localities are expected to absorb the remaining costs. A

provision is made for parental reimbursement if it is ascertained that public transportation cannot be provided at a reasonable cost or within a reasonable distance.

Grants and Tax Credits

Ohio enacted legislation that provided grants to parents to subsidize part of the tuition cost of private education, but in 1972 the Supreme Court upheld without written opinion a federal district court decision to strike down the law. In *Essex v. Wolman*⁶¹ the Court affirmed the lower court decision that the parent-reimbursement program had secular purpose but “fosters an excessive government entanglement with religion by transferring public funds to religiously oriented private schools in violation of the establishment clause.”⁶²

Approximately two months following the decision, the Ohio legislature passed a tuition tax credit law that failed under constitutional challenge in *Wolman v. Kosydar*.⁶³ The statute granted a tax credit to parents for expenses in excess of those borne by parents generally. The tax law had provisions for public school parents with special needs children, but the beneficiaries of the legislation were primarily nonpublic school parents. District Court declined to make the distinction between direct and indirect tax benefits, so the statute was ruled infirm.

Cleveland Project Scholarship Program

In 1995 the Ohio General Assembly enacted legislation that would provide 2,000 low-income families in the Cleveland City School District with vouchers to help pay for

tuition at schools parents choose to enroll their children, including religiously affiliated schools. The vouchers are designed to cover from 75 to 90 percent of the cost of tuition up to a maximum value of \$2,500. Families taking part in the program are expected to pick up the remaining tuition costs, if any. Private schools voluntarily participate in the program and agree to charge no more than ten percent of the value of the voucher in additional tuition.

Public schools in adjacent districts are eligible to participate, but none have indicated an interest. They complain the vouchers do not cover the cost of educating scholarship participants in their schools.

An article in *Education Week* reported that 6,200 families applied to the program.⁶⁴ Eligibility was restricted to low-income families and to children in kindergarten through third grade. Families chosen to participate were selected by lottery. Children already matriculated in private schools may also participate, however no more than 50 percent of the vouchers could be allotted them.⁶⁵

If scholarship families choose nonpublic schools for their children, checks are made out in their names but are sent to the nonpublic schools. The families then complete a release form which specifies the payment schedule and acknowledges that the checks will be endorsed by the parents as payable only to the nonpublic school of their choice. If a public school were to participate and be chosen, the funds would be forwarded directly to them. Payments are made in four installments.

The program has its critics. One Cleveland public school teacher labeled vouchers as “society’s attempt to run away from the problem of providing quality education for all children.”⁶⁶ Ron Marec, president of the Ohio Federation of Teachers, indicated that the funds being used to finance the pilot project, estimated to be \$5.25 million this first year, comes from a state budget item for disadvantaged students in the Cleveland system. State officials say, though, the district still counts the voucher students in their enrollment and that the formula used to calculate funding for disadvantaged students “has been adjusted upward so the district won’t lose money *this year*.”⁶⁷

The pilot project is currently being litigated. In the lawsuit’s initial hearing, the Franklin Common Pleas Court consolidated the two original cases, *Gatton v. Goff*⁶⁸ and *Simmons-Harris v. Goff*.⁶⁹ The court judged the statute constitutionally sound because it was designed to meet the guidelines set forth in *Nyquist*.⁷⁰

“R.C. 3313.974 through 3313.979 is obviously intended to fall within the explicit reservation set out the Supreme court in *Nyquist*. The scholarships are available without respect to the sectarian or nonsectarian nature of the schools benefited...[T]he scholarships are awarded without regard to the public or nonpublic nature of the schools.”⁷¹

The court continued by saying that the program did not provide for direct aid because “the school gains no control over the funds...because the school does not actually receive the fund until the check has been endorsed over to the school by the parent.”⁷² The court also held that the state constitution protections were no more extensive than

those of the First Amendment in United States Constitution, and therefore the court rejected the state constitutional argument.

The case is currently before the appeals court in Columbus. Legal arguments were held in February, 1997. A decision is not expected for several months.

Funding and Free Exercise

The jurisprudence is there but it remains unclear how the Establishment and Free Exercise Clauses can be used both to keep public authority out of religiously affiliated schools and to allow public money in. On one hand, sectarian educational institutions argue their religious mission requires separation of church and state. They properly resist oversight of the schools' functions beyond what is required to protect the state's interest in an appropriate education for and the welfare of the children who attend such schools.

On the other hand, religiously affiliated schools plead secular purpose and public service when asking for public funding. As put forth in their justifications, the administrative responsibility for advancing the religious mission can be segregated from the secular task of daily academic instruction. Justices who join in majority opinions that favor public assistance to parents who have children enrolled in private schools have not questioned this assertion.

An Ohio case that reflects the complexities and contradictions inherent in the relationship of church and state is *Dayton Christian Schools v. Ohio Civil Rights Commission*.⁷³ Although the case does not center on funding issues, it does reveal the

interwovenness of religious mission, governance, and the role of the teacher as the paragon of the church's dogma. It also illustrates the competing interests of church and state; in this case, the church's right to administer its educational institutions pursuant to its religious creed and the state's compelling interest in protecting against discrimination.

Dayton Christian Schools required its teachers to subscribe to a particular religious doctrine, the characteristics of which were contained in the "Statement of Faith." This doctrine was included in the nonprofit corporation charter and was incorporated, in part, in the contractual agreement between the board of directors and each teacher. As a part of this agreement, teachers agreed to abide by the "Biblical chain of command." In essence this meant that any grievance would be resolved internally and teachers would be expected to "acquiesce in the final authority of Dayton's board of directors."⁷⁴

Linda Hoskinson was employed as a teacher at Dayton. When she became pregnant, she was notified that she would not be rehired the following year because Dayton's religious doctrine required mothers to remain at home with preschool age children. She retained an attorney who advised the board of directors that such action constituted sex discrimination and unless the school rescinded its decision, he would file a complaint.⁷⁵

The board responded by firing Ms. Hoskinson, claiming she had not followed the Biblical chain of command and, therefore, had violated church tenets. Ms. Hoskinson's lawyer filed a complaint with the Ohio Civil Rights Commission alleging sex

discrimination and retaliatory firing. The Commission preceded with its investigation and eventually ascertained that Dayton Christian Schools probably had violated Ms. Hoskinson's rights.

While the investigation was in progress, Dayton Christian Schools filed suit in federal court under 42 U.S.C. § 1983, requesting a permanent injunction against the commission's proceedings. Dayton Christian Schools claimed the state's action was in violation of both the Free Exercise and Establishment Clauses of the First Amendment. The district court rejected the constitutional claims, but the Sixth Circuit reversed on both. The United States Supreme Court overturned the Sixth Circuit, stating that they "have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities."⁷⁶ The court referred to *Yoder*⁷⁷ and affirmed that religious schools cannot expect to be completely free from state regulation.

This case illustrates the difficulties of separating religious from secular functions and promoting public purpose, particularly if it conflicts with church doctrine in church affiliated schools. Dayton Christian Schools expected teachers to model the tenets of the church. Ms. Hoskinson, upon becoming pregnant, was to relinquish her job and stay home to care for her child. She was expected to accept the decision of the board and, if she did not, appeal it within the internal administrative structure of the school. When she choose to exercise her civil rights and pursue a claim against the school, she was fired.

Both board decisions - not renewing her contract, then subsequently firing her - were applications of religious doctrine and were highly visible to her students. The administrative actions were concrete examples of how applying religious doctrine reaches into the classroom.

A policy requiring teachers to follow the “Biblical chain of command” brings into question how such an administrative structure promotes public purpose. A fundamental public purpose of education is inculcating democratic principles and teaching students how to pursue and protect their rights in a democratic society. Requiring all school employees to submit to a unilateral decision-making process based on a religious doctrine that states that “one Christian should not take another Christian into courts of the State”⁷⁸ does not promote democratic principles. (It would be interesting to know if a similar clause is in the student and parent handbook.)

A teacher is the most important instructional element in a school. The permeation of religious doctrine throughout a school’s infrastructure and its effect on teachers, as illustrated in *Dayton*, begs the question, how can a religiously affiliated school claim separation of religious and secular functions under such circumstances? It seems equally paradoxical that a religious organization that does not subscribe to the basic civil rights protections of a democratic government would readily accept money from the same government.

Government regulation of and public aid to nonpublic schools remain front burner issues in Ohio even after nearly 95 years of statehood. Over the years, Ohio has demonstrated great enterprise in devising funding legislation that would benefit private schools. In return, it requires a certain level of compliance from private schools in promoting its interests in providing an adequate educational program, a safe environment in which children can learn, and protection for students against discriminatory practices.

Recent trends in Supreme Court jurisprudence have aided Ohio's endeavors, though the voucher program may push the limits of constitutionality. In the meanwhile, state legislators continue to seek new avenues. An Ohio lawmaker successfully attached an appropriation to a capital-construction bill that would have provided \$500,000 to a historic Roman Catholic school in his district. The Toledo-area legislator only agreed to support the state capital appropriations bill if the Holy Trinity Elementary School received money to help it remodel its buildings. The appropriation made it all the way to the governor's desk before the Republican representative requested the governor use his line item veto to remove it. This came only after the Department of Education questioned the constitutionality of the funding and, perhaps more importantly, the legislator was the target of public criticism.⁷⁹

Competing Public School Funding Issues

Arguments in support of public assistance to Ohio's nonpublic school students should be contrasted with the realities facing Ohio's public school students. In a recent Congressional Quarterly report Ohio is ranked 32nd among states in per-capita spending for public education, which is down from 24th six years ago. Directing state money to support 240,000 nonpublic school students while 1.8 million remain in public schools that are, with few exceptions, underfunded or inequitably funded might be considered by some to be questionable educational policy.

Funding Equity

It is within the purview of the Ohio General Assembly to "make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."⁸⁰ Its competency in adequately executing its mandate has been disputed a number of times in court.

The centerpiece of equity litigation is the state funding formula. Simply put, the formula is usually a mathematical manipulation designed to distribute state resources to each of the public school districts in a manner that reflects the number, grade level, and needs of students. It *guarantees* a minimal level of funding that has been determined as necessary to provide a basic level of education for children throughout the state. This basic level of program is represented by a dollar figure per pupil to which both the state

and local school district contribute. The formula requires a uniform level of fiscal effort by each district. The state then contributes the difference between the funds the school district generates and the minimum amount guaranteed by the state. The formula usually includes a second calculation that contains variables representative of students whose educational needs are beyond what the basic program can provide.

Individual school districts are free to generate additional funds through increased property taxation, which becomes the source of disparity in educational opportunity for children. Wealthy school districts are able to fund an education program that is significantly better than that which can be provided by the minimum guaranteed amount. Property poor areas have difficulty raising the revenue necessary to provide for more than what the state has figured as the cost of a basic education. To raise additional funds, these poorer districts have to tax at a much higher rate than what is necessary in wealthier districts. These differences in capacity to generate revenues result in a disparity in educational opportunity for the children. The quality of education available to a child becomes a function of where the child lives.

The equity debate, therefore, focuses on the roles of the state and locality in funding public education. Those searching to minimize the disparity in educational opportunity argue that greater state participation in funding education will result in a more equitable distribution of resources and, therefore, a more equitable educational system. Those on the other side of the debate claim that the level of educational program

should be determined by the locality and such control should not be relinquished to the state.

Ohio's state system of funding education is currently under court scrutiny, although it is not the first time. In 1979, in *Board of Education v. Walter*,⁸¹ Cincinnati's parents, school board, superintendent, and students challenged the state's funding formula which, at that time, was a guaranteed yield formula.⁸² The plaintiffs claimed the formula was unconstitutional under the equal protection and benefit clause⁸³ and under the common school fund clause⁸⁴ of the Ohio constitution for depriving them of their fundamental right to an education. (See Appendix A for the full text of the clauses.)

The Ohio Supreme Court deflected the focus of the case from a question of the fundamental right to an education to "issues of taxation, fiscal planning, and educational policy."⁸⁵ By doing so, the court needed only to apply the *rational basis*⁸⁶ analysis instead of the *strict scrutiny*⁸⁷ test that would have been required if education had been ruled a fundamental right under the Ohio constitution.

The funding formula was found constitutionally sound because the court concluded that "local control provides a rational basis supporting the disparity in per pupil expenditures in Ohio's school districts." The court defined local control as "not only the freedom to devote more money to the education of one's children but also control over and participation in the decision-making process as to how those local tax dollars are to be spent."⁸⁸

Morris Hawk describes the decision in the *Walter* case “a curious opinion”

because the court “decided the case without ever deciding the issues.” He explains that:

[T]he court failed to determine whether education was a fundamental right and failed, as well, to establish any test of fundamentality for Ohio constitutional provisions. As for the “thorough and efficient” claim, the court set forth a standard that comported with the language of the “thorough and efficient” clause, but decided the issue on its own facts, not the trial court’s findings.⁸⁹

Recent litigation has brought the unresolved complaints iterated in *Walter* back into the courtroom. In *DeRolph v. State of Ohio*⁹⁰ plaintiffs charge that the state funding formula is unconstitutional under a number of clauses of the Ohio constitution, including the two clauses, Article I, section 2 and Article VI, section 2, used to challenge the formula in *Walter*. The plaintiffs are 500 school districts which have joined the Ohio Coalition for Equity and Adequacy of School Funding. The coalition filed the original suit in 1991.

The *DeRolph* trial court judged Ohio’s current system of funding public elementary and secondary education through local property taxes as “inequitable, inadequate and unconstitutional.”⁹¹ The court ruled that the current method of educational funding created educational inequities for students in poor districts, depriving them of a fundamental right to education and, therefore, denying them equal protection under the law. The court further stipulated that because the state had not remedied these inequities, it had failed in its constitutional mandate to provide a “thorough and efficient system of common schools.”

The State Board of Education had not intended to appeal the decision of the trial court, but Governor Voinovich directed it to do so. The 5th District Court of Appeals overturned the trial court's ruling, chastising the lower court for ignoring the rule of law established in *Walter*:

Although the Perry County Court of Common Pleas cited various other aspects of the Ohio Constitution that it deemed this legislation violated, nevertheless those two issues appear most basic to this analysis. We find that the facts found by the trial court, excluding conclusions included as findings of fact by the court, do not rise to the level of overcoming the ruling in the *Walter* case.⁹²

Judge W. Don Reader filed a separate opinion, using the opportunity to comment on the interrelationship between the plaintiffs and the defendants and to state the court's deference to the legislature in resolving these issues.

[A]n examination of testimony by defense witnesses in this case would indicate that these witnesses stated that the system of funding was immoral and inequitable. If there was ever a case where the parties acted more in concert than this one, I haven't seen it. It is like asking the fox how many hens do you want...The General Assembly of Ohio is the proper forum for solving the problem of insufficient funding...The taxpayers of this state should rise up in righteous indignation and tell all the parties in this case to take their truckloads of paper and solutions if any, to where it would do the most good--the General Assembly of the State of Ohio.⁹³

Judge W. Scott Gwin wrote a separate opinion in which he concurred in part and dissented in part. He disagreed with the majority that the court was not the proper forum for challenging the constitutionality of legislation. He also noted that the current funding system had forced some school districts into a pattern of borrowing against the coming year's revenues, driving them into deeper indebtedness each year. He also reviewed the

trial court's findings that the Classroom Facilities Act was seriously underfunded.

Schools "generally do not meet, and cannot meet state and federal provisions aimed at removing dangerous asbestos and making the school buildings handicap accessible."⁹⁴ His observations provide an appropriate lead in to the next significant challenge facing Ohio's public schools, the poor condition of school facilities statewide in Ohio.

School Facilities

The United States General Accounting Office published a 1996 document entitled "School Facilities: Profiles of School Condition by State" in which it reported that 95 percent of Ohio's schools indicated a need to upgrade or repair on-site buildings to good overall condition. Sixty-one percent of the schools admitted that at least one on-site building was in inadequate condition. The publication also noted that Ohio only spent \$68.6 million, or \$38 per pupil, on K-12 school facilities for the 1993-94 school year.⁹⁵

This report compliments a similar one released in 1990 from the Ohio Department of Education. The study surveyed the facility needs of 3,643 schools from which it was estimated that \$10 billion was required to bring existing schools up to good working condition. Of that sum, \$3.2 billion would be needed to replace buildings that are beyond repair and \$6.8 billion would be used to bring schools up to the building code. The previous year the legislature had responded to inspectors' threats to close some schools because of multiple code violations by exempting schools from parts of the building code.⁹⁶

In January of 1991, a special legislative committee recommended the formation of a special task force to address the issue of school facilities, saying the existing repair program was inadequate. In June, the legislature chose instead to reduce expenditures for repairs. Only in the past two years has the governor begun to express concern about the conditions under which children are expected to learn, promising to lobby for a constitutional amendment that would provide \$1 billion dollars over the next decade for school repairs and construction. At that rate, his critics complain, schools will be up to code in about a century's time.

Cleveland City Schools

Cleveland City School District has been plagued with financial and social ills for a number of years. In 1976 the district and the State Board of Education were found liable for "intentionally and deliberately operating a racially dual public school system in Cleveland." The decision was upheld through all appeals and both entities were held responsible for "implementing a remedy to eliminate all vestiges of unconstitutional segregation in Cleveland public school district."⁹⁷

In 1995, by federal court order, the state took stewardship of the Cleveland City School District after U.S. Circuit Judge Robert Krupansky, who was presiding over the district's desegregation case at the time, declared the urban school system to be in a "state of crisis."⁹⁸ He cited internal dissension, mismanagement, and a budget deficit that was edging the district toward bankruptcy were conspiring to undermine the district's ability

to provide an adequate education to Cleveland's 74,000 public school children. His order also included instructions to the school board to identify and close at least 14 schools that were considered beyond repair and to prepare a tax levy proposal to put before the voters.

In these two years since the State Board of Education has assumed control, the district narrowly has averted an acrimonious teacher strike, has struggled with a steady decline in student achievement, and has lost several school board members who cited frustration with their diminished role. On a positive note, the city gained voter approval for a property tax increase, the first since 1983. The tax increase should help relieve some of the financial pressure created by the \$152 million debt. Recently, there has been discussion about placing control of the city school district with Cleveland's mayor, Richard White, in an effort to increase community support of the schools.

It was no coincidence, then, that Cleveland was targeted for the incipient pilot scholarship program which was implemented this school year, 1996-97. The rationale was offered that the city's low-income students, those most affected by the poor condition of the schools, could benefit educationally by being given an opportunity to enter a private school. Critics argue that the program serves only 2,000 students, diverts precious resources to private schools, and offers no long term strategy for aiding the 72,000 students who remain in the public schools.

In his January, 1997, State of the State address to the General Assembly, Governor Voinovich outlined his priorities for the coming legislative year. He claimed his to be the first administration “in Ohio history to take decisive action to close the equity gap between our low- and high-wealth schools districts.”⁹⁹ He said that between Fiscal Year 1991 and the current fiscal year, state per-pupil appropriations to low-wealth district increased 31 percent while those to the wealthiest districts grew on 5.7 percent.

The governor proposed allocating \$300 million for improving school facilities, \$200 million of which will be directed to the 60 lowest-wealth districts and the remaining \$100 million to the eight largest urban districts. He also wants to use \$30 million in “excess” lottery funds toward the state’s technology initiative, SchoolNet. This program helps schools with wiring problems they have encountered as they retrofit their buildings for technology.

While praising the legislature for holding schools accountable for performance, commenting that the October proficiency test results as the “best ever,” the governor acknowledged that the urban graduation rate was down to 35 percent in the six largest districts. Voinovich noted that three-quarters of prisoners in Ohio jails are high school dropouts and admitted that the corrections budget has grown from \$479 million in Fiscal Year 1991 to a projected \$1.2 billion by Fiscal Year 1999, a 149 percent increase. His response to those crippling figures was to suggest expanding kindergarten programs in urban settings to full day schedules, to increase the Cleveland Pilot Project Scholarship

Program by adding a kindergarten class each year, and to fund a pilot charter school program in Lucas County.

While the state is responsible for providing educational opportunity for *all* children, the constitutionally mandated process for doing so is “for the organization, administration and control of the public school system of the state supported by public funds.”¹⁰⁰ Whether the State of Ohio has fulfilled satisfactorily its obligation in this regard is the question that public school advocates ask when they see time, money and energy detoured to nonpublic schools. Governor Voinovich’s State of the State address suggests, though, that this diversion of human and fiscal resources will continue under his administration.

Chapter Three Endnotes

¹ Governor Samual Huntington, Address to the Legislature, Ohio, 1810. Quoted in Andrew Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* (Kent: The Kent State University Press, 1986), 142-143.

² R. Freeman Butts, *American Tradition in Religion and Education* (Westport: Greenwood Press, 1950), 26. Butts defines multiple establishment as an attempt by some colonies to allow "greater free exercise by granting financial, legal, and moral support by the state to several groups rather than to a single religious group."

³ Madison's letter is quoted in Butts, p. 70. He took the letter (Letter to James Monroe, May 29, 1785) from a collection edited by Gaillard Hunt, *Writings of James Madison*, II, p.145.

⁴ Butts, p. 70-1.

⁵ Edward Alanson Miller, *The History of Educational Legislation in Ohio from 1803 to 1850* (New York: Arno Press, 1969), 1; James J. Burns, *Educational History of Ohio* (Columbus: Historical Publishing Co., 1905), 301.

⁶ Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (New York: Hill and Wang, 1983), 184; Miller, p. 5.

⁷ Cayton, p. 142; Kaestle, p. 184.

⁸ Kaestle, p. 184.

⁹ Miller, p. 2-3; James J. Burns, p. 302; Burns cites the diversity represented at the first constitutional convention: "Of the forty-seven members of the convention that framed the first constitution of Ohio, eight were from New England, nine were from New Jersey and New York, though from the State last named Ohio's first state school law was in the main imported...Sixteen of those members were from Pennsylvania, Virginia, and Kentucky; and it would be irrational to suppose that the many thousands of people whom they represented had left behind them the old home notions about the way to educate their children."

¹⁰ Cayton, p. 14-16; He provides a more thorough discussion on Rush's belief, a common one among the enlightened in the late 18th century, that environment greatly influenced human character. Rush wrote an essay detailing his theory of the three phases of frontier

settlement as they are represented by the people who inhabit the region during a particular phase. His analysis was based on observations of Pennsylvania's stages of settlement.

¹¹ Cayton, p. 15.

¹² *Ibid.*, p. 15.

¹³ *Ibid.*, p. 31.

¹⁴ See Cayton, p. 33-80; He describes the tension created by Federalists in their attempts to exert national government authority over the Northwest Territory. It acted as a catalyst to bring diverse groups together long enough to acquire Ohio statehood; Miller, p. 1-2; Miller also describes the antagonism toward central government.

¹⁵ Miller, p. 114.

¹⁶ Miller, p. 119-178; He cites all education legislation enacted from 1803-1850, which is listed in Appendix A.

¹⁷ Miller, p. 25.

¹⁸ Constitution of the State of Ohio, Article VI. Education, § 1. Funds for educational and religious purposes.

¹⁹ Most of the funds from the sale of school lands had been used to build canals, creating an irreducible state debt. See Francis R. Aumann and Harvey Walker, *The Government and Administration of Ohio*, American Commonwealth Series, W. Brooke Graves, ed., (New York: Thomas Y. Crowell Company, 1978), 223.

²⁰ Kaestle, p. 187.

²¹ Aumann and Walker, p. 225.

²² Constitution of the State of Ohio, Article VI. Education, § 2. Common school fund.

²³ Aumann and Walker, p. 226; Quote taken from the Ohio School Survey Commission, *Equalizing Educational Opportunity in Ohio* (Columbus, 1932), 6.

²⁴ O.R.C. § 3301.0714.

²⁵ Ohio Department of Education, *Ohio Information Management System*, September 1996, Online: http://www.ode.ohio.gov/www/ims/emis_docs.html; accessed October 1996.

²⁶ The home page for the Ohio Department of Education is <http://www.ode.ohio.gov/> From there one can access several other sites that display the aforementioned data.

²⁷ Rev. James A. Burns, *The Growth and Development of the Catholic School System in the United States* (New York: Arno Press, 1969), 63-96 and 294-310; Walter H. Beck, *Lutheran Elementary Schools in the United States* (St. Louis: Concordia Publishing House, 1965), 85-95.

²⁸ Lewis Joseph Sherrill, *Presbyterian Parochial Schools, 1846-1870* (New York: Arno Press, 1969, reissued), 69-89.

²⁹ The resolution read: "*Resolved*, That religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the common-school fund; Butts, p. 138.

³⁰ *Board of Education v. Minor*, 23 Ohio 211 (1872).

³¹ Article I. Bill of Rights, § 7 Rights of conscience; the necessity of religion and knowledge.

³² 23 Ohio 211, at 248-254. R. Freeman Butts provides a more detailed analysis of the decision, p. 138-141.

³³ McCluskey, *Catholic Education*, p. 61-62; Rev. James A. Burns, *Growth of Catholic Schools*, p. 253-269.

³⁴ The teachers were the Sisters of Charity, the very same who had taught in the two schools prior to the new arrangements. They became public school employees under the terms of the agreement; Rev. James A. Burns, *Growth of the Catholic Schools*, p. 256 and 257.

³⁵ McCluskey, p. 89-106; Rev. James A. Burns, p. 217-247; The school controversy arose as a result of a perceived conflict between those who supported accommodation with civil government in education and those who believed that civil government should have no authority over Catholic parochial schools.

³⁶ Skinner's decision to terminate the contract is quoted in Rev. James A. Burns, p. 266.

³⁷ Refer to the description of the Faribault Plan implemented in Stillwater and Faribault, Minnesota, in Rev. James A. Burns, p. 258-265; McCluskey, p. 61-62.

³⁸ Butts, p. 181-184.

³⁹ As reported by Doug Oplinger and Dennis Willard, "Rival for Dollars," *Akron Beacon Journal* (July 21, 1996):A1+.

⁴⁰ Student Development Division, Equity Assurance and Compliance Section, "Racial Nondiscriminatory Compliance Rules," Ohio Department of Education, revised October, 1994.

⁴¹ Ohio Department of Education, *Ohio Educational Directory, School Year 1995-96*, inside back cover.

⁴² National Center for Education Statistics, *Schools and Staffing in the United States: A Statistical Profile, 1993-94*, Table 2.1 (Washington, D.C.: U.S. printing Office, 1996), 22.

⁴³ Data on nonchartered schools was provided by telephone and e-mail communication with John Rothwell from the Standards and Evaluation section of the Division of Assessment and Evaluation in March, 1997.

⁴⁴ 351 N.E.2d 750 (1976).

⁴⁵ 415 N.E.2d 279 (1980).

⁴⁶ 351 N.E.2d 750, at 752 (court syllabus).

⁴⁷ See generally David M. Smolin, "State Regulation of Private Education: Ohio Law in the Shadow of the United States Supreme Court Decisions," *Univ. of Cincinnati Law Rev.* 54(1986):1013-1019 for a more thorough analysis of the issues.

⁴⁸ 415 N.E.2d 279.

⁴⁹ 406 U.S. 205 (1972). The United States Supreme Court ruled that the Amish did not have to comply with Wisconsin's compulsory attendance laws and could withdraw their children after completing the eighth grade. The Court recognized the Amish had a history of truly held religious beliefs that included vocational and cultural traditions, one of which required their children to remain with the community after the eighth grade in order to learn the skills and trades needed to maintain the community. The Court determined that Wisconsin could not adequately provide a compelling reason why the compulsory education laws would take precedence over the right of religious freedom by the Amish. The Court narrowly defined its decision, though, stating the Amish had a 300-year tradition that provided for the well being of their community and their children so they were never a burden to the State. The Court implied that this ruling may not serve other religious sects.

⁵⁰ 415 N.E.2d 279, at 288.

⁵¹ 92 F.3d 419 (6th Cir. 1996).

⁵² Laura Miller, "Ohio Private Schools Challenge Required Test," *Education Week* 15(November 1, 1995):18+.

⁵³ *Ibid.*, p. 18.

⁵⁴ 92 F.3d 419, at 423.

⁵⁵ 351 N.E.2d 750.

⁵⁶ 92 F.3d 419, at 423.

⁵⁷ Millicent Lawton, "Judge Upholds Ohio Test for Private Students," *Education Week* 15(February 7, 1996):11.

⁵⁸ Lawton, p. 11. On March 3, 1997, the United States Supreme Court refused without comment to hear an appeal by the Ohio Association of Independent Schools. Reported in an article written by Mark Walsh, "Ohio Private School Challenge to State Testing Law Rejected," *Education Week on the Web* (March 12, 1997) Online: <http://www.edweek.org>

⁵⁹ 433 U.S. 229 (1977).

⁶⁰ Oplinger and Willard, p. A11.

⁶¹ 406 U.S. 912 (1972).

⁶² *Ibid.*

⁶³ 353 F.Supp. 744 (S.D. Ohio 1972).

⁶⁴ Walsh, Mark, "Battle Wages Over Vouchers," *Education Week* 16(February 19, 1997):23.

⁶⁵ The *Education Week* article, "Battle Wages Over Vouchers," reported that only 25 percent of the scholarships could be set aside for students already enrolled in private schools at the time they apply for the scholarship program. However, the statute stipulates up to 50 percent of the vouchers can be used by existing private school children.

⁶⁶ Walsh, p. 23.

⁶⁷ Walsh, p. 23. Italics added.

⁶⁸ Case No. 96CVH01-0193 (Ohio Com.Pl. 1996).

⁶⁹ Case No. 96CVH01-721 (Ohio Com.Pl. 1996).

⁷⁰ 413 U.S. 756 (1973).

⁷¹ 1996 WL 466499, at 13 (Ohio Com.Pl. 1996).

⁷² *Ibid.*, at 14.

⁷³ 106 S.Ct. 2718 (1986).

⁷⁴ *Ibid.*, at 2718 (Court syllabus).

⁷⁵ *Ibid.*, at 2720-21.

⁷⁶ *Ibid.*, at 2723.

⁷⁷ 406 U.S. 205 (1972).

⁷⁸ 106 S.Ct. 2718, at 2720.

⁷⁹ News In Brief, "Never Mind," *Education Week on the Web* (June 19, 1996) Online: <http://www.edweek.org>; Oplinger and Willard, p. A11.

⁸⁰ Constitution of the State of Ohio, Article I., § 2.

⁸¹ 58 Ohio St.2d 368 (1979).

⁸² Morris Hawk, "As Perfect as Can Be Devised: DeRolph v. State of Ohio and the Right to Education in Ohio," *Case Western Reserve Law Rev.* 45(1995):680. Hawk provides and explanation of the issues involved in the *Walter* case. He includes a description of the guaranteed yield formula Ohio used at the time: "The guaranteed yield formula operated as follows. First, the local districts were required to levy a tax of at least 20 mills per dollar of taxable property valuation. The state would then guarantee each district funds sufficient to achieve a minimum property tax base of \$48,000 per pupil, which results in a minimum guaranteed of \$960 per pupil (\$48,000 x 20 mills). The state would also give districts a bonus for extra local millage between 20 and 30 mills." FN 21.

⁸³ Constitution of the State of Ohio, Article I, § 2.

⁸⁴ Constitution of the State of Ohio, Article VI, § 2.

⁸⁵ 58 Ohio St.2d 368, at 375.

⁸⁶ The *rational basis* test is explained in *Black's Law Dictionary* as: "As a standard of review for statutory enactments challenged on equal protection grounds, this test requires that classifications created by a state must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Under this test, an appellate court will not second-guess the legislature as to the wisdom or rationality of a particular statute if the challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective.

⁸⁷ *Strict scrutiny* is defined in *Black's Law Dictionary* as: "Under this test for determining if there has been a denial of equal protection, burden is on government to establish

necessity of the statutory classification. Measure which is found to affect adversely fundamental right will be subject to 'strict scrutiny' test which requires state to establish that it has compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose.

⁸⁸ 58 Ohio St.2d 368, at 377.

⁸⁹ Hawk, p. 679-680.

⁹⁰ 1995 WL 557316 (Ohio App. 5 Dist.).

⁹¹ "Court to Hear School Funding Case," Online:
<http://132.235.238.184/archives/011896/briefly/court.html>.

⁹² 1995 WL 557316, at 2.

⁹³ *Ibid.*, at 11-12.

⁹⁴ *Ibid.*, at 14.

⁹⁵ United States General Accounting Office, Health, Education, and Human Services Division, "State Profile: Ohio," *School Facilities: School Condition by State*, Report to Congress (June 14, 1996), Appendix XXXIX:143.

⁹⁶ Oplinger and Willard, p. A11.

⁹⁷ *Reed v. Rhodes*, 500 F.Supp. 404 (1980), at 404-5.

⁹⁸ Bradley, Ann, "Crisis Spurs State Takeover of Cleveland," *Education Week* 14(March 15, 1995):1+.

⁹⁹ George V. Voinovich, "State of the State Address," (January 14, 1997) Online:
<http://www.state.oh.us/gov/SOS97.html>.

¹⁰⁰ Constitution of the State of Ohio, Article I., § 3.

CHAPTER FOUR: SUMMARY AND ANALYSIS OF FINANCIAL DATA

It's time for results. It's time to get something out of our money...They have to do what everybody else has to. They have to restructure.¹

We're a bunch of flowers growing in a garbage can.²

Overview

This chapter centers on disaggregating state budgetary appropriations for public and nonpublic education in Ohio and on reporting the results of the financial analysis of the data. The objectives of the financial study were threefold: 1) to determine the total amount of state public funds allocated to nonpublic school students, 2) to calculate the "pure" fiscal effort Ohio has exerted over a six-year period, and 3) to analyze funding trends, if any, in public and nonpublic education in Ohio. For this reason, all education dollar totals used in this study are exclusive of federal and local funds, except in the calculation of the total transportation operations costs. Those figures include the local contribution and are designated as such.

The data collected and used in the analysis came from three sources. The total state expenditures for primary and secondary education and for each of the five disbursements stipulated by statute and made on behalf of nonpublic schools and their students for each of the six years under study were provided by the Assistant Director of

Policy Research and Analysis in the Ohio Department of Education.³ Public and nonpublic pupil enrollment and ethnicity data and the state total assessed valuation of property were obtained from databases available online and were accessed through the Ohio Department of Education web pages.⁴ Total nonpublic school student bus ridership for each of the six years came from a programmer/analyst with the Information Management Services, Ohio Department of Education.⁵ He also provided the total public and nonpublic ridership and the total transportation operations costs for FY 1993-1995. Total public and nonpublic ridership and total transportation operations costs for FY 1990-1992 were provided by the Assistant Director of Policy Research and Analysis.

The education dollars represent funds allocated from the general revenue fund and lottery profits for primary and secondary education. All dollar amounts used in the calculations and displayed in tables and graphs have been converted to constant dollars, using Fiscal Year 1993 as the base year. Fiscal Year 1993 was selected because it was one of the two years that represented the middle of the six years (FY 1990 - FY 1995) under study. The formula for converting current dollars to constant dollars is:

$$\frac{BaseYearCPI}{CurrentYearCPI} * CurrentYearDollars = BaseYearDollars . \text{CPI is the Consumer Price}$$

Index. The formula and indices were provided by a policy analyst with the National Education Association.⁶

Fiscal Years 1990 through 1995 represent the most recent audited data available at the time the study was initiated. The six-year span was thought to be sufficiently long to establish any funding trend that might emerge.

State Funds Allocated to Primary and Secondary Education

The total state aid allocated to education is comprised of basic and equity aid, categorical aid, real and tangible property tax rollback reimbursements, and funds designated for schools for the visually and hearing impaired. Table 1, “State of Ohio Funding for Primary and Secondary Education,” displays the dollars allotted for each of the six fiscal years, 1990-1995. Ohio has provided an average of \$4.28 billion (in 1993 dollars) over the period under study, with the allocations ranging from \$4.13 billion, appropriated in FY 1992, to \$4.37 billion, in FY 1995.

As is noted in the table, the figures accounted for, on the average, 35.6 percent of the total state budget. The percents ranged from 34.9 percent in FY 1992 to 36.4 percent in FY 1990. The annual rate of growth ranged from -0.7 percent in FY 1992 to 7.3 percent in FY 1993, with an average growth rate of 3.9 percent over the six-year period. These percentages are represented graphically in Chart 1, “State of Ohio Funding for Primary and Secondary Education for Fiscal Years 1990-1995.”

TABLE 1
STATE OF OHIO FUNDING FOR PRIMARY AND SECONDARY EDUCATION

State GRF and LPEF Expenditures
FY 1990 - FY 1995
(Constant Dollars in Millions)

Primary & Secondary Education	1990	1991	1992	1993	1994	1995
State Basic Aid & Equity Aid	\$2,223.9	\$2,214.3	\$2,158.0	\$2,251.2	\$2,226.4	\$2,242.5
Other Education	1,626.3	1,623.1	1,506.6	1,578.8	1,564.4	1,632.0
Real & Tangible Property Rollback	439.5	439.7	456.1	467.9	479.6	486.7
Schools for the Blind & Deaf	9.7	9.9	10.0	9.9	10.3	10.4
Total	\$4,299.3	\$4,286.9	\$4,130.8	\$4,307.8	\$4,280.7	\$4,371.7
% of State Budget	36.4%	35.9%	34.9%	35.6%	35.3%	35.3%
Annual Rate of Growth	5.6%	3.9%	-0.7%	7.3%	2.0%	5.0%

Notes:

1. State GRF is the State General Revenue Fund and LPEF is the Lottery Profits Education Fund.
2. Lottery profits are used to support Education and are included among the Education expenditures.
Annual Lottery Disbursements \$657.02 \$716.17
(Constant dollars in millions)
3. FY 1993 served as the base year for constant dollar conversion.

\$627.34

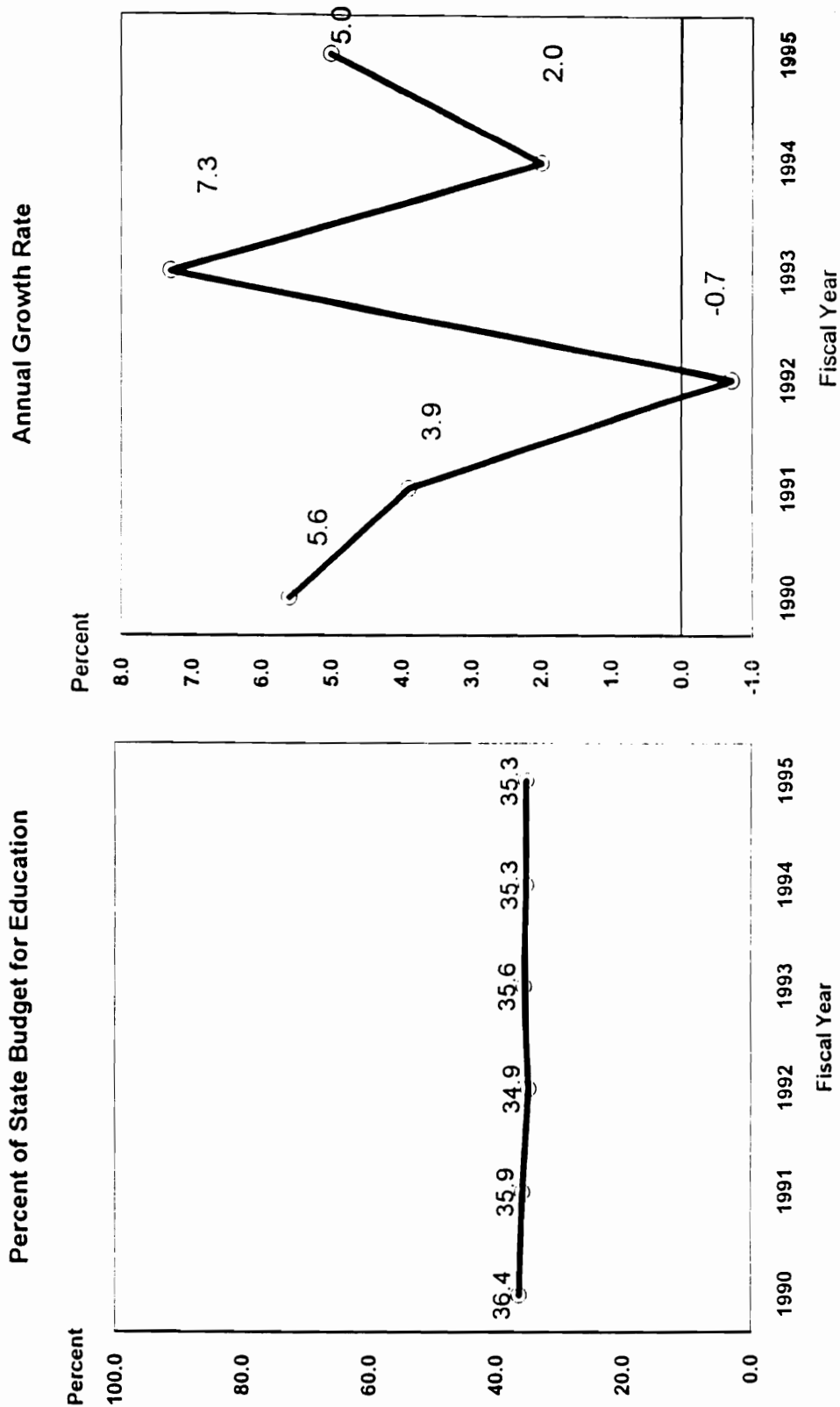
\$632.78

\$678.80

\$679.79

Chart 1

State of Ohio Funding for Primary and Secondary Education for Fiscal Years 1990-1995



State Funds Allocated to Nonpublic School Students

- There are five disbursements the state makes on behalf of nonpublic school students. Each is explained in the previous chapter, but for clarity will be reviewed briefly as the financial analysis proceeds.

Auxiliary Services

Auxiliary services is the largest funding component among the five listed in the study, representing an average of 65.8 percent of the total funds the state diverts to nonpublic schools. This category of aid to nonpublic school students covers a range of services (e.g., speech and hearing diagnostic and therapeutic services, medical, dental, and optometric services, and guidance and counseling services) and purchases (e.g., textbooks, computer software, and science and math equipment). Table 2, “State of Ohio Funding for Primary and Secondary Education, Nonpublic School Students,” itemizes each fiscal year’s expenditure for auxiliary services, which ranged from \$69.8 million to \$76.8 million and averaged \$74.8 million over the six years.

Administrative Cost Reimbursement

As stated in the previous chapter, this is the only aid that is paid directly to the nonpublic schools. This appropriation reimburses for actual costs incurred by the schools for complying with state mandated administrative tasks, including preparing, maintaining, and filing a variety of forms, reports and records. Each fiscal year’s amount represents the expense the nonpublic schools incurred that year. The schools did not receive payment

TABLE 2 **STATE OF OHIO FUNDING FOR PRIMARY AND SECONDARY EDUCATION** **NONPUBLIC SCHOOL STUDENTS**

State GRF and LPEF Expenditures
FY 1990 - FY 1995
 (Constant Dollars in Millions)

Nonpublic School Student Expenditures	1990	1991	1992	1993	1994	1995
Transportation Operations	\$15.6	\$15.8	\$13.2	\$14.7	\$14.2	\$14.3
Bus Purchases (estimate)	1.7	8.3	7.6	4.4	4.2	3.5
Auxiliary Services	75.3	76.8	69.8	75.8	75.0	76.1
Mobile Unit Replacement	1.7	1.3	0.7	0.5	0.3	0.7
Administrative Cost	16.2	16.5	16.9	16.8	17.0	28.9
Total	\$110.5	\$118.6	\$108.2	\$112.2	\$110.7	\$123.5
% of State Education Budget	2.6%	2.8%	2.6%	2.6%	2.6%	2.8%
 Transportation Operations (Local)*	 19.8	 21.2	 23.4	 28.4	 29.8	 30.0
Total	\$130.3	\$139.8	\$131.6	\$140.6	\$140.5	\$153.5

*Transportation Operations (Local) are expenditures public school districts absorb for the transportation of nonpublic school students.

Notes:

1. State GRF is the State General Revenue Fund and LPEF is the Lottery Profits Education Fund.
2. Lottery profits are used to support Education and are included among the Education expenditures.
 Annual Lottery Disbursements \$657.02 \$716.17 \$679.79 \$678.80 \$632.78 \$627.34
 (Constant dollars in millions)
3. FY 1993 served as the base year for constant dollar conversion.

until the following year because the reimbursement is based on actual costs, up to a maximum per pupil amount. The maximum per pupil is determined by the General Assembly when it appropriates funds for this line item.

The sums range from \$16.2 million in FY 1990 to \$28.9 million in FY 1995, although the latter figure is a considerably larger amount than those claimed in the other five years. (Refer to Table 2.) The large increase for FY 1995 can be explained by the 50 percent increase in the per pupil maximum, from \$100 to \$150, granted by the legislature for FY 1996. (As explained previously, the amounts claimed by nonpublic schools and shown in the table for FY 1995 were actually paid in FY 1996.)

According to Susan Tavakolian, Director of School Finance in the Ohio Department of Education, the maximum per pupil reimbursement is usually claimed.⁷ Chartered nonpublic schools complete a reimbursement form on which they declare their actual costs or the total maximum allowed by the per pupil cap, whichever is less. These statements are taken on faith and no other documentation is required. The increased appropriation for FY 1995, though, resulted in a \$4 million balance because nonpublic schools did not submit claims totaling \$150 per pupil. Private schools explained that if they had been allowed to state the full amount of their actual costs instead of what they understood to be the maximum amount allowable at the time they submitted the forms, they would have consumed the full appropriation allocated to administrative cost reimbursement line item.

Mobile Unit Replacement Costs

- Mobile units are used as sites for delivery of educational support services by public school employees to nonpublic school students that cannot be delivered legally on sectarian school grounds. Guidance and therapeutic services are examples of support services rendered in mobile units. As indicated in Table 2, the cost of replacing mobile units no longer suitable for repair ranged from \$0.3 million to \$1.7 million. The average cost over the six years was \$0.9 million.

Bus Purchases

Funds are allotted for the replacement of buses used to transport nonpublic school students. Public school districts own and operate the buses that transport nonpublic school students but the state reimburses the districts for the full replacement cost. It should be noted that the figures quoted here are estimates. In the state budget, allocations for purchasing buses for transporting nonpublic school students are mixed with that for purchasing buses for transporting special education students. Not separating the allocation for these bus purchases makes it difficult to ascertain the true expense incurred on behalf of nonpublic school students.

The estimates were arrived at by determining the ratio of nonpublic school students to special education students who are provided transportation and then calculating a proportional amount from the cost of purchasing buses for both groups. As

can be noted from Table 2, the cost varied from a low of \$1.7 million in FY 1990 to a high of \$8.3 million in FY 1991. The cost averaged over the six years was nearly \$5.0 million.

Transportation Operations

Transportation operations refers to that portion of the cost the state reimburses public school districts for transporting nonpublic school students. The portion the state reimburses, however, does not cover the full expense. The state government's goal has been to cover 50 percent of the cost, but has not met that goal successfully in the past decade.⁸

For the purpose of establishing an accurate estimate the full cost of transporting nonpublic school students, the total cost of transporting all students statewide, the total student ridership, and the nonpublic school student ridership were used to calculate the portion of the expense the public school districts were expected to cover. The ratio of nonpublic school students to total state ridership was computed, from which the nonpublic school student portion of the total transportation cost was calculated. Subtracting the state reimbursement from the pro rata cost provided an estimate of the expense to public school districts for transporting nonpublic school students.

For the period under study, the state reimbursed an average of \$14.6 million to public school districts for transporting nonpublic school students. The reimbursements ranged from \$13.2 million to \$15.8 million. Table 3A, "Total Transportation Operations Expenditures, Nonpublic School Students," provides a year-to-year account of the state's

Table 3A Total Transportation Operations Expenditures Nonpublic School Students

Combined State and Local Contributions
FY 1990 - FY 1995

Nonpublic School Student Expenditures	1990	1991	1992	1993	1994	1995
State Reimbursement*	\$15.6	\$15.8	\$13.2	\$14.7	\$14.2	\$14.3
Public School District Contribution*	19.8	21.2	23.4	28.4	29.8	30.0
Total *	35.4	37.0	36.6	43.1	44.0	44.3
% Public School District Contribution	55.9%	57.3%	63.9%	65.9%	67.7%	67.7%
% State Contribution	44.1%	42.7%	36.1%	34.1%	32.3%	32.3%
Nonpublic School Ridership	132,487	136,292	135,599	139,430	140,452	140,184
Per Pupil Cost (Total)	\$267	\$271	\$270	\$309	\$313	\$316
Per Pupil Cost (State)	118	116	97	105	101	102
Per Pupil Cost (Local)	149	156	173	204	212	214

Notes:

*Amounts quoted in constant dollars in millions.

Per pupil amounts may not sum correctly due to rounding.

expenditures for transportation costs, including per pupil expenditures and percentages. (Appendix B, Ohio Revised Code, sections 3327.01 and 3317.02.4 provides general parameters for calculating and reimbursing for transportation.)

Similar calculations were performed to derive the full cost of transporting public schools students. From these data, state and local percentages and per pupil costs for both groups were determined. The dollar figures are listed in Table 3B.

The state reimbursements averaged only 36.9 percent of the full cost of transporting nonpublic school students. Ohio public school districts absorbed the remaining expense, which was, accordingly, 63.1 percent of the cost over the six-year period.

The per pupil cost to the state for transporting nonpublic school students ranged from \$97 to \$118, averaging \$107 per pupil. The average cost per pupil for the public school districts was \$185, and ranged from \$149 to \$214. This brings the average total per pupil cost to \$291 for that six-year period. Chart 2, "State and Local Transportation Operations Expenditures for Nonpublic School Students, FY 1990-1995," provides a graphic depiction of the relative contributions of the state and local governments toward the cost of transporting nonpublic school students. Similarly, Chart 3 illustrates the state and local contributions toward the cost of transporting public school students. Chart 4 compares the per pupil expenditures for public and nonpublic school students.

Table 3B
Total Transportation Operations Expenditures
Public School Students

Combined State and Local Contributions
FY 1990 - FY 1995

Public School Student Expenditures	1990	1991	1992	1993	1994	1995
State Reimbursement*	\$116.4	\$114.8	\$97.4	\$100.5	\$99.9	\$100.7
Public School District Contribution*	191.4	200.9	216.9	262.9	269.7	274.4
Total *	307.8	315.7	314.3	363.4	369.6	375.1
% Public School District Contribution	62.2%	63.6%	69.0%	72.3%	73.0%	73.2%
% State Contribution	37.8%	36.4%	31.0%	27.7%	27.0%	26.8%
 Public School Ridership	 1,152,541	 1,162,880	 1,163,148	 1,176,676	 1,177,457	 1,186,159
Per Pupil Cost (Total)	\$267	\$271	\$270	\$309	\$314	\$316
Per Pupil Cost (State)	101	99	84	85	85	85
Per Pupil Cost (Local)	166	173	186	223	229	231

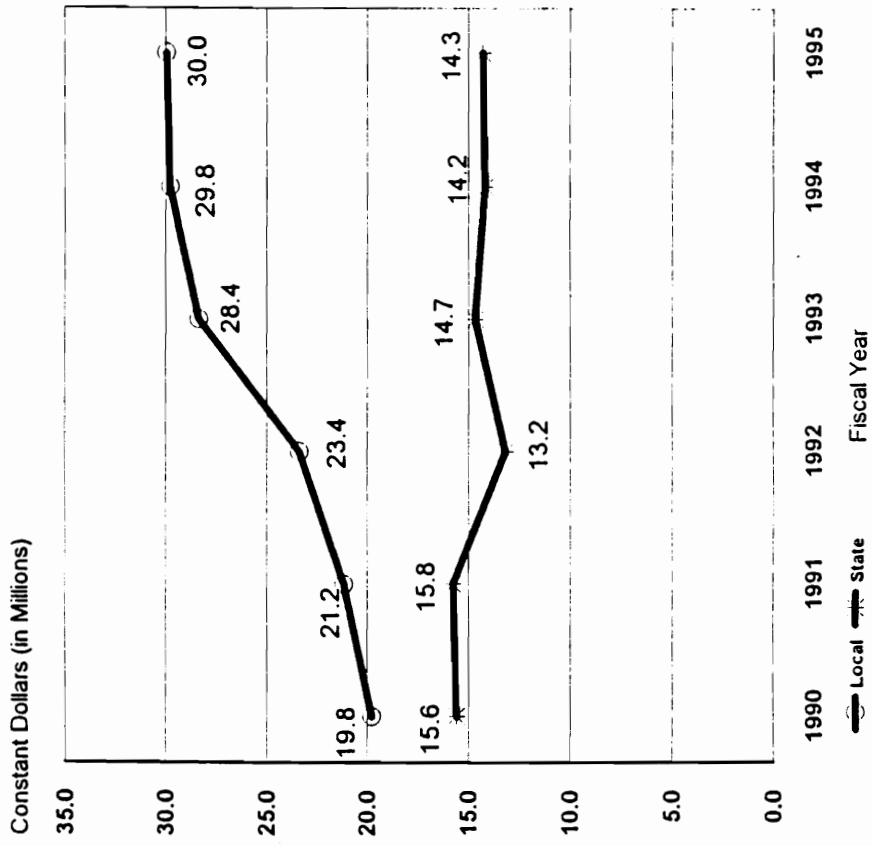
Notes:

*Amounts quoted in constant dollars in millions.

Per pupil amounts may not sum correctly due to rounding.

Chart 2 State and Local Transportation Operations Expenditures for Nonpublic School Students, FY 1990-1995

State and Local Contributions in Dollars



Percent Contribution by State and Local Government

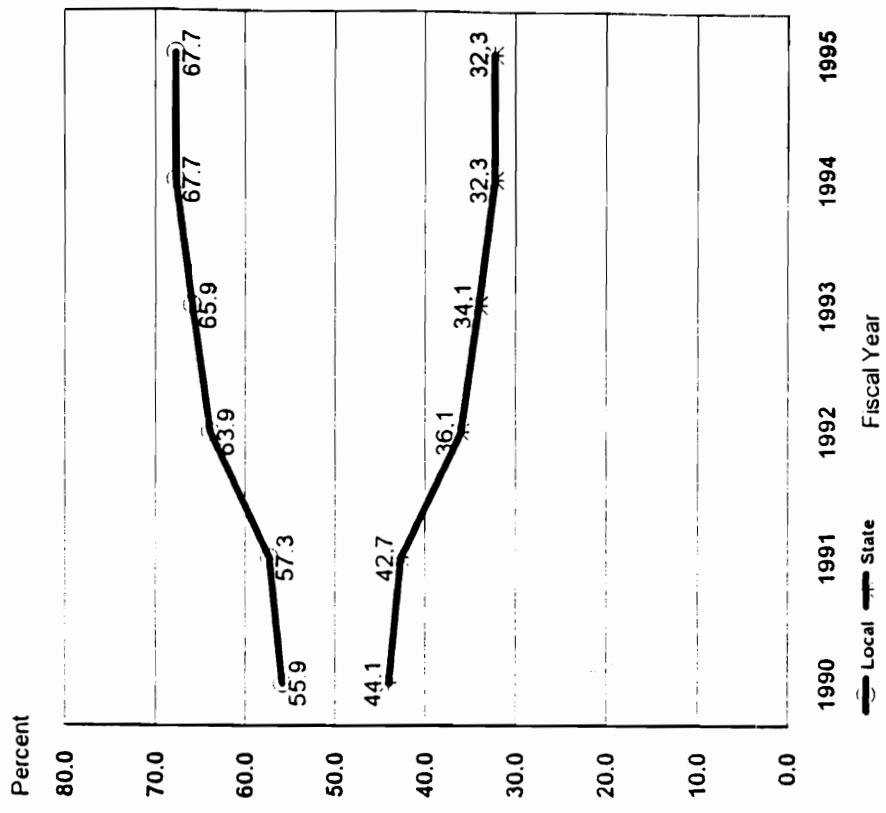


Chart 3 State and Local Transportation Operations Expenditures for Public School Students, FY 1990-1995

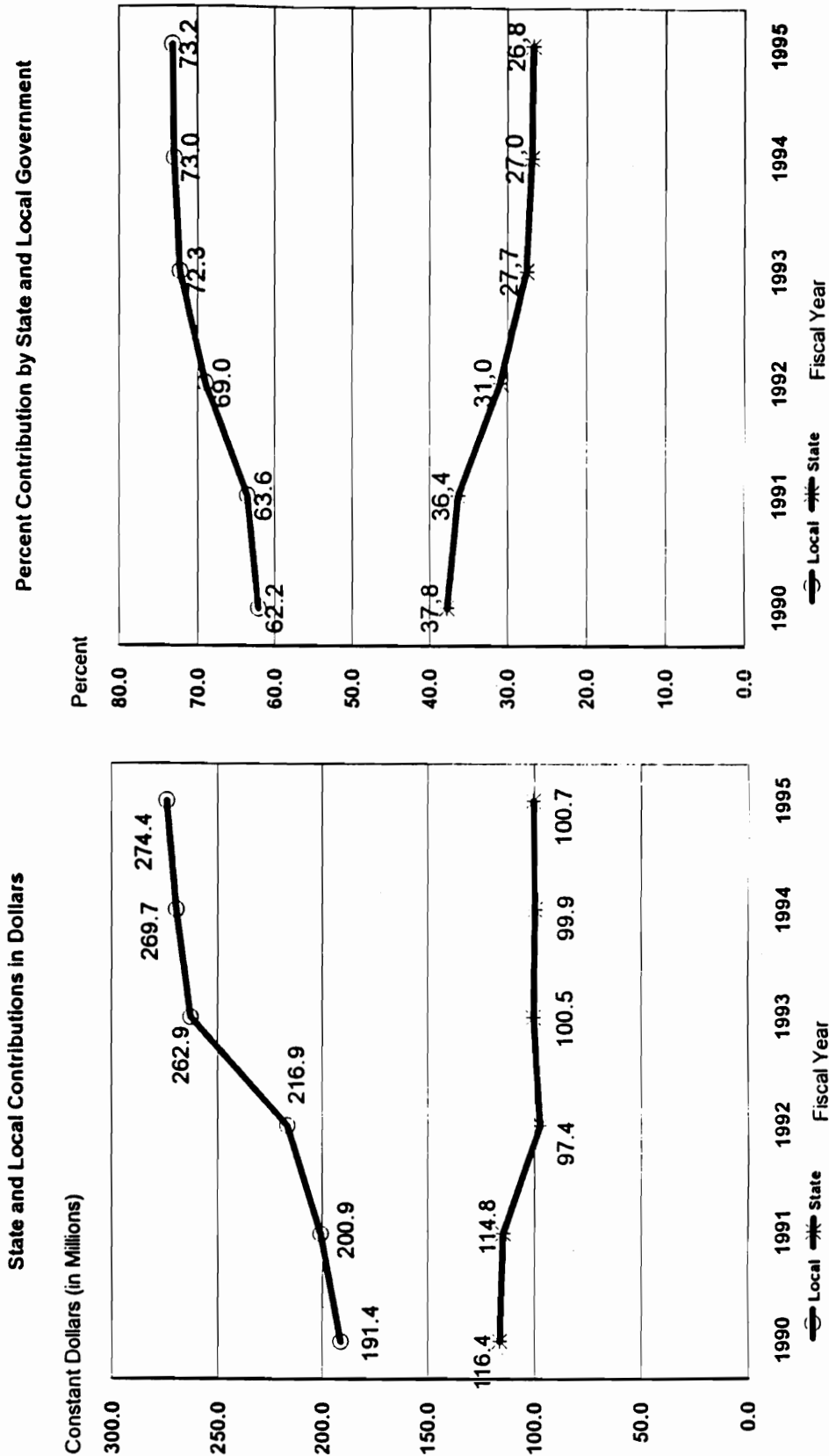
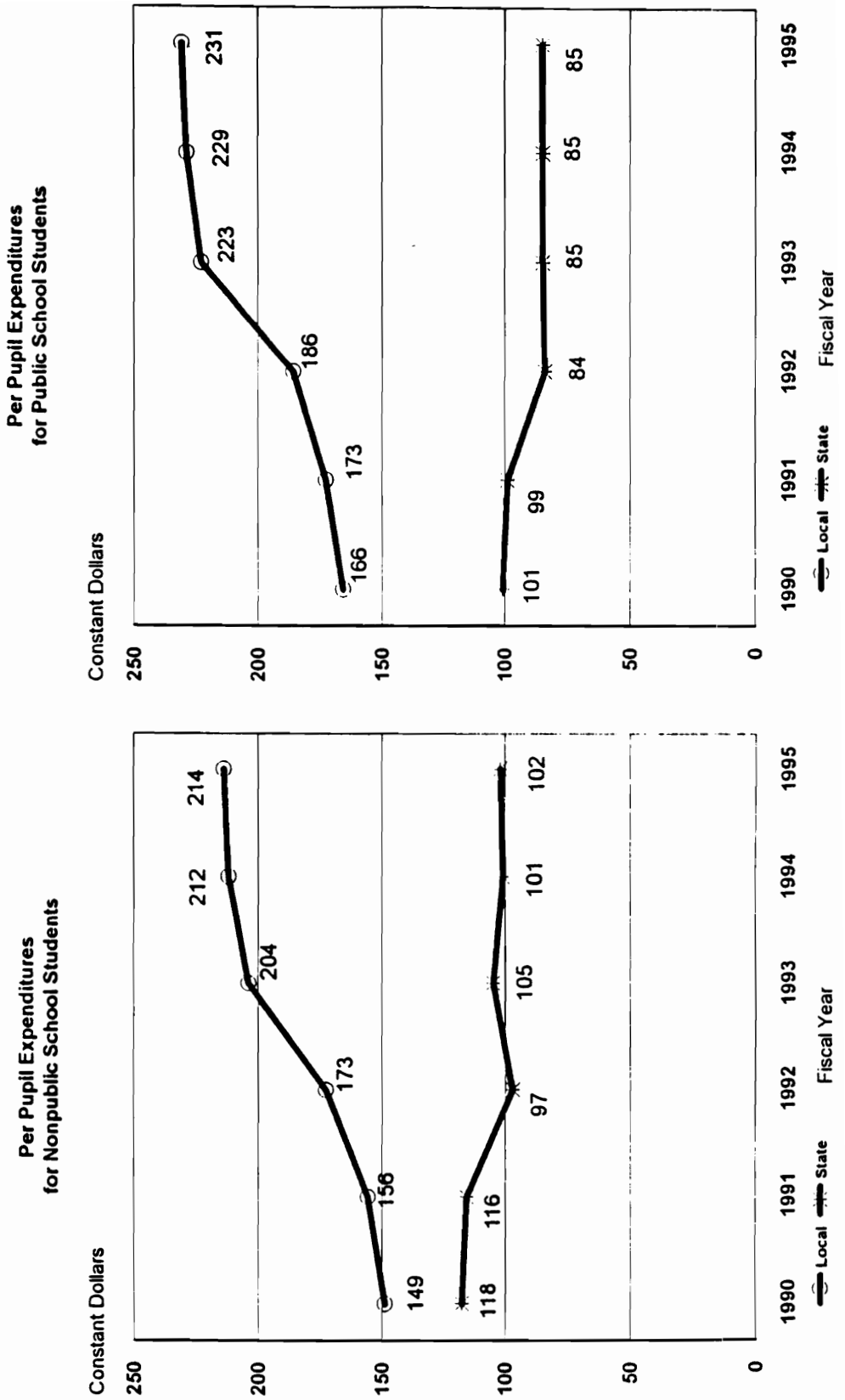


Chart 4
 State of Ohio Primary and Secondary Education
 Transportation Operations Per Pupil Expenditures for
 Public and Nonpublic School Students, FY1990-1995



Total State Contribution

- Table 4 summarizes the total funds appropriated to K-12 education and the proportions allocated to public and nonpublic school students. Approximately 2.67 percent of the state's education budget was allotted to subsidize the cost of private education. The dollar amounts ranged from \$108.2 million to \$123.5 million per year. These figures do not include the transportation costs to public school districts.

The percent of funds allotted to public education averaged 97.33 percent of the state education budget. The amounts ranged from \$4.02 billion to \$4.25 billion and averaged \$4.17 billion over the six years. Chart 5, "Percent of Funding for Public and Nonpublic School Students for Primary and Secondary Education in the State of Ohio," graphs the percentages of the education budget that were expended on public and nonpublic school students over the six years.

Per Pupil Expenditures

Using the total state expenditures and enrollment data, per pupil expenditures were tallied for each of the six fiscal years. The per pupil expenditure was calculated twice for each of the two categories, public and nonpublic school students. The first per pupil computation divided the state funds by the total enrollment for each group. The second per pupil number was figured by summing the state funds with the local contribution for transportation, then dividing by the enrollment. The results are listed in Table 5 and graphed in Chart 6.

TABLE 4
STATE OF OHIO FUNDING FOR PRIMARY AND SECONDARY EDUCATION
COMPARISON OF STATE AID TO NONPUBLIC AND PUBLIC SCHOOLS

State GRF and LPEF Expenditures
FY 1990 - FY 1995
(Constant Dollars in Millions)

Primary & Secondary Education	1990	1991	1992	1993	1994	1995
Total	\$4,299.3	\$4,286.9	\$4,130.8	\$4,307.8	\$4,280.7	\$4,371.7
% of State Budget	36.4%	35.9%	34.9%	35.6%	35.3%	35.3%
Annual Rate of Growth	5.6%	3.9%	-0.7%	7.3%	2.0%	5.0%
Nonpublic School Student Expenditures						
Total*	\$110.5	\$118.6	\$108.2	\$112.2	\$110.7	\$123.5
% of State Education Budget	2.6%	2.8%	2.6%	2.6%	2.6%	2.8%
Public School Education						
Difference	\$4,188.8	\$4,168.3	\$4,022.6	\$4,195.6	\$4,170.0	\$4,248.2
% of State Education Budget	97.4%	97.2%	97.4%	97.4%	97.4%	97.2%

*Does not include public school district contribution to transportation.

Notes:

1. State GRF is the State General Revenue Fund and LPEF is the Lottery Profits Education Fund.
2. Lottery profits are used to support Education and are included among the Education expenditures.
Annual Lottery Disbursements
(Constant dollars in millions)
\$657.02 \$716.17 \$679.79 \$678.80 \$632.78 \$627.34
3. FY 1993 served as the base year for constant dollar conversion.

Chart 5
Percent of Funding for Public and Nonpublic School
Students for Primary and Secondary Education
in the State of Ohio, FY1990-1995

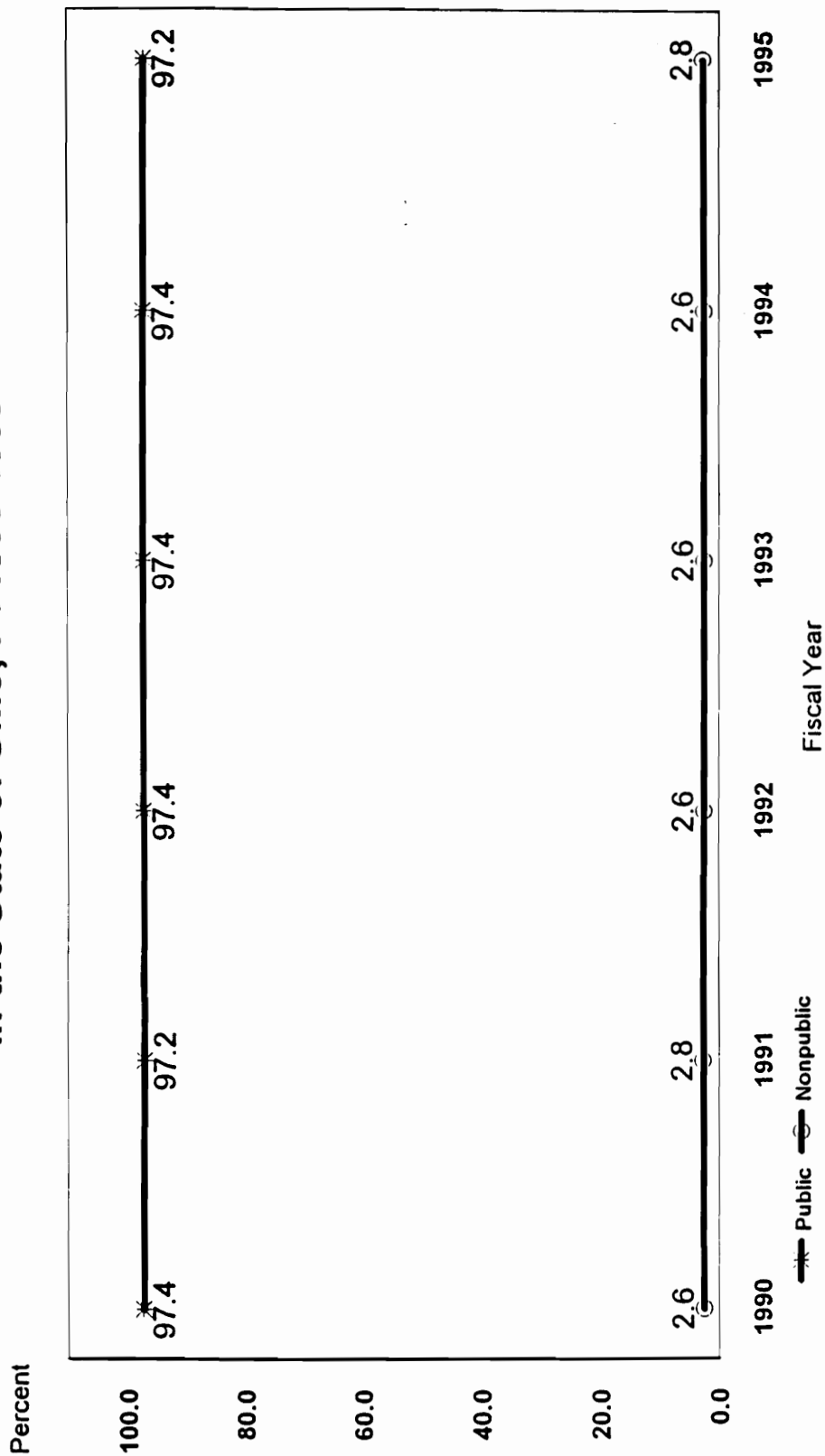


Table 5
State of Ohio Primary and Secondary Education
State Per Pupil Expenditures
for Public and Nonpublic School Students

FY 1990 - FY 1995
 (Constant Dollars in Millions)

State Per Pupil Expenditures	1990	1991	1992	1993	1994	1995
Public School Students*	\$2,368	\$2,353	\$2,261	\$2,353	\$2,328	\$2,350
Public School Students**	2,464	2,467	2,396	2,500	2,479	2,502
Nonpublic School Students *	495	529	478	494	482	525
Nonpublic School Students **	584	624	582	619	612	653

Notes:

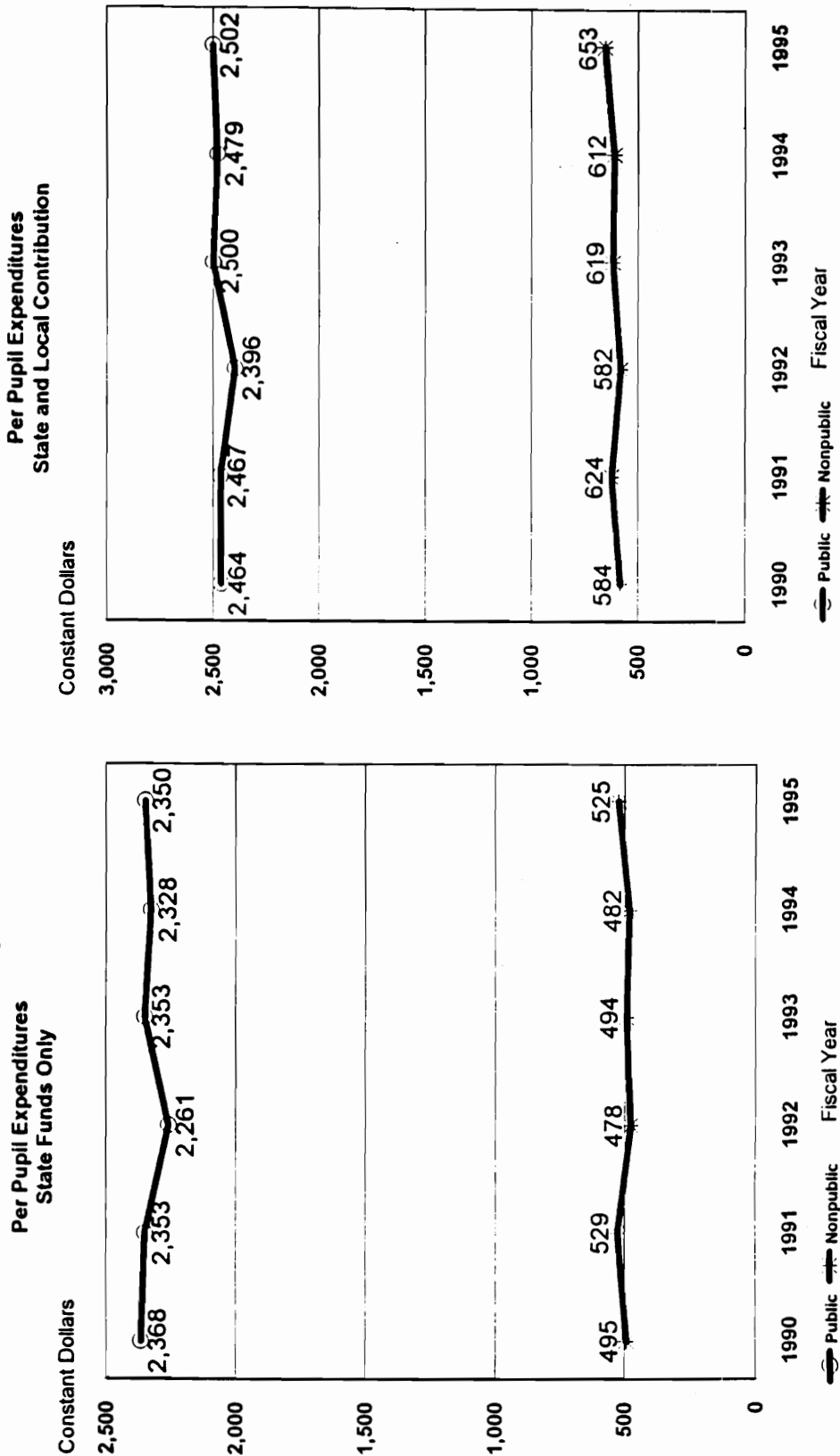
*Represents state only per pupil expenditure.

**Includes public school district contribution for transportation.

All per pupil expenditures are in constant dollars.

FY 1993 served as the base year for constant dollar conversion.

Chart 6 State of Ohio Primary and Secondary Education State Per Pupil Expenditures for Public and Nonpublic School Students, FY 1990-1995



Per pupil expenditures for nonpublic school students averaged \$501 from FY 1990-1995. The highest state per pupil expenditure was \$529, which occurred in FY 1991. The lowest expenditure was in FY 1992, when it dropped to \$478 per pupil. When the local contribution for bus transportation was included in the computation, the average expenditure increased to \$612 per pupil. The highest expenditure was recorded for FY 1995, at \$653 per pupil, and the lowest at \$582 in FY 1992.

Student Demographics

In Table 6, "State of Ohio Primary and Secondary Education, Public and Nonpublic Student Data," statewide enrollment data are listed. For the time period under study Ohio's total student enrollment hovered around 2 million students, of which an average of 227,525 were nonpublic school students. Chart 7, "State of Ohio Primary and Secondary Education, Public and Nonpublic School Enrollment Data," displays the relative numbers of nonpublic school students to public school students from FY 1990-1995. These enrollment figures reflect matriculation in chartered nonpublic schools only. Generally speaking, nonpublic school enrollment was slightly more than 11 percent of student enrollment statewide.

The Education Management Information Services (EMIS) online databases generated reports enumerating the dioceses and nonpublic school excluding dioceses enrollments for each of the six years. These, too, have been included in Table 6. The *Ohio Educational Directory, 1995-96 School Year*, lists the subcategories of chartered

Table 6
State of Ohio Primary and Secondary Education
Public and Nonpublic School Student Data

FY 1990 - FY 1995

Enrollment	1990	1991	1992	1993	1994	1995
Public School	1,768,827	1,771,188	1,779,238	1,783,078	1,791,055	1,807,763
Nonpublic School	223,082	224,030	226,265	226,970	229,738	235,067
Total	1,991,909	1,995,218	2,005,503	2,010,048	2,020,793	2,042,830
% Nonpublic School	11.20	11.23	11.28	11.29	11.37	11.51
Dioceses	180,904	179,694	180,376	183,717	183,407	184,945
% Dioceses	81.09	80.21	79.72	80.94	79.83	78.68
Nonpublic Excluding Dioceses	42,178	44,336	45,889	43,253	46,331	50,122
% Nonpublic Excluding Dioceses	18.91	19.79	20.28	19.06	20.17	21.32

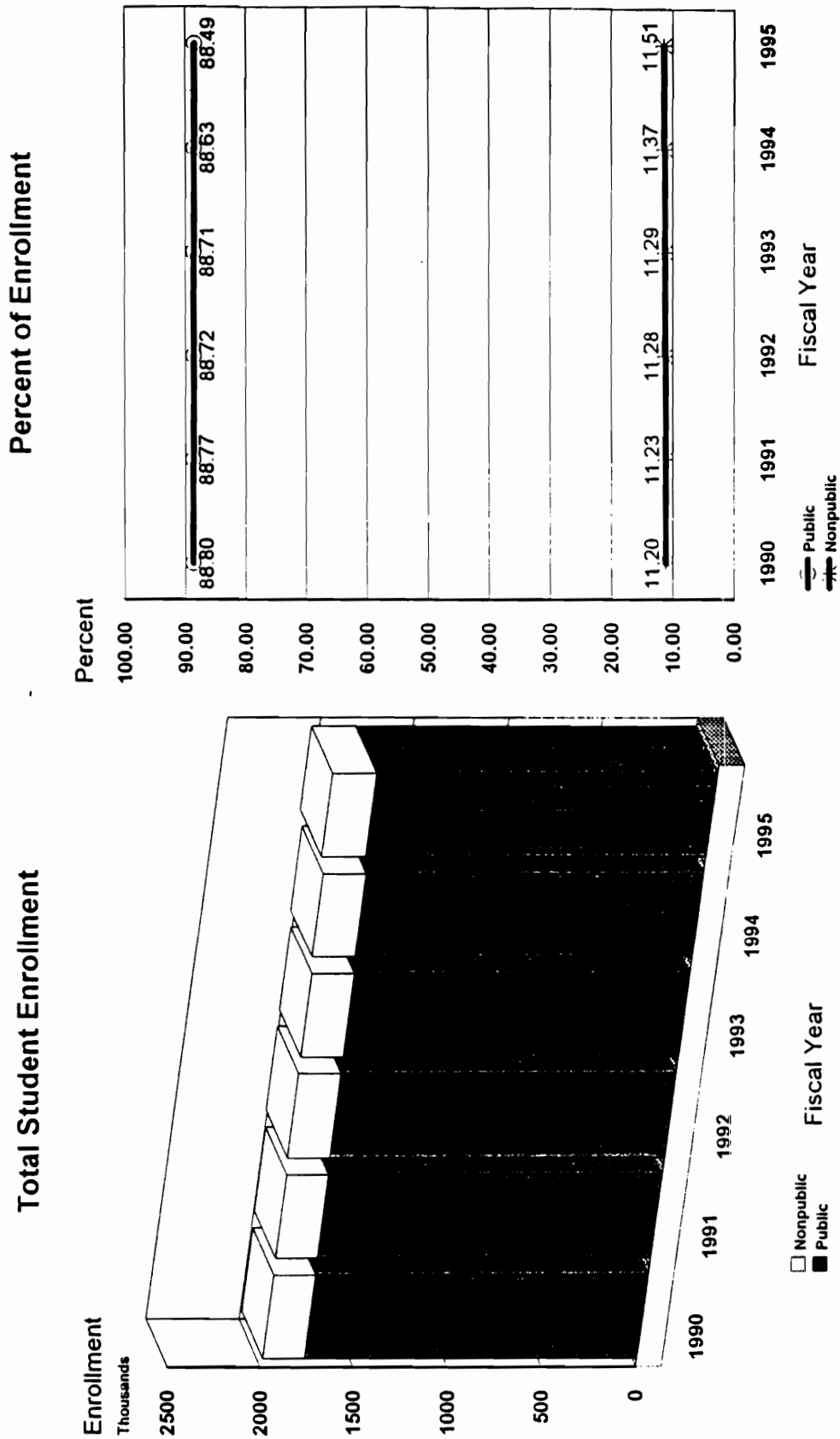
Note:

The source of the information is the Education Management Information System database online: http://www.ode.ohio.gov/fms/emis_docs.html. Accessed January, 1997.

Chart 7

State Of Ohio Primary and Secondary Education

Public and Nonpublic School Enrollment Data, FY 1990 - 1995



nonpublic schools as Catholic Conference of Ohio, Cleveland Lutheran High School Association, Lutheran Schools of Ohio, Seventh-day Adventist Ohio Conference, and Independent Schools.

Total diocese enrollment during the six years under study ranged from 179,694 students in FY 1991 to 184,945 students in FY 1995. The mean enrollment over the six-year period was 182,174 students, representing slightly more than 80 percent of the total nonpublic school enrollment. Chart 8, "Nonpublic School Enrollment," illustrates the numbers and percentages for Catholic and non-Catholic school enrollments.

The EMIS databases also contain ethnicity data for the three categories of enrollment. (Refer to Table 7.) The ethnic makeup in public schools over the six years averaged 0.11 percent Indian, 0.95 percent Asian, 14.70 percent Black , 82.82 percent White, and 1.31 percent Hispanic.⁹ Catholic school enrollments were 0.14 percent Indian, 1.28 percent Asian, 6.97 percent Black, 89.69 percent White, and 1.93 percent Hispanic. In non-Catholic private schools, 0.14 percent of the students were Indian, 3.48 percent were Asian, 10.99 percent Black, 84.44 percent White, and 0.95 percent Hispanic. The remaining percentages not represented in each of these groups were attributed to multiracial and "not reported" classifications.

Generally speaking, the level of representation of each group has not varied much over the six-year span. White enrollment in public schools dropped a little more than one percent overall. Although white enrollment in non-Catholic schools increased one percent

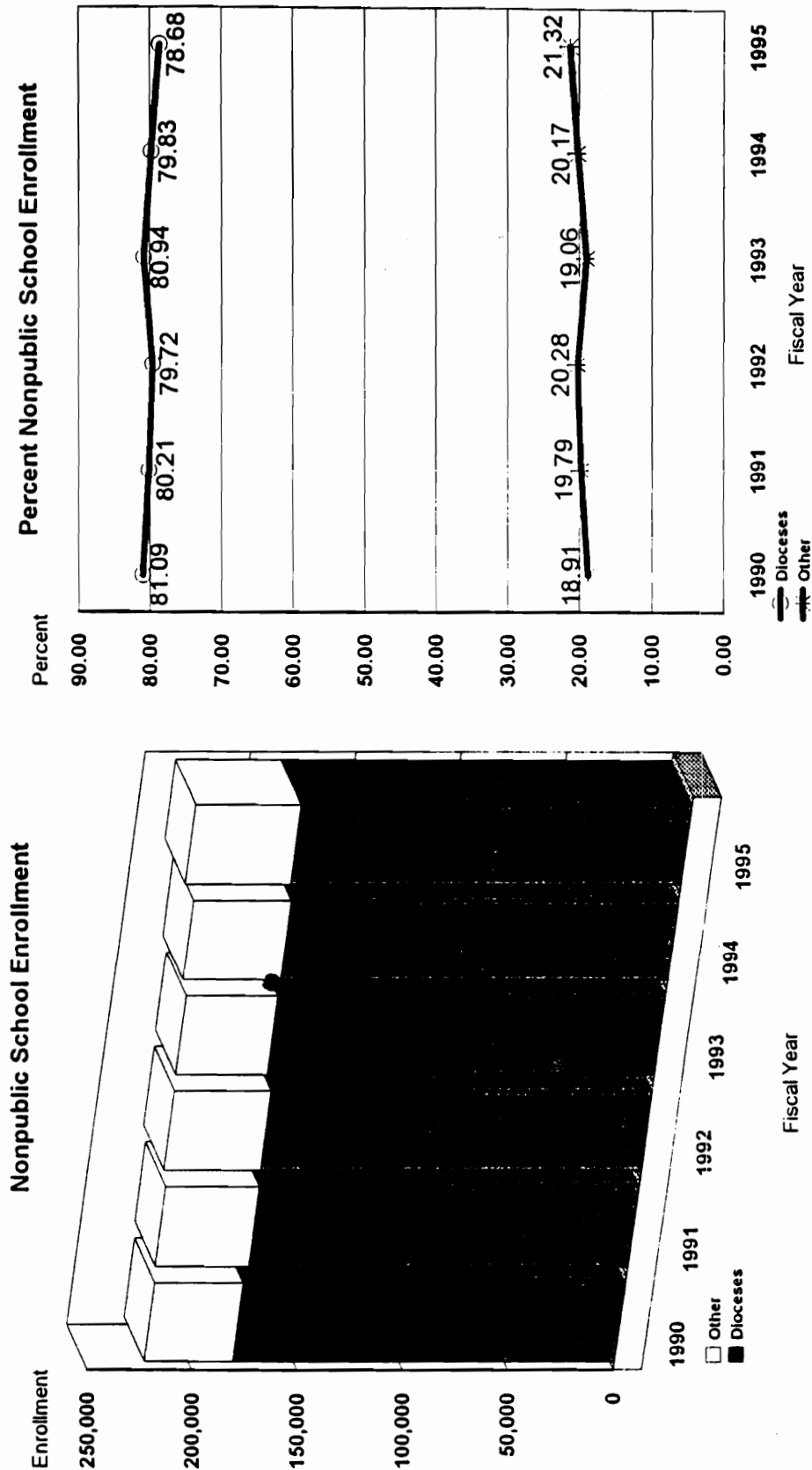
Table 7
State of Ohio Primary and Secondary Education
Public and Nonpublic School Enrollment
Percentages by Ethnicity, FY 1990-1995

Public Schools	1990	1991	1992	1993	1994	1995
Indian	0.11	0.12	0.08	0.10	0.11	0.11
Asian	0.90	0.94	0.93	0.97	0.97	0.98
Black	14.46	14.57	14.53	14.68	14.87	15.11
White	83.29	83.08	83.18	82.81	82.48	82.09
Hispanic	1.24	1.31	1.27	1.32	1.34	1.37
Dioceses						
Indian	0.13	0.13	0.14	0.15	0.14	0.14
Asian	1.30	1.30	1.21	1.28	1.30	1.27
Black	6.75	6.86	7.24	6.74	7.04	7.16
White	89.94	89.83	89.49	89.89	89.60	89.41
Hispanic	1.89	1.88	1.92	1.94	1.91	2.02
Nonpublic excl.						
Dioceses						
Indian	0.08	0.09	0.18	0.24	0.15	0.10
Asian	3.53	3.66	3.27	3.39	3.65	3.44
Black	9.18	9.94	11.38	11.35	12.42	11.68
White	86.38	85.39	84.32	84.00	82.71	83.81
Hispanic	0.83	0.92	0.85	1.03	1.08	0.98

Notes:

1. Ethnicity classifications designated by the Ohio Department of Education.
2. Percentage totals may not add to 100 due to rounding or "other" classification.

Chart 8
State of Ohio Primary and Secondary Education
Nonpublic School Enrollment by Dioceses and Other
FY 1990-1995



in the last year, from FY 1994 to FY 1995, it was still two percent lower than it had been in FY 1990. White enrollment in Catholic schools, while about seven percent higher than in public schools, decreased slightly during the six years. Black enrollment increased slightly in public and Catholic schools, but rose about two percent in non-Catholic private schools. Representation of Blacks in Catholic schools was on the average almost eight percent lower than in public schools and was almost four percent lower in non-Catholic schools than in public schools.

There was a higher representation of Asian students in non-Catholic private schools than in either Catholic or public schools, at 3.48 percent. Less than one percent of the public school population was Asian. The average percent of Indian students in all three categories differed very little.

The only indication of a significant change in enrollment pattern was in non-Catholic schools. As mentioned, there was a one percent increase in the number of White students during the last year under study. Their enrollment jumped from 33,977 to 37,471 students. Whether this is due to an increase in Christian fundamental school enrollment or to another phenomenon is unclear. Sufficient data were unavailable by the completion of the study.

Generally speaking, though, the relative percent of White students in non-Catholic schools had dropped over the six years under study. This appears to be a result of an increase in the relative percent of Black students enrolled in non-Catholic private schools.

“Pure” State Fiscal Effort

There are a variety of measures one can employ to calculate fiscal effort if one does not intend to make interstate comparisons. In this instance, state education expenditures were divided by the assessed valuation of property, then multiplied by one thousand. Calculating “pure” state fiscal effort required deducting state funds paid on behalf of nonpublic school students from the state education budget prior to the computation.

As Table 8 indicates, state fiscal effort (with nonpublic school funds) ranged from \$31.64 per \$1000 of assessed valuation to \$34.31, averaging \$32.65. When nonpublic school funds are subtracted, the range of state fiscal effort is \$30.82 per \$1,000 of assessed valuation to \$33.36, with a mean of \$31.78.

Trend Analyses

What is most noticeable is that state funding of both public and nonpublic education, in terms of the percent of the general revenue fund and lottery profits, varied little over FY 1990-1995. Ohio appropriated, on the average, about 35.6 percent of the funds available, apparently regardless of the amount of dollars. Even in FY 1992, when the annual growth rate of the education budget dropped to -0.7 percent, 34.9 percent of state funds were allocated to education, just 0.5 percent below the average for the entire period.

Table 8
State of Ohio Primary and Secondary Education
"Pure" State Fiscal Effort for Public Education

FY 1990 - FY 1995
(Constant Dollars in Millions)

Fiscal Effort	1990	1991	1992	1993	1994	1995
State Expenditure (without)*	\$4,188.8	\$4,168.3	\$4,022.6	\$4,195.6	\$4,170.0	\$4,248.2
State Expenditure (with)**	\$4,299.3	\$4,286.9	\$4,130.8	\$4,307.8	\$4,280.7	\$4,371.7
Assessed Valuation of Property	125,141.0	124,949.0	129,612.3	136,144.3	132,646.1	136,632.6
Fiscal Effort (without)	\$32.95	\$33.36	\$31.04	\$30.82	\$31.44	\$31.09
Fiscal Effort (with)	\$33.82	\$34.31	\$31.87	\$31.64	\$32.27	\$32.00
Fiscal Effort (nonpublic)	\$0.87	\$0.95	\$0.83	\$0.82	\$0.83	\$0.91

* (without) means that amount does not include funds designated for nonpublic schools.

** (with) means that amount includes funds designated for nonpublic schools.

Notes:

1. Assessed valuation of property taken from the Ohio Department of Education, Education Management Information Services web pages:
http://www.ode.ohio.gov/www/lrms/lrms_progs.html
2. FY 1993 served as the base year for constant dollar conversion.
3. Fiscal effort for intrastate comparison only. Calculated by dividing state expenditure by assessed valuation of property and multiplied by 1000.

Ohio suffered a recession in FY 1991-1992, which explains the general drop in revenues and expenditures in FY 1992 in all categories and in the results of the calculations that related to education funding in this study. Governor Voinovich referred to this period in his January 1997 State of the State Address to the General Assembly. He recalled Ohio faced a potential revenue shortfall of \$1.5 billion in March of 1991, the reason for which severe budget cuts were made and the contingency fund was reduced to 14 cents.¹⁰

Consistent with the level funding of education is the equally level distribution between public and nonpublic education. The state contribution on behalf of nonpublic school students varied little, no more than two-tenths of a percent, over the six-year period under study. Accordingly, public education funding remained relatively steady.

What is evident is that both public and nonpublic education funds share the same general education funds. In other words, when funding increases for nonpublic school students, it decreases for public school students. There is no pattern involving funding of nonpublic education relative to the overall education budget to suggest new money is allocated when there is an increase in nonpublic school student funding.

For instance, in FY 1991 funds allotted to nonpublic school aid increased from 2.6 to 2.8 percent of the education budget, but appropriations to the education budget from the general revenue fund and lottery profits dropped one-half percent, from 36.4 to 35.9 percent. Likewise, nonpublic school funds increased to 2.8% again in FY 1995 while

allocations to the state education budget remained level from the previous year, at 35.3 percent.

The reimbursements for nonpublic school administrative costs were fairly steady, with a gradual increase through Fiscal Year 1994. This was followed, however, with a sizable increase, 70 percent, in Fiscal Year 1995. It was reported that the legislature increased the maximum per pupil allotment from \$100 for FY 1994 to \$150 for FY 1995. This explains the significant increase in this category of nonpublic school funding.

It bears repeating that this reimbursement is made directly to the nonpublic schools and not through the public school district as all other nonpublic school funds are. An increase in this funding mechanism is an increase in public assistance that goes directly into nonpublic school coffers, including sectarian schools.

Another trend that should be of concern is the cost of transporting nonpublic school students at public expense. While providing transportation for nonpublic school students is a well established practice in Ohio, a greater share of the cost has been shifted to public school districts and away from the state. Chart 2 clearly illustrates this trend. In FY 1990, the state reimbursed localities for 44.1 percent of the cost of transporting nonpublic school students. By FY 1995, the share had dropped to 32.3 percent, the result of a steady decline over the six years. This shift represented a significant amount of money. In FY 1990, public school districts expended \$19.8 million dollars (in constant

dollars) to transport nonpublic school students. By FY 1995 that amount increased to \$30.0 million dollars, a 51.5 percent increase.

In terms of per pupil expenditures, the cost to public school districts increased from \$149 in FY 1990 to \$214 in FY 1995. The cost to the state dropped from a high of \$118 per pupil in FY 1990 to \$102 per pupil in FY 1995.

On another note, the state supports a higher per pupil cost for nonpublic school students than it does for public school students. The average state per pupil aid for nonpublic school student transportation was \$107 over the six years while support for public school students averaged \$90 per pupil. In other words, per pupil state aid for nonpublic school students was nearly 19 percent higher than for public school students.

State fiscal effort on behalf of *public* education has lessened, particularly in the latter four years under study. (Refer to Table 8.) It was at a high of \$34.31 in FY 1991, but dropped to \$31.64 in FY 1993. The average effort over the six years was \$31.78, but only \$31.10 during the last four years.

Generally speaking, funding for education has remained fairly steady. The reports citing deplorable school facilities, Cleveland's city school district problems, and the disparate funding levels throughout the state would indicate that level funding means underfunding. Public and nonpublic school funds have remained proportionately level, with nonpublic schools and their students capturing an average 2.67 percent of education funds over the six years. There was an increase to 2.8 percent from 2.6 percent during the

last fiscal year, 1995. Nonpublic schools had not had the additional 0.2 percent since FY 1991. This increase can be attributed to the substantial increase in the administrative cost reimbursement.

When one considers that more money is going to nonpublic schools as a result of the new Cleveland Project Scholarship Program and there was yet another increase, from \$150 per pupil to \$250 per pupil, for administrative cost reimbursements for FY 1996, it is unlikely that the percent of the education budget appropriated for nonpublic education will ebb in the coming years. Only if the General Assembly increased education's relative share of state's general revenue fund would that assumption prove false.

Chapter Four Endnotes

¹ Gov. George Voinovich, Ohio, July 1994. Vindu P. Goel, "Voinovich Assails Schools Over Lawsuit," *Cleveland Plain Dealer* (July 7, 1994):5B. These comments were directed toward school districts for not doing more with less after the DeRolph decision from the trial court.

² An elementary school teacher, Ohio, 1996. In Bill Moyer's and Jonathan Kozol's "Children in American Schools," the Saint/Hayden Company, 1996. This is a documentary film on the state of American public schools, with particular focus on Ohio. The teacher's remark was made in response to a child's question about the poor condition of the school building.

³ The nature of the personal communications ranged from telephone calls, e-mail, and postal mail. The period of data gathering began in October, 1996 with the last contact was in March, 1997.

⁴ Web pages were accessed over a nine-month period, from July, 1996 to March, 1997.

⁵ Most communication was through e-mail beginning in February, 1997. Direct communication with the EMIS programmer only began after four months of unproductive attempts to obtain information through the office of School Finance.

⁶ The data was requested and clarified by telephone. The formula and CPIs were faxed to the researcher.

⁷ A telephone interview was conducted with Susan Tavakolian, Director of School Finance, Ohio Department of Education, in March, 1997. She clarified several points relating to the administrative cost reimbursement.

⁸ Jim Payton and Walter Hack, "Ohio," in *Public School Finance Programs of the United States and Canada, 1993-94*, Steven Gold, David Smith, and Stephen Lawton, eds., American Education Finance Association and the Center for the Study of the States, Vol. 2 (Albany: The Nelson A. Rockefeller Institute of Government, 1995), 498.

⁹ The ethnicity classifications used here are the same as those designated in the EMIS databases.

¹⁰ George V. Voinovich, "State of the State Address," (January 14, 1997) Online: <http://www.state.oh.us/gov/SOS97.html>.

CHAPTER FIVE: REVIEW OF ISSUES

Frankly, if I had my way I would put more money in the hands of parents [and let them] choose the school.¹

Overview

The school choice debate positions parents opposite government around the issue of responsibility for education. Advocates of choice regard government as a facilitator, an agency that, at most, should aid in securing access to whatever educational environment the parents choose. Critics of school choice believe government is primarily responsible for providing adequate and equitable education for children. They argue individual parents should be supportive and involved but ultimately that they should be subsidiary to the system for the sake of the common good.

It is reasonable to conclude that the Ohio legislature has opted for the role of facilitator over that of provider. Ohio's General Assembly has a substantial history of attenuating state responsibility for a thorough and efficient system of common schools and of deferring to local authority. Ohio legislative and judicial histories chronicle decades of state efforts to subsidize private education and expand school choice. Most recently the Ohio General Assembly has shifted more responsibility to parents by providing a full range of choices through open enrollment policies for public schools and by implementing

a new scholarship program in which public money can be used to matriculate young Cleveland children into private schools of choice, including religiously affiliated schools.

The effect of Ohio's educational policies on universal educational opportunity for all of the children in the state has been documented through a number of legal and descriptive narratives. The plaintiffs in the *DeRolph*² funding lawsuit allege immense funding disparities among Ohio public school districts. Funding disparities translate into differences in educational programs and resources, which logically lead to unequal educational opportunity statewide for children. The lawsuit questions whether this is what the authors of the state constitution intended in 1853 when they instructed the state to provide a thorough and efficient system of common schools.

Those who oppose the lawsuit counter by arguing that the quality of schooling available to children is yielded from local interest in education. They contend that taxpayers in public school districts who want a high level of education will make the necessary fiscal effort to do so. In making this argument, they tend to ignore evidence of widespread disparity in local capacity to generate funds, a factor that operates independently of interest or willingness. They firmly believe local control is more important than statewide equity in education opportunity.

This perspective was given credence in an earlier funding case, *Board of Education v. Walter*.³ In 1979, the Ohio Supreme Court held that "local control provides a rational basis supporting the disparity in per pupil expenditures in Ohio's school districts" and

thus “control over and participation in the decision-making process as to how those local tax dollars are to be spent” are extended.⁴

The Ohio court made these remarks even after a federal court, in *Reed v. Rhodes*,⁵ condemned local educational authorities in Cleveland for using tax dollars to maintain a racially dual system of public education and held the state accountable for intentionally abetting Cleveland’s action. The federal court required both state and local authorities to find and fund a remedy.

Local mismanagement prompted a federal judge to place Cleveland public schools under state control in 1995. Dissension, debt, and deterioration of the infrastructure convinced U.S. Circuit Judge Robert Krupansky, who was presiding over the desegregation order at the time, stated that local authorities were no longer capable of managing the city’s public school system.⁶ He required the state to administer the public school system, to prepare and place a levy initiative on the ballot, and to guarantee loans to the school system until the situation could be stabilized. Although residents already put forth one of the highest fiscal efforts in the state, they approved a new levy in November, 1996, which should begin to alleviate the \$152 million debt, pay for teacher salaries increases, and replenish instructional resources.

The United States General Accounting Office issued a school facilities report in 1996 which portrayed Ohio public school buildings as some of the most deficient in the nation.⁷ Ohio already had compiled its own report in which it estimated that \$10 billion

dollars would be needed to bring all public school facilities up to code. It was noted that \$3.2 billion alone would be needed to replace buildings that are beyond repair. Judge Krupansky, as a part of his court order to assign control of Cleveland schools to the state, instructed authorities to identify and close fourteen of the city's most dilapidated school buildings.

The poor condition of school facilities in Ohio has been debated in the legislature since the late 1970s and millions of dollars have been spent studying the issue, yet relatively little money has been allocated to remedy the situation.⁸ As recently as the 1993-94 school year the state had only spent \$38 per pupil in repair and construction of school facilities.⁹ In 1995 Governor Voinovich said he would lobby for a constitutional amendment that would allocate \$1 billion to school facilities over the next decade.¹⁰ To-date that recommendation remains in committee.

Funding Issues

Regardless of the problems and the on-going controversies that surround public education in Ohio, the Ohio General Assembly continues to develop and implement educational policies that divert public funds to private education. During Fiscal Years 1990-1995 there is no evidence that new money was introduced into the budget to fund policies supportive of private education. In fact, the percentage of general revenue funds

and lottery profits allocated to primary and secondary education deviated little from an average of 35.6 percent per year.

Specifically, K-12 education funding appears to be based on a *zero sum* budget strategy. Public and private education appropriations appear to be allocated on a percentage basis, seemingly independent of increasing or decreasing education program needs. When funding is shifted toward nonpublic education, the percent of the education budget designated for public education is decreased and visa versa. Public education received about 97 percent of the state education budget with private education capturing the remaining 3 percent. The straight line graph in Chart 5 would lead one to speculate that public and nonpublic education funding is a rather simplistic mathematical manipulation. The budget questions apparently did not center on how much of the budget would be allocated to either group but rather what of the educational needs would and would not be financed.

Clearly, nonpublic education enjoys the patronage of the Ohio state government. Nonpublic school students have been provided transportation at public expense for more than thirty years. Auxiliary educational services have been subsidized for twenty years. Nonpublic schools have been reimbursed for clerical and other expenses related to recording and filing state mandated reports and forms, a subsidy public schools do not receive.

In recent years the trend has been to channel public assistance to nonpublic schools through less circuitous routes than previously traveled. For instance, the administrative cost reimbursements, which are paid directly to nonpublic schools and not through public school districts, have increased significantly in the past two fiscal years.¹¹ The first consequential increase, which took effect in FY 1995, went from \$100 to \$150 per pupil and the second, in FY 1996, went to \$250 per pupil.¹²

The second increase was legislated to absorb a \$4 million balance incurred the previous year when claims did not reach the per pupil maximum. One might reason that if nonpublic schools did not utilize about 14 percent of the available funds for reimbursement one year they would not need an increase the next year. However, when notice of the \$4 million balance spread, State Rep. Tom Johnson, the Republican chair of the House Finance Committee said he received a call from every one of the Catholic schools in his district urging release of the \$4 million to private schools.¹³ Apparently the heavy lobbying was effective. In 1996 the Ohio General Assembly passed a bill to absorb the \$4 million in balance from state's administrative cost reimbursement fund by increasing the per pupil expenditure to \$250 instead of reappropriating money to public schools. This pushes the total direct reimbursement to the 877 chartered nonpublic schools to an estimated \$35.3 million (current dollars) for FY 1996.

Another shortcut for diverting public funds into private schools has been created with the nascent Cleveland Pilot Project Scholarship Program. It was implemented during

the 1996-97 school year with no date for termination. The voucher program is to remain in effect as long as the General Assembly chooses to appropriate funding for it and the courts do not rule it unconstitutional.

Children entering the scholarship program for the first time must be in grades kindergarten through third grade, and will continue to receive annual scholarships up through completion of the eighth grade. In fact, if the General Assembly ceases to fund the scholarship program, recipients already enrolled and attending nonpublic schools will continue to receive scholarships until they complete the eighth grade.

The Cleveland Pilot Project Scholarship Program and the exorbitant increases in the appropriations for administrative cost reimbursements are not solely means by which to funnel money directly into nonpublic schools but are also indicators of the legislative mindset currently in control of the state education budget. In Moyer's and Kozol's documentary film, "Children in American Schools," Rep. Michael Fox, Chair of the Education Committee, stated quite frankly he was fortunate that his children "are not trapped in public schools" and that if he had his way, he "would put more money in the hands of parents" and let them choose schools for their children.¹⁴

These funding mechanisms and Rep. Fox's comments illustrate the strong support for nonpublic schools and for assisting them with public funds. In FY 1995 the percentage of the funds allocated to nonpublic schools already had increased to 2.8 percent. This increase occurred prior to the second increment in administrative cost

reimbursements and the initiation of the scholarship program whose funding is guaranteed for at least six years for the third grade scholarship recipient and nine years for the kindergarten recipient. Although the funding trend for nonpublic schools for the six fiscal years in the study was virtually unchanged, remaining level at 2.6 percent for four of the six years, these recent events and attitudes give reason to suppose there will be a gradual increase in the percentage of state funds earmarked for nonpublic schools in the future.

This portends fiscal calamity for public schools, and particularly for the localities that fund public schools, if education funding trends remain static. As evidenced by Chart 1, "State of Ohio Funding for Primary and Secondary Education for Fiscal Years 1990-1995," and Chart 5, "Percent of Funding for Public and Nonpublic School Students for Primary and Secondary Education in the State of Ohio," the level of education appropriations from a combination of the general revenue fund and lottery profits varied little over the course of the six years and when funding, as a percentage of the education budget, was increased for nonpublic education it was decreased for public schools.

The "pure" state effort on behalf of public education varied 7 percent over the course of the six years, but no clear trend emerged. The fiscal effort for public education of the last four years is lower than the first two years of the study. The fiscal effort for nonpublic education increased considerably from FY 1994 to FY 1995 due to the increase in administrative cost reimbursements. There was a shift in the expense of transporting nonpublic school students from the state to the localities, which should be of concern.

The state legislature may choose to continue to place a greater portion of the cost of nonpublic education onto localities, which could have the effect of disguising the amount of public funds being spent on the transportation of nonpublic school students.

It can be surmised that these trends will continue. There is no evidence that other mandated programs, such as Medicaid and the Department of Rehabilitation and Correction,¹⁵ will require less of the general state budget and there is no indication that the General Assembly intends to increase taxes. Ergo, it is unlikely that more money or new money will be appropriated to the education budget, which, pursuant to these funding trends, signifies that in the future public education will receive a smaller percentage of education funding in Ohio.

Legal Issues

Ohio's state government has faced considerable litigation as a result of its attempts to fund and regulate nonpublic schools. The experience obviously has not deterred it from its efforts. In fact the state government has learned to craft legislation that incorporates elements of statutes that successfully withstand challenge and that follows cautionary remarks made by justices.¹⁶

Public Funding of Nonpublic Schools

What is left for Ohio to learn is whether more innovative and untested legislation will survive state and federal constitutional challenges and how much money will be

allowed to fund private education before the courts decide the benefits are no longer *attenuated*. It is unknown whether funding programs like the Cleveland voucher program, which allows sectarian schools to participate, will be tolerated under state and federal constitutions. United States Supreme Court precedent disallows direct funding or funding that encourages families to choose nonpublic over public education, but voucher programs resembling the Cleveland scholarship project have not yet been litigated in the Supreme Court.¹⁷

There is debate in state courts about whether vouchers constitute direct funding. In *Gatton v. Goff*¹⁸ and *Simmons-Harris v. Goff*¹⁹ Judge Sadler, using the *effect* prong of the *Lemon* test and citing *Mueller*, *Witters*, and *Zobrest*, upheld the constitutionality of the scholarship program under the First Amendment. Sadler ruled that vouchers are awarded parents selected to participate in the Cleveland Pilot Project Scholarship Program “without regard to the public or nonpublic nature of the schools, since the statute gives benefits to students who attend both public and private schools” and, therefore, nonpublic sectarian schools “are benefited only indirectly, and purely as the result of the ‘genuinely independent and private choices of aid recipients.’”²⁰ Judge Sadler also ruled, citing previous Ohio decisions, that the rights protected under the Ohio constitution are no more extensive than those protected by the First Amendment of the United States Constitution. Since the scholarship program was not considered violative of

the United States Constitution, it could not be infirm under similar provisions in the state constitution.

In Wisconsin, however, Judge Higginbotham of the Dane County Circuit Court ruled that including sectarian schools in the amended Milwaukee Parental Choice Program violated the state constitution by compelling taxpayers to support religion and by using money from the treasury for the benefit of religious organizations.²¹ He said the Wisconsin constitution is more restrictive on government aid to religion than is the United States Constitution and rejected the argument that vouchers are aid to the parents and not to the religiously affiliated schools. Like Judge Sadler in Ohio, Judge Higginbotham referred to *Mueller* and *Zobrest*, but he concluded that such Supreme Court decisions “ignore the real impact of such aid, [and] this court refuses to accept that myth.”²²

Judge Higginbotham’s comments are a revealing contrast to Judge Sadler’s. It is speculated that one or both of these programs will face a Supreme Court hearing some day. It can be inferred from the state court hearings in Ohio and Wisconsin that a decision regarding the constitutionality of vouchers will hinge on whether they are considered direct or indirect aid and if the aid is neutral. As in the state courts, defendants and plaintiffs will argue the similarities and differences of vouchers to the tuition reimbursements and tax credits in *Nyquist*²³ and the tax deductions in *Mueller*.²⁴ If there were no significant changes in the membership of the Court, one could venture an educated guess and surmise that the public assistance these voucher programs provide

will be likened to the tax deductions in *Mueller* and would be held as constitutional. If this were the case, one could suppose that the Cleveland scholarship program will expand to districts through out the state, creating immense fluctuations in state funding between public and nonpublic schools.²⁵

Regulation of Nonpublic Schools

Regulating nonpublic schools, especially church sponsored schools, has been the subject of significant litigation in Ohio. In both *State of Ohio v. Whisner*²⁶ and *Nagle v. Olin*²⁷ religious freedom prevailed over the state's efforts to impose comprehensive curricular and administrative policies on nonpublic schools. In both cases, the Ohio Supreme Court instructed the state to modify its regulatory policies because they were too pervasive and impinged on the instructional and administrative autonomy of sectarian schools. Dissatisfied with the lack of progress by the state in reviewing its regulatory practices, the *Olin* court warned the state that the court would continue to uphold religious freedom claims until the state reformed its policies. The state responded and in 1983 revised and relaxed those statutes that govern nonpublic schools.

Ralph Mawdsley believes that "the existence or nonexistence of a religious nexus is most important in assessing the degree to which a state can regulate the operation of a nonpublic school."²⁸ Since the Supreme Court ruling in *Wisconsin v. Yoder*²⁹ state courts have asked three questions when evaluating a state regulatory claim against a parent's free exercise claim. First, they want to know if the free exercise claim is founded in sincerely

held religious beliefs. Secondly, they determine if and to what extent the regulation burdens religious freedom. Finally, the courts require states to have a compelling public interest of sufficient magnitude that would justify overriding the right of free exercise.³⁰ While the three questions are clear, the standards by which they are measured are not. Unfortunately, the Supreme Court did not provide parameters by which states could evaluate a compelling state interest. As a result there is tremendous judicial variation among states when gauging the magnitude of a compelling public interest and weighing it against a free exercise claim.

A Perspective

The religious clauses of the First Amendment have become tender in the judicial marketplace of education and religion. The Free Exercise Clause is pulled from the pocket when religious educational institutions want to purchase exemption from government regulation or oversight. The same clause has been used to buy a parent's right to place a child in a religiously affiliated school or to exempt a child from compulsory education after the eighth grade. It has also been used to pay for the various release time programs around the country.

The Establishment Clause, once a strong currency, has been devalued in favor of Free Exercise in recent decades. The tripartite test, though not a perfect instrument, used to protect the clause from counterfeit claims. Now it is sometimes bypassed when the

Supreme Court decides indirect aid to sectarian institutions furthers a secular purpose. The Court has stopped looking at the size of the denominations on the legislative bills. Hundreds of thousands of dollars for bus fares in 1947 have become hundreds of millions of dollars in a smorgasbord of aid in 1997.

The evidence provided in this study shows that the funds allocated to subsidize private schools in Ohio are squeezed from the public education budget. Although there is federal as well as state documentation of the poor condition of Ohio school buildings and of the financial plight of large urban school districts like Cleveland, enormous amounts of money have been diverted to support private education. During the six years investigated in this study, \$683.7 million in operating funds went to defer costs of nonpublic schools, most of which are religiously affiliated schools.

Consider the *Akron Beacon Journal* story, reported on July 21, 1996. It revealed that during the 1995-96 school year, 20 districts had to secure emergency state loan guarantees to borrow \$87.1 million just so they could stay in operation.³¹ In FY 1995, Ohio spent \$123.5 million on nonpublic school students. That taxpayer money would have saved those 20 public school districts from debt and interest payments, with \$36.4 million left over to repair and build schools.

Many argue that the amount of public money spent on private education is a small price to pay considering what it would cost public schools to educate those children if they were to come into the schools. Others countered that if the needs of public school

students are not met, there is increased illiteracy, drop out rates, crime rates, and related social-costs. There is no bargain to be had in siphoning public school budgets to support private schools. Certainly, it can be argued that there is a need for adequate funding to provide an equitable education for *all* children.

School choice advocates assert that public schools enjoy an “education finance monopoly” which diminishes a family’s capacity to exercise their parental rights in providing for the educational and ethical formation of their children.³² They believe that exercising school choice without financial penalty is the proper way to allow parents to assume greater responsibility for their children’s education and a more equitable method of distributing tax dollars for education.

Critics of school choice believe distributing public dollars to individuals to enable them to choose private schools is contrary to fostering community and national identities and promoting consensus among and across diverse groups. They fear what would result would be further social and economic stratification and a modern day public charity school system that would serve only the very poor or needy.

Peter Cookson believes that major school reform movements, such as advocacy for unrestricted school choice, are a brew of complex social, economic, and political factors.³³ However, only those reform movements supported by people with the necessary influence are transformed into educational policy. In Cookson’s view, educational reform movements “pass in and out of favor depending on social conditions

and how prevailing ideologies interpret these conditions.”³⁴ He hypothesizes that the current educational movement is a result of the 1980s cultural and economic transformations during which the sense of community was replaced by a culture of consumption and self-realization. School choice is an extension of that ideology.

Mary Jane Guy provided an erudite analysis of the debate over private and public control of education. She developed two models, private interest and public interest, that contrast the positions of individuals and government in society and their relationship to education. She explains that the tension that exists between these two perspectives is the basis for the controversy over control of education.

The laissez-faire or private self-interest model minimizes the role of government in providing education and promotes Adam Smith’s thesis that all members of society will benefit coincidentally if the capable few are left to accomplish their goals unfettered by government regulation.³⁵ This philosophical framework is embraced by free market economists and school choice promoters who insist that education should be viewed as a commodity, subject to market forces of supply and demand.

Guy’s public interest model, the republican model of universal education, epitomizes the purposes of common schools: To produce an educated and enlightened citizenry dedicated to the maintenance of a representative and virtuous government. The mantra of the republican model is that education must be “public in purpose, public in access, public in control, and public in support.”³⁶

Reflective leaders, such as Thomas Jefferson and Noah Webster, understood that public education could neutralize certain social and economic forces which might conspire to oppose the principles upon which the nation was founded. Jefferson was persistent in his quest to promote civic education for he recognized its potential as a safeguard of representative government. He believed common schooling could protect against tyranny by educating citizens as guardians of and participants in the republican political process. After three attempts to introduce public education into Virginia were thwarted, Jefferson blamed the failures on “ignorance, malice, egoism, fanaticism, and religious, political and local perversities.”³⁷ Many perceive those same elements as threats to public education today.

Education policy, from the standpoint of the republican model, is based on the premise that individual interests should be subordinate to broader public policy objectives, such as creation of an educated citizenry, knowledge of the basic tenets of democracy, equal access to educational, economic, and political opportunity, and the formation of cultural and social commonalities. This implies that public funding of private choice is counterproductive and would undermine the social, political, and economic objectives of a republican system of governance.

More importantly, funded private choice threatens the existence of public education as an institution. Guy argues convincingly that public education must survive

because “further diversity, separatism, and division may not be the politically or morally correct choice Americans really want to make.”³⁸

Recommendations for Further Study

As contended earlier in this document, financial studies that track funding of nonpublic education programs are scarce. For the edification of the taxpaying public, more financial studies on public funding of private education need be conducted and disseminated. Wisconsin, New York, Pennsylvania, and Louisiana would make excellent candidates for funding studies. One suggestion would be to expand the number of years under study. Perhaps a decade or more would be more revealing or more conclusive.

It is often said that public funds spent on private education is a good investment because it would cost the taxpayer considerably more if children currently attending private schools were to enter public schools. This premise should be quantified for in order to test its veracity.

The inclusion of the new scholarship program and the increased allocations in administrative cost reimbursement would justify a follow-up to this study in the next few years. The state appropriations for nonpublic and public education over the next four or five years might disclose differences in or substantiate the funding trends that emerged in this study.

A student demographic study is an essential component in the analysis of school choice policies. There are questions of who benefits and who is penalized under choice policies. Public and nonpublic school student profiles need to be developed in states that provide substantial public assistance to private education. Socioeconomic status, religious affiliation, and ethnicity are a few of the variables that should be analyzed.

It would be particularly interesting to track demographic shifts, if any, in private schools that participate in voucher programs. Wisconsin and Ohio would be good subjects for this kind of study. It will also be interesting to follow any changes in the target population of such aid programs. Currently, both states restrict the aid for low income families in large urban cities. If these programs withstand legal challenge, it will be important to follow the legislatures' modifications of the programs over time.

There is potential for legal studies, too. If voucher programs come before the Supreme Court, there is potential for substantial analysis of the Court's response, whatever it may be.

It might be revealing to do a comprehensive analysis of sectarian school literature (e.g., student and parent handbooks, teacher manuals, board policy handbooks). It would be useful to assess how the literature describes the school's mission and administrative structure and how it treats issues of student and faculty discipline, admissions, and hiring and firing.

One of the aspects of the school choice debate that it inadequately addressed is whether nonpublic schools promote the degree of parental involvement in administrative decision-making that advocates claim. Religious schools especially may or may not permit parental and student participation in decisions about curriculum and instructional materials. It would be fascinating to find out.

Finally, state legislatures are requiring public schools to be more “accountable” to taxpayers. This accountability takes many forms; increasing student test scores, publishing school report cards, requiring comprehensive teacher examinations, and filing detailed financial reports are a few examples. It is worthy to ask if nonpublic schools that accept public money should be and are held to the same standards. A study of regulatory practices and relevant litigation in states that provide significant financial support to nonpublic schools might be revealing.

There are a multitude of potential studies that would add significantly to the school choice debate and provide legislators with data that would aid them as they craft educational policy. The importance of such studies is paramount; such information would serve to educate the public about school choice and state funding and education policies and thus helping them make better political and educational decisions.

Chapter Five Endnotes

¹ Rep. Michael Fox, Chair, Education Committee, Ohio General Assembly, 1996. Remarks made during “town meeting” in Bill Moyer’s and Jonathan Kozol’s documentary film, “Children in American Schools,” The Saint/Hayden Company, 1996.

² 1995 WL 557316 (Ohio App. 5 Dist.).

³ 58 Ohio St.2d 368 (1979).

⁴ *Ibid.*, at 377.

⁵ 500 F.Supp. 404 (1980).

⁶ Ann Bradley, “Crisis Spurs State Takeover of Cleveland,” *Education Week* 14(March 15, 1995):1+.

⁷ United States General Accounting Office, Health, Education, and Human Services Division, “State Profile: Ohio,” *School Facilities: School Condition by State*, Report to Congress (June 14, 1996).

⁸ Doug Oplinger and Dennis Willard, “Rival for Dollars,” *Akron Beacon Journal* (July 21, 1996):A1+.

⁹ United States General Accounting Office, Health, Education, and Human Services Division, “State Profile: Ohio,” *School Facilities: School Condition by State*, Report to Congress (June 14, 1996), Appendix XXXIX:143.

¹⁰ *Supra*, note 8.

¹¹ The issue of direct reimbursement to nonpublic schools for expenses incurred for completing, filing and maintaining state-mandated records and testing was tested in two United States Supreme Court cases, *Levitt v. PEARL*, 413 U.S. 472 (1973) and *PEARL v. Regan*, 444 US 646 (1979). In *Levitt*, the Supreme Court ruled a New York statute that reimbursed nonpublic schools, including religiously sponsored schools, for costs incurred for complying with state-mandated reporting, including testing. The statute was ruled infirm because it reimbursed for teacher-prepared tests as well as standardized exams, allowing for the possibility that religious content or objectives could be included. Also, there was no mechanism for verifying that the expenses incurred were strictly related to secular activities. New York responded by enacting a new law in which reimbursement

would be made for actual expenses associated with state-mandated record keeping and standardized testing with a provision for auditing said expenditures. Ohio's statute reimburses for state-mandated record keeping and testing. In practice, nonpublic schools are required only to complete a voucher attesting to their actual expenditures or to the maximum cap per pupil, whichever is less.

¹² Information obtained in a telephone interview with Susan Tavakolian, Director of School Finance, Ohio Department of Education, March, 1997.

¹³ Oplinger and Willard, p. A10.

¹⁴ Remarks made during "town meeting" in Bill Moyer's and Jonathan Kozol's documentary film, "Children in American Schools," The Saint/Hayden Company, 1996.

¹⁵ In *DeRolph v. State of Ohio*, it is explained that the state first funds other mandated programs then applies whatever funds remain to education; 1995 WL 557316, at 2. It uses Medicaid and the Department of Rehabilitation and Correction as examples of mandated programs. It should be recalled as well that Governor Voinovich, in his State of the State Address, talks about the expanding need for prisons and warned that costs for the Department of Rehabilitation and Correction continues to require additional funding.

¹⁶ In *Wolman v. Walter* Justice Blackmun acknowledged the legislature's attempt to follow the teachings of the *Meek* decision in writing the Ohio statute, 433 U.S. 229, at 233; Judge Sadler remarked in *Gatton et al. v. Goff* that the Cleveland Pilot Project Scholarship Program was "obviously intended to fall within the explicit reservation set out by the Supreme Court in *Nyquist*," 1996 WL 466499, at 12.

¹⁷ As early as *Everson*, the Court has iterated an unconditional stance against public funds directly aiding sectarian institutions: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." [330 U.S. 1 (1947), at 16.] In *Grand Rapids v. Ball*, Justice Brennan writes, "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular faith." [105 S.Ct. 3216 (1985), at 3224.] In defining direct aid, however, the Court has incorporated several subtle distinctions. Direct aid has been described as public money paid directly to religiously affiliated schools, such as grants for repair and maintenance of school buildings [*PEARL v. Nyquist*, 413 U.S. 756 (1973)], payments for purchasing services from religiously sponsored schools [*Lemon v. Kurtzman*, 403 U.S.

602 (1971)], and reimbursements for the cost of teacher-prepared tests [*Levitt v. PEARL*, 413 U.S. 472 (1973)]. Public funds used to pay for services or materials that go directly to the nonpublic school student, though, has been characterized in indirect. Textbooks [*Board of Education v. Allen*, 392 U.S. 236 (1968)], transportation [*Everson v. Board of Education*, 330 U.S. 1 (1947)], and an interpreter for a deaf student attending a sectarian school [*Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993)] are examples in which public funds are used to support students attending sectarian institutions, yet are considered constitutionally sound. The argument is that the students, not the institutions, are the primary beneficiaries.

The subtle difference in the eyes of the Court is the principle of neutrality. Rehnquist explains in *Nyquist* that the Court is “guided by the fact that any effect from state aid to parents has a necessarily attenuated impact on religious institutions when compared to direct aid to such institutions...the impact, if any, on religious education from the aid granted is significantly diminished by the fact that the benefits go to the parents rather than to the institutions.” (*Nyquist*, at 812.) Another distinction neutrality is argued when the publicly funded benefit is available to a broad class of citizens. In school funding litigation, a publicly subsidized benefit is constitutionally acceptable if both public and nonpublic school families are eligible to receive. This was the contention in *Mueller v. Allen* [463 U.S. 388 (1983)] when the Court upheld a Minnesota statute that allowed parents to claim tax deductions for fees paid for tuition, textbooks, and transportation: “Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools, and those whose children attend non-sectarian...or sectarian private schools.” (*Ibid.*, 3068.) The same rationale is used in *Witters v. Washington Dept. of Services* [106 S.Ct. 748 (1986)]. The Court decided that the state could extend assistance under the vocational rehabilitation program to a blind student who chose to attend a Christian college so that he might become a pastor: “It is well-settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution...Any aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” (*Ibid.*, at 751 and 752.)

The concept of neutrality camouflaging direct aid is not without its critics. Souter disputes the claim of indirect aid in *Rosenberger v. University of Virginia* [115 S.Ct. 2510 (1995)]. A student publication that promoted a Christian viewpoint sued the university when it denied payment for the cost of printing the newspaper, though it was an officially recognized “Contracted Independent Organization” and eligible for funds generated from student activity fees. The sponsoring body claimed its right of First Amendment Free Speech was violated. The university believed such a payment would be contrary to the Establishment Clause. The fees were mandatory and the university was a

public institution. The Court ruled in favor of the student publication, once again referring to the neutrality principal when it dismissed the university's Establishment Clause concerns: "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." (*Ibid.*, 2521.)

Justice Souter disagreed, contending the payment was a direct subsidy of religion. He referred to Madison's Memorial and Remonstrance when he wrote: "The principal against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it...and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment." (*Ibid.*, at 2539.)

More importantly, Justice Souter confronts the problems faced by the Court when dealing with funding issues that are at the edges of the Establishment Clause's application: "In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channeling aid to it exclusively." (*Ibid.*, at 2541). He describes "evenhanded" as just "one element of a permissibly attenuated benefit... [but is not] a sufficient condition of constitutionality for direct financial support of religious proselytization." (*Ibid.*, at 584.) He reminds the Court that in previous marginal cases, such as *Mueller*, *Zobrest*, and *Witters*, there was never any suggestion that the "breadth of potential recipients, or distribution on an evenhanded basis, could have justified the use of (public) funds for religious activities." (*Ibid.*, at 2543.)

This aspect of neutrality will continue to gain importance as new methods of infusing public money into sectarian schools emerge. Ohio's scholarship program would be an informative test of this perspective.

¹⁸ Case No. 96CVH01-0193 (Ohio Com.Pl. 1996).

¹⁹ Case No. 96CVH01-721 (Ohio Com.Pl. 1996).

²⁰ 1996 WL 466499, at 13 and 14.

²¹ Mark Walsh, "Judge Overturns Expanded Wisconsin Voucher Plan," *Education Week on the Web*, January 22, 1997; online: <http://www.edweek.org/htbin/fastweb?searchform+view4>.

²² *Ibid.*

²³ 413 U.S. 756 (1973).

²⁴ 463 U.S. 388 (1983).

²⁵ In *Gatton v. Goff* Judge Sadler notes that the state intended the scholarship program to be statewide, but chose to implement first a pilot program in one district only, 1996 WL 466499, at 1, FN1.

²⁶ 351 N.E.2d 279 (1976).

²⁷ 415 N.E.2d 279 (1980).

²⁸ Ralph Mawdsley and Steven P. Permuth, *Legal Problems of Religious and Private Schools* (NOLPE, 1983), 70.

²⁹ 406 U.S. 205 (1972).

³⁰ Mawdsley, p. 70; Alexander and Alexander, p. 207.

³¹ Oplinger and Willard, p. A11.

³² Quade, p. 5.

³³ Peter W. Cookson, Jr., *The Choice Controversy*, (Newbury Park: Corwin Press, Inc., 1992).

³⁴ Cookson, p. 9.

³⁵ Mary Jane Guy, "The American Common Schools: An Institution at Risk," *J. of Law and Educ.* 21(Fall 1992):572.

³⁶ Butts, p. 4.

³⁷ Kaestle, p. 7.

³⁸ Guy, p. 598.

EPILOGUE

In the interim period between completing the study and defending the dissertation, the Ohio State Supreme Court handed down its ruling in *DeRolph v. State of Ohio*.¹ The court ruled that “the current legislation fails to provide for a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution.” The majority rejected the notion of the appellate court that the education funding problems presented in the case should be left solely to the General Assembly to resolve as they see fit and that constituent discontent should be resolved politically. In plain language, the court asserted that the state constitution places the responsibility of maintaining a system of common schools on the state and that the state “should not shirk its obligation by espousing clichés about ‘local control.’”²

By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio’s public school financing scheme must undergo a complete systematic overhaul. The factors which contribute to the unworkability of the system and which must be eliminated are (1) the operation of the School Foundation Program, (2) the emphasis of Ohio’s school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly’s biennium budget for the construction and maintenance of public school buildings. The funding laws reviewed today are inherently incapable of achieving their constitutional purpose.³

The court has indicated that the state will be responsible for providing adequate funds to school districts in order to provide equitable educational opportunity and a

healthy and safe learning environment throughout the state. How the state will remedy the education funding problems listed by the court and the amount of funding that will be necessary to do so remain as unknown variables at this point in time. What can be surmised is the inevitable effect the decision will have on the funding trends presented in this study. It may be assumed that the legislature will have to re-evaluate its education funding policies, including those relating to funding of nonpublic schools. Clearly, it would be interesting to follow up the education funding trends in Ohio over the next several years and track the effect this decision has on those trends.

¹ The decision is accessible on the Internet, but is not available on the West Law database, yet. The case number is 94-CA-477. The Internet site is the Bricker & Eckler Law Firm, <http://www.bricker.com>.

² *Ibid.* The pages of the decision on the web site are unnumbered. The quote is in the section under the subheading, A “Thorough and Efficient System of Common Schools.”

³ *Ibid.* This paragraph comes under the subheading, “Conclusion.”

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APPENDIX A

Selected Articles from the Constitution of the State of Ohio

Article I. Bill of Rights

Sec. 1. **Inalienable Rights.** All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Sec. 2. **Equal protection and benefit.** All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Sec. 7. **Rights of conscience; the necessity of religion and knowledge.** All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage school and the means of instruction.

Article II. Legislative

Sec. 1. **In whom power invested.** The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representative but the people reserve...the power to propose...laws...on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any...section of any law...appropriating money passed by the General Assembly, except as hereinafter provided; and...to propose amendments to the constitution. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power

of the people to enact laws. The people also reserve...the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the **Cōnstitution of the United States**.

Sec. 26. Uniform operation and approval. All laws, of a general nature, shall have a uniform operation throughout the State; nor shall any act, except as relates to public school, be passed, to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this constitution.

Article VI. Education

Sec. 1. Funds for educational and religious purposes. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific object of the original grants, or appropriations.

Sec. 2. Common school fund. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Sec. 3. Public school system. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

Sec. 4. State board of education and superintendent. There shall be a state board of education which shall be selected...as...provided by law. There shall be a superintendent of public instruction, who shall be appointed by the State Board of Education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Article VII. Public Institutions

Sec. 1. Insane, blind, deaf and dumb. Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly.

Article XII. Finance and Taxation

Sec. 2. Uniform taxation. No property, taxed according to value, shall be so taxed in excess of one percent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation....general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

APPENDIX B

Selections from the Ohio Revised Code

State Board of Education

3301.07 Powers of the State Board

The state board of education shall exercise under the acts of the general assembly general supervision of the system of public education in the state. In addition to the powers otherwise imposed on the state board under the provisions of law, the board shall have the following powers:

- (A) Exercise policy forming, planning, and evaluative functions for the public schools of the state, and for adult education, except as otherwise provided by law;
- (B) Exercise leadership in the improvement of public education in this state, and administer the educational policies of this state relating to public schools, and relating to instruction and instructional material, building and equipment, transportation of pupils, administrative responsibilities of school officials and personnel, and finance and organization of school districts, educational service centers, and territory. Consultative and advisory services in such matters shall be provided by the board to school districts and educational service centers of this state. The board also shall develop a standard of financial reporting which shall be used by all school districts and educational service centers to make their financial information available to the public in a format understandable by the average citizen and provide year-to-year comparisons for at least five years. The format shall show, among other things, district and educational service center revenue by source; expenditures for salaries, wages, and benefits of employees, showing such amounts separately for classroom teachers, other employees required to hold licenses issued pursuant to sections 3319.22 to 3319.31 of the Revised Code, and all other employees; expenditures other than for personnel, by category, including utilities, textbooks and other educational materials, equipment, permanent improvements, pupil transportation, extracurricular athletics, and other extracurricular activities; and per pupil expenditures.
- (C) Administer and supervise the allocation and distribution of all state and federal funds for public school education under the provisions of law, and may prescribe such systems of accounting as are necessary and proper to this function. It may require county auditors and treasurers, boards of education, educational service center governing boards, treasurers of such boards, teachers, and other school officers and employees, or other public officers

or employees, to file with it such reports as it may prescribe relating to such funds, or to the management and condition of such funds.

(D) Formulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community; locally developed competency programs; the licensing of teachers, administrators, and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration, and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirements for graduation; and such other factors as the board finds necessary. In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of those schools, provided they do not conflict with the provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.

(E) Formulate and prescribe minimum standards for driver education courses conducted at high schools in the state or by educational service centers or joint vocational school district boards of education. In the formulation of standards for driver education courses, the board shall call upon the director of public safety for advice and assistance. The board shall require energy conservation information as part of the driver education curriculum. Such information shall include, but need not be limited to, the identification of inefficient driving techniques and improper maintenance as they relate to decreased gas mileage, information regarding the costs and benefits of different modes of travel, and information concerning relative fuel economy and life-cycle costs of new automobile purchases. The board also shall require financial responsibility information as part of the driver education curriculum.

(F) Prepare and submit annually to the governor and the general assembly a report on the status, needs, and major problems of the public schools of the state, with recommendations for necessary legislative action and a ten-year projection of the state's public and nonpublic school enrollment, by year and by grade level;

(G) Prepare and submit to the director of budget and management the biennial budgetary requests of the state board of education, for its agencies and for the public schools of the state;

(H) Cooperate with federal, state, and local agencies concerned with the health and welfare of children and youth of the state;

(I) Require such reports from school districts and educational service centers, school officers, and employees as are necessary and desirable. The superintendents and treasurers of school districts and educational service centers shall certify as to the accuracy of all reports required by law or state board or state department of education rules to be submitted by the district or educational service center and which contain information necessary for calculation of state funding. Any superintendent who knowingly falsifies such report shall be subject to license revocation pursuant to section 3319.31 of the Revised Code.

(J) In accordance with Chapter 119 of the Revised Code, adopt procedures, standards, and guidelines for the education of handicapped children pursuant to Chapter 3323. of the Revised Code, including procedures, standards, and guidelines governing programs and services operated by county boards of mental retardation and developmental disabilities pursuant to section 3323.09 of the Revised Code;

(K) For the purpose of encouraging the development of special programs of education for academically gifted children, employ competent persons to analyze and publish data, promote research, advise and counsel with boards of education, and encourage the training of teachers in the special instruction of gifted children. The board may provide financial assistance out of any funds appropriated for this purpose to boards of education and educational service center governing boards for developing and conducting programs of education for academically gifted children.

(L) Require that all public schools emphasize and encourage, within existing units of study, the teaching of energy and resource conservation, beginning in the primary grades;

(M) Formulate and prescribe minimum standards requiring the use of phonics as a technique in the teaching of reading in grades kindergarten through three. In addition, the state board shall provide in-service training programs for teachers on the use of phonics as a technique in the teaching of reading in grades kindergarten through three.

(N) Develop and modify as necessary a state plan for technology to encourage and promote the use of technological advancements in educational settings. The board may

adopt rules necessary for carrying out any function imposed on it by law, and may provide rules as are necessary for its government and the government of its employees, and may delegate to the superintendent of public instruction the management and administration of any function imposed on it by law. It may provide for the appointment of board members to serve on temporary committees established by the board for such purposes as are necessary. Permanent or standing committees shall not be created.

Certification of Teachers in Nonpublic Schools

3301.071 Certification of Teachers In Nontax-Supported Schools

(A) In the case of nontax-supported schools, standards for teacher certification prescribed under section 3301.07 of the Revised Code shall provide for certification, without further educational requirements, of any administrator, supervisor, or teacher who has attended and received a bachelor's degree from a college or university accredited by a national or regional association in the United States except that, at the discretion of the state board of education, this requirement may be met by having an equivalent degree from a foreign college or university of comparable standing. In the case of nonchartered, nontax-supported schools, the standards for teacher certification prescribed under section 3301.07 of the Revised Code shall provide for certification, without further educational requirements, of any administrator, supervisor, or teacher who has attended and received a diploma from a "bible college" or "bible institute" described in division (E) of section 1713.02 of the Revised Code.

(B) Each person applying for a certificate under this section for purposes of serving in a nonpublic school chartered by the state board under section 3301.16 of the Revised Code shall pay a fee in the amount established under division (A) of section 3319.51 of the Revised Code. Any fees received under this division shall be paid into the state treasury to the credit of the state board of education certification fund established under division (B) of section 3319.51 of the Revised Code.

(C) A person applying for or holding any certificate pursuant to this section for purposes of serving in a nonpublic school chartered by the state board is subject to sections 2301.373, 3319.31, and 3319.311 of the Revised Code.

(D) Divisions (B) and (C) of this section and sections 3319.291, 3319.31, and 3319.311 of the Revised Code do not apply to any administrators, supervisors, or teachers in nonchartered, nontax-supported schools.

Proficiency Tests

3301.0711 Administration of Statewide Proficiency Tests; Exempt Students; Intervention Services; Scores; Nonpublic School Participation; Blind or Deaf Students

(A) The department of education shall:

- (1) Annually furnish, grade, and score all tests required by section 3301.0710 of the Revised Code to city, local, and exempted village school districts;
- (2) Adopt rules for the ethical use of tests and prescribing the manner in which the tests prescribed by section 3301.0710 of the Revised Code shall be administered to students.

(B) Except as provided in divisions (C) and (J)(2) of this section, the board of education of each city, local, and exempted village school district shall, in accordance with rules adopted under division (A) of this section:

- (1) Administer the tests prescribed under division (A)(1) of section 3301.0710 of the Revised Code at least once annually to all students in the fourth grade.
- (2) Administer any tests prescribed under division (A)(2) of section 3301.0710 of the Revised Code at least once annually to all students in the grade designated under that division.
- (3) Administer any tests prescribed under division (A)(3) of section 3301.0710 of the Revised Code at least once annually to any student in the twelfth grade who, on all the tests prescribed under division (B) of that section, has attained the applicable scores designated under such division prior to the first day of January of that year.
- (4) Administer any test prescribed under division (B) of section 3301.0710 of the Revised Code at least twice annually to:
 - (a) All students in ninth, tenth, eleventh, or twelfth grade who have not yet attained the score on that test designated under that division;
 - (b) Any person who has successfully completed the curriculum in any high school or the individualized education program developed for the person by any high school pursuant to section 3323.08 of the Revised Code but has not received a high school diploma and who requests to take such test, at any time such test is administered in the district.

(C)

- (1) Any student receiving special education under Chapter 3323. of the Revised Code shall be excused from taking any particular test required to be administered under this section if the individualized education program developed for the

student pursuant to section 3323.08 of the Revised Code excuses the student from taking that test. In the case of any student so excused from taking a test, the school district board of education shall not prohibit him from taking the test.

(2) A district board may, for medical reasons or other good cause, excuse a student from taking a test administered under this section on the date scheduled, but any such test shall be administered to such excused student not later than fifteen days following the scheduled date. The board shall annually report the number of students who have not taken one or more of the tests required by this section to the state board of education not later than the thirty-first day of May.

(D) In the school year next succeeding the school year in which the tests prescribed by division (A)(1) of section 3301.0710 of the Revised Code are administered to any student, the board of education of any school district in which the student is enrolled in that year shall provide intervention services to the student in any skill in which the student failed on those tests to demonstrate at least fourth-grade levels of literacy and basic competency. This division does not apply to any student receiving services pursuant to an individualized education program developed for the student pursuant to section 3323.08 of the Revised Code.

(E) No school district board of education shall permit any student to be denied promotion to a higher grade level solely because of the student's failure to attain a specified score on any test administered under this section.

(F) No person shall be charged a fee for taking any test administered under this section.

(G) Not later than sixty days after any administration of any test prescribed by section 3301.0710 of the Revised Code, the department shall send to each school district board a list of the individual test scores of all persons taking the test.

(H) Individual test scores on any tests administered under this section shall be released by a district board only in accordance with Δ section 3319.321 of the Revised Code and the rules adopted under division (A) of this section. No district board or its employees shall utilize individual or aggregate test results in any manner that conflicts with rules for the ethical use of tests adopted pursuant to division (A) of this section.

(I) Except as provided in division (G) of this section, the department shall not release any individual test scores on any test administered under this section and shall adopt rules to ensure the protection of student confidentiality at all times.

(J) Notwithstanding division (D) of section 3311.19 and division (D) of section 3311.52 of the Revised Code, this section does not apply to the board of education of any joint vocational or cooperative education school district except as provided under rules adopted pursuant to this division.

(1) In accordance with rules that the state board of education shall adopt, the board of education of any city, exempted village, or local school district with territory in a joint vocational school district or a cooperative education school district established pursuant to divisions (A) to (C) of section 3311.52 of the Revised Code may enter into an agreement with the board of education of the joint vocational or cooperative education school district for administering any test prescribed under this section to students of the city, exempted village, or local school district who are attending school in the joint vocational or cooperative education school district.

(2) In accordance with rules that the state board of education shall adopt, the board of education of any city, exempted village, or local school district with territory in a cooperative education school district established pursuant to section 3311.521 of the Revised Code shall enter into an agreement with the cooperative district that provides for the administration of any test prescribed under this section to both of the following:

(a) Students who are attending school in the cooperative district and who, if the cooperative district were not established, would be entitled to attend school in the city, local, or exempted village school district pursuant to section 3313.64 or Δ 3313.65 of the Revised Code;

(b) Persons described in division (B)(4)(b) of this section. Any testing of students pursuant to such an agreement shall be in lieu of any testing of such students or persons pursuant to this section.

(K)

(1) Any chartered nonpublic school may participate in the testing program by administering any of the tests prescribed by section 3301.0710 of the Revised Code if the chief administrator of the school specifies which tests the school wishes to administer. Such specification shall be made in writing to the superintendent of public instruction prior to the first day of August of any school year in which tests are administered and shall include a pledge that the nonpublic school will administer the specified tests in the same manner as public schools are required to do under this section and rules adopted by the department.

(2) The department of education shall furnish the tests prescribed by section 3301.0710 of the Revised Code to any chartered nonpublic school electing to participate under this division.

(L)

(1) Except as provided in division (L)(3) of this section, the superintendent of the state school for the blind and the superintendent of the state school for the deaf shall administer the tests described by section 3301.0710 of the Revised Code. Each superintendent shall administer the tests in the same manner as district boards are required to do under this section and rules adopted by the department of education.

(2) The department of education shall furnish the tests described by section 3301.0710 of the Revised Code to each superintendent.

(3) Any student enrolled in the state school for the blind or the state school for the deaf shall be excused from taking any particular test required to be administered under division (L)(1) of this section if the individualized education program developed for the student pursuant to section 3323.08 of the Revised Code excuses the student from taking that test. In the case of any student so excused from taking a test, the superintendent of the school shall not prohibit the student from taking the test.

(M) Notwithstanding division (B)(4) of this section and division (C)(3) of section 3301.0710 of the Revised Code, upon request of a district board of education, the department of education shall provide for the district to administer the tests prescribed under division (B) of section 3301.0710 of the Revised Code to students in the eighth grade on a specified date during the month of March. In such a district, tests shall be administered either once or twice during the ninth grade year to students who did not attain the designated scores on such tests in the eighth grade. Such ninth grade test administration shall be prior to the thirty-first day of December or subsequent to that date but prior to the thirty-first day of March or during both such time periods. The district board of education shall determine whether to administer such tests once or twice during the ninth grade year and during which time period to administer the tests if they are only administered once during such year.

Chartering Nonpublic Schools

3301.16 Classifying and Chartering Schools

Pursuant to standards prescribed by the state board of education as provided in division (D) of section 3301.07 of the Revised Code, the state board shall classify and charter school districts and individual schools within each district except that no charter shall be granted to a nonpublic school unless pursuant to division (K) of section 3301.0711 of the Revised Code the school elects to administer the tests prescribed by division (B) of section 3301.0710 of the Revised Code beginning July 1, 1995. The state board shall revoke the charter of any school district or school which fails to meet the standards for

elementary and high schools as prescribed by the board. The state board shall also revoke the charter of any nonpublic school that does not comply with section 3313.612 of the Revised Code or, on or after July 1, 1995, does not participate in the testing program prescribed by division (B) of section 3301.0710 of the Revised Code. In the issuance and revocation of school district or school charters, the state board shall be governed by the provisions of Chapter 119. of the Revised Code.

In case a school district charter is revoked pursuant to this section, the state board may dissolve the school district and transfer its territory to one or more adjacent districts. An equitable division of the funds, property, and indebtedness of the school district shall be made by the state board among the receiving districts. The board of education of a receiving district shall accept such territory pursuant to the order of the state board. Prior to dissolving the school district, the state board shall notify the appropriate educational service center governing board and all adjacent school district boards of education of its intention to do so. Boards so notified may make recommendations to the state board regarding the proposed dissolution and subsequent transfer of territory. Except as provided in section 3301.161 of the Revised Code, the transfer ordered by the state board shall become effective on the date specified by the state board, but the date shall be at least thirty days following the date of issuance of the order.

A high school is one of higher grade than an elementary school, in which instruction and training are given in accordance with sections 3301.07 and 3313.60 of the Revised Code and which also offers other subjects of study more advanced than those taught in the elementary schools and such other subjects as may be approved by the state board of education.

An elementary school is one in which instruction and training are given in accordance with sections 3301.07 and 3313.60 of the Revised Code and which offers such other subjects as may be approved by the state board of education. In districts wherein a junior high school is maintained, the elementary schools in that district may be considered to include only the work of the first six school years inclusive, plus the kindergarten year.

Minimum Standards

3313.48 Free Education to Be Provided; Minimum School Year

The board of education of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof.

Except as provided in section 3313.481 of the Revised Code, each school so provided shall be open for instruction with pupils in attendance for not less than one hundred eighty-two days in each school year, which may include all of the following:

(A) Up to four school days per year in which classes are dismissed one-half day early or the equivalent amount of time during a different number of days for the purpose of individualized parent-teacher conferences and reporting periods;

(B) Up to two days for professional meetings of teachers when such days occur during a regular school week and schools are not in session;

(C) The number of days the school is closed as a result of public calamity, as provided in section 3317.01 of the Revised Code.

The state board of education shall adopt standards for defining "school day" as used in sections 3313.48 and Δ 3317.01 of the Revised Code.

Except as otherwise provided in this section, each day for grades seven through twelve shall consist of not less than five clock hours with pupils in attendance, except in such emergency situations, including lack of classroom space, as are approved by the state board of education.

Except as otherwise provided in this section, each day for grades one through six shall consist of not less than five clock hours with pupils in attendance which may include fifteen minute morning and afternoon recess periods, except in such emergency situations, including lack of classroom space, as are approved by the state board of education.

3313.60 Curriculum Required

Notwithstanding division (D) of section 3311.52 of the Revised Code, divisions (A) to (E) of this section do not apply to any cooperative education school district established pursuant to divisions (A) to (C) of section 3311.52 of the Revised Code.

In adopting minimum standards under section 3301.07 of the Revised Code, the state board of education shall not require chartered schools to utilize any model curriculum adopted pursuant to section 3301.0716 of the Revised Code.

(A) The board of education of each city and exempted village school district, the governing board of each educational service center, and the board of each cooperative education school district established pursuant to section 3311.521 of the Revised Code

shall prescribe a curriculum for all schools under their control. Except as provided in division (E) of this section, in any such curriculum there shall be included the study of the following subjects:

- (1) The language arts, including reading, writing, spelling, oral and written English, and literature;
- (2) Geography, the history of the United States and of Ohio, and national, state, and local government in the United States, including a balanced presentation of the relevant contributions to society of men and women of African, Mexican, Puerto Rican, and American Indian descent as well as other ethnic and racial groups in Ohio and the United States;
- (3) Mathematics;
- (4) Natural science, including instruction in the conservation of natural resources;
- (5) Health education, which shall include instruction in:
 - (a) The nutritive value of foods, including natural and organically produced foods, the relation of nutrition to health, the use and effects of food additives;
 - (b) The harmful effects of and legal restrictions against the use of drugs of abuse, alcoholic beverages, and tobacco;
 - (c) Venereal disease education, except that upon written request of his parent or guardian, a student shall be excused from taking instruction in venereal disease education;
 - (d) In grades kindergarten through six, instruction in personal safety and assault prevention, except that upon written request of his parent or guardian, a student shall be excused from taking instruction in personal safety and assault prevention.
- (6) Physical education;
- (7) The fine arts, including music;
- (8) First aid, including a training program in cardiopulmonary resuscitation, safety, and fire prevention, except that upon written request of his parent or guardian, a student shall be excused from taking instruction in cardiopulmonary resuscitation.

(B) Except as provided in division (E) of this section, every school or school district shall include in the requirements for promotion from the eighth grade to the ninth grade one year's course of study of American history.

(C) Except as provided in division (E) of this section, every high school shall include in the requirements for graduation from any curriculum one unit of American history and government, including a study of the constitutions of the United States and of Ohio.

(D) Except as provided in division (E) of this section, basic instruction in geography, United States history, the government of the United States, the government of the state of Ohio, local government in Ohio, the Declaration of Independence, the United States Constitution, and the Constitution of the State of Ohio shall be required before pupils may participate in courses involving the study of social problems, economics, foreign affairs, United Nations, world government, socialism and communism.

(E) For each cooperative education school district established pursuant to section 3311.521 of the Revised Code and each city, exempted village, and local school district that has territory within such a cooperative district, the curriculum adopted pursuant to divisions (A) to (D) of this section shall only include the study of the subjects that apply to the grades operated by each such school district. The curriculums for such schools, when combined, shall provide to each student of these districts all of the subjects required under divisions (A) to (D) of this section.

(F) The board of education of any cooperative education school district established pursuant to divisions (A) to (C) of section 3311.52 of the Revised Code shall prescribe a curriculum for the subject areas and grade levels offered in any school under its control.

Definitions

Sect. 3313.974 Definitions

As used in this section and in sections 3313.975 to 3313.979 of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public instruction pursuant to section 3313.976 of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 of the Revised Code.

Pilot Project Scholarship Program

Sect. 3313.975 Pilot Project Scholarship Program

(A) The superintendent of public instruction shall establish a pilot project scholarship program in one school district that, as of March 1995, was under a federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third. The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)

(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until he has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are attending an alternative school under the pilot project shall be entitled to

continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose. If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.35, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 to 3313.979 of the Revised Code, the district board of education may enter into an agreement with any teacher it employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

(E) The state superintendent shall make a grant to the pilot project school district sufficient to defray one hundred per cent of the additional costs to the district of providing transportation to and from the alternative school for all students utilizing a scholarship to attend an alternative school.

Sect. 3313.976 Registration of Schools

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

- (1) The school is located within the boundaries of the pilot project school district;
- (2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 to 3313.979 of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 of the Revised Code;

- (3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;
- (4) The school does not discriminate on the basis of race, religion, or ethnic background;
- (5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;
- (6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;
- (7) The school does not provide false or misleading information about the school to parents, students, or the general public;
- (8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 to 3313.979 of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

Sect. 3313.977 Priorities for Admission of Students

(A)

(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) Children residing anywhere whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school;

(e) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot. Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(e) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

Uncodified Law

1996 S 310, s 34, eff. 9-19-96, reads: Notwithstanding divisions (A)(1) and (C) of section 3313.977 of the Revised Code, for the school years beginning July 1, 1996, and July 1, 1997, each registered private school may admit students to kindergarten through third grades in accordance with whatever admission requirements the school has established, provided that such criteria are applied equally to all applicants, whether or not the applicants have been selected to receive scholarships pursuant to division (A) of section 3313.978 of the Revised Code.

Sect. 3313.978 Award of Scholarships; Tuition Assistance Grants

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through three. The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

- (a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.
- (b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteenth day of February and was admitted by the school pursuant to division (A) of section 3313.977 of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to division (C) of section 3313.977 of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 of the Revised Code. All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

(C)

(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's actual charges for such assistance or a percentage

established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 of the Revised Code.

(D)

(1) Annually by the first day of November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

(2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

Sect. 3313.979 Payments to Parents and to Schools

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

(A)

(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such

students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and since the date of admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 of the Revised Code.

Provision of Services

Section 3317.06. Limitations on Use of Moneys Distributed to Chartered Nonpublic Schools

Moneys paid to school districts under division (P) of sections 3317.024 (3317.02.4) of the Revised Code shall be used for the following independent and fully servable purposes:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents and to hire clerical personnel to administer such lending program. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such request shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual request to the local public school district. As used in this section, "textbooks" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

(B) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

(C) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.

(D) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided the school attended by the pupil receiving the service.

(E) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off the nonpublic premises as determined by the department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the school district in which the nonpublic school is located.

(F) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided the public school or in public centers, transportation to and from such facilities shall be provided by the school district in which the nonpublic school is located.

(G) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off of the nonpublic premises as determined by the department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the school district in which the nonpublic school is located.

(H) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state.

(I) To provide programs for children who attend nonpublic schools within the district and are handicapped children as defined in division (A) of section 3323.01 of the Revised Code or gifted children. Such programs shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such programs are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the school district in which the nonpublic school is located.

(J) To hire clerical personnel to assist in the administration of programs pursuant to divisions (B), (C), (D), (E), (F), (G), and (I) of this section and to hire supervisory personnel to supervise the providing of services and textbooks pursuant to this section.

(K) To purchase any secular, neutral, and nonideological computer software, prerecorded video laserdiscs, compact discs, and video cassette cartridges and mathematics or science equipment and materials that are in general use in the public schools of the state and loan such computer software, prerecorded video laserdiscs, compact discs, and video cassette cartridges, equipment, and materials to pupils attending nonpublic schools within the district or to their parents, and to hire clerical personnel to administer the lending program. Only computer software, prerecorded video laserdiscs, compact discs, and video cassette cartridges, equipment, and materials that are incapable of diversion to religious

use and that are susceptible of loan to individual pupils and are furnished for the use of individual pupils shall be purchased and loaned under this division.

(L) To purchase instructional equipment, including computer hardware, for use by pupils attending nonpublic schools within the district if such usage only occurs when these pupils are provided services in public schools, in nonpublic schools that have no religious or sectarian affiliation and provide only a nonreligious educational program, in public centers, or in mobile units located off of nonpublic school premises as determined by the department of education.

(M) To purchase mobile units needed for the provision of services pursuant to divisions (E), (F), (G), and (I) of this section and to pay for necessary repairs and operating costs associated with these units.

Clerical and supervisory personnel hired pursuant to division (J) of this section shall perform their services in the public schools, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or mobile units where the services are provided to the nonpublic school pupil except that such personnel may accompany pupils to and from neutral service sites when necessary to ensure the safety of the children receiving the services.

Health services provided pursuant to divisions (B), (C), (D), and (E) of this section may be provided under contract with the department of health, city or general health districts, or private agencies whose personnel are properly licensed by an appropriate state board or agency.

Transportation of pupils provided pursuant to divisions (E), (F), (G), and (I) of this section shall be provided by the school district from its general funds and not from moneys paid to it under division (P) of section 3317.024 of the Revised Code unless a special transportation request is submitted by the parent of the child receiving service pursuant to such divisions. If such an application is presented to the school district, it may pay for the transportation from moneys paid to it under division (P) of section 3317.024 of the Revised Code.

No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district.

Materials, equipment, computer software, textbooks, and health and remedial services provided for the benefit of nonpublic school pupils pursuant to this section and the

admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers.

No school district shall provide services for use in religious courses, devotional exercises, religious training, or any other religious activity. As used in this section, "parent" includes a person standing in loco parentis to a child.

Notwithstanding section 3317.01 of the Revised Code, payments shall be made under this section to any city, local, or exempted village school district within which is located one or more nonpublic elementary or high schools.

The allocation of payments for materials, equipment, textbooks, health services, and remedial services to city, local, and exempted village school districts shall be on the basis of the state board of education's estimated annual average daily membership in nonpublic elementary and high schools located in the district.

Payments made to city, local, and exempted village school districts under this section shall be equal to specific appropriations made for the purpose. All interest earned by a school district on such payments shall be used by the district for the same purposes and in the same manner as the payments may be used.

The department of education shall adopt guidelines and procedures under which such programs and services shall be provided, under which districts shall be reimbursed for administrative costs incurred in providing such programs and services, and under which any unexpended balance of the amounts appropriated by the general assembly to implement this section may be transferred to the auxiliary services personnel unemployment compensation fund established pursuant to section 4141.47 of the Revised Code. The department shall also adopt guidelines and procedures limiting the purchase and loan of computer software, equipment, and materials under division (K) of this section to items that are in general use in the public schools of the state, that are incapable of diversion to religious use, and that are susceptible to individual use rather than classroom use. Within thirty days after the end of each biennium, each board of education shall remit to the department all moneys paid to it under division (P) of section 3317.024 of the Revised Code and any interest earned on those moneys that are not required to pay expenses incurred under this section during the biennium for which the money was appropriated and during which the interest was earned. If a board of education subsequently determines that the remittal of moneys leaves the board with insufficient money to pay all valid expenses incurred under this section during the biennium for which the remitted money was appropriated, the board may apply to the department of education for a refund of money, not to exceed the amount of the

insufficiency. If the department determines the expenses were lawfully incurred and would have been lawful expenditures of the refunded money, it shall certify its determination and the amount of the refund to be made to the administrator of the bureau of employment services who shall make a refund as provided in section 4141.47 of the Revised Code.

3317.064 Auxiliary Services Mobile Unit Replacement and Repair Fund

(A) There is hereby established in the state treasury the auxiliary services mobile unit replacement and repair fund. By the thirtieth day of January of each odd-numbered year, the administrator of the bureau of employment services and the superintendent of public instruction shall determine the amount of any excess moneys in the auxiliary services personnel unemployment compensation fund not reasonably necessary for the purposes of Δ section 4141.47 of the Revised Code, and shall certify such amount to the director of budget and management for transfer to the auxiliary services mobile unit replacement and repair fund. If the administrator and the superintendent disagree on such amount, the director shall determine the amount to be transferred.

(B) Moneys in the auxiliary services mobile unit replacement and repair fund shall be used for the replacement and repair of mobile units required to provide the services specified in division (E), (F), (G), or (I) of section 3317.06 of the Revised Code and for no other purpose. The state board of education shall adopt guidelines and procedures for replacement and repair of mobile units and the procedures under which a school district may apply to receive moneys with which to repair or replace such units.

Transportation of Pupils

Sect. 3327.01. Transportation of Pupils

In all city, exempted village, and local school districts where resident elementary school pupils live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (d) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the nonpublic school which they attend the board of education shall provide transportation for such pupils to and from such school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable.

In all city, exempted village, and local school districts the board may provide transportation for resident high school pupils to and from the high school to which they are assigned by the board of education of the district of residence or to and from the

nonpublic high school which they attend for which the state board of education prescribes minimum standards pursuant to division (d) of section 3301.07 of the Revised Code.

In determining the necessity for transportation, availability of facilities and distance to the school shall be considered. A board of education shall not be required to transport elementary or high school pupils to and from a nonpublic school where such transportation would require more than thirty minutes of direct travel time as measured by school bus form the collection point as designated by the coordinator of school transportation, appointed under section 3327.011 (33 27.01.1) of the Revised Code, for the attendance area of the district of residence. Where it is impractical to transport a pupil by school conveyance, a board of education may, in lieu of providing such transportation, pay a parent, guardian, or other persons in charge of such child, an amount per pupil which shall in o event exceed the average transportation cost per pupil, such average cost to be based on the cost of transportation of children by all boards of education in this state during the next preceding year.

In all city, exempted village, and local school districts the board shall provide transportation for all children who are so crippled that they are unable to walk to and from the school for which the state board of education prescribes minimum standards pursuant to division (d) of section 3301.07 of the Revised code and which they attend. In case of dispute whether the child is able to walk to and from the school, the health commissioner shall be the judge of such ability.

In all city, exempted village, and local school districts the board shall provide transportation to and from school or special education class for educable mentally retarded children in accordance with standards adopted by the state board of education.

When transportation of pupils is provided the conveyance shall be run on a time schedule that shall be adopted and put in force by the school board not later than ten days after the beginning of the school term.

A district receiving a payment pursuant to division (b) of section 3317.02 of the Revised code is not eligible for reimbursement of transportation operating costs or eligible for school bus purchase subsidy payment pursuant to section 3317.06 of the Revised Code, except for transporting children who are crippled and for transporting pupils attending nonpublic schools.

The cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly out of state appropriations, in accordance with regulation adopted by the state board of

education. No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members, or employees, practices discrimination against any persons on the grounds of race, color, religion or national origin.

APPENDIX C

Rules on Racially Nondiscriminatory Policies And Practices for Nonpublic Schools

3301-39-04 Procedures

(A) Nonpublic schools desiring a charter or an approval to operate

- (1) The nonpublic school shall request information from the division of elementary and secondary education, Ohio department of education, concerning the procedures to follow to obtain either an approval to operate or a charter.
- (2) The division of elementary and secondary education shall provide the nonpublic school with a copy of Chapter 3301-39 of the Administrative Code and the "Procedure for a Nonpublic School Requesting Either an Approval to Operate or a Charter."
- (3) To be eligible for technical assistance from the Ohio department of education, the nonpublic school shall sign and return to the division of equal educational opportunities, Ohio department of education, an affidavit of intent not to discriminate and assurance that the nonpublic school is not an alternative to court or administrative agency ordered, or public school district initiated, desegregation.
- (4) Following investigation and approval by the division of equal educational opportunities of the affidavit, the division of elementary and secondary education will be available to provide technical assistance for the purpose of assuring that the nonpublic school develops and implements educational policies and practices consistent with minimum standards. The division of equal educational opportunities will be available to provide technical assistance for the purpose of assuring that the nonpublic school develops and implements nondiscriminatory policies.
- (5) The governing board of the nonpublic school shall adopt racially nondiscriminatory policies on recruitment, admissions, employment, scholarships/loans/fee waivers, educational programs, and athletics/extracurricular activities. Copies of such policies shall be submitted for approval to the division of equal educational opportunities.
- (6) The nonpublic school shall advertise notice of the approved policies required by this rule. Such advertisement shall be:
 - (a) In the form approved by the division of equal educational opportunities,
 - (b) Published within ninety days prior to the annual acceptance of any applications for enrollment or the enrollment of any pupils, and

- (c) Placed once a week for a four-week period in two newspapers of general circulation in those school districts from which the nonpublic school intends to enroll pupils. Proof of publication of such advertisement shall be submitted to the division of equal educational opportunities.
- (7) If a determination is made that the nonpublic school has not adopted and advertised such policies, the nonpublic school is to be notified in writing, and all technical assistance from the Ohio department of education shall cease. If the nonpublic school is determined to have adopted and advertised such policies, the process of providing technical assistance shall continue.
- (8) The duly authorized representative of the nonpublic school shall complete and submit to the division of equal educational opportunities immediately following the first full week of October in each school year the form entitled "Report of Nonpublic School."
- (9) The division of equal educational opportunities shall determine through an on-site evaluation that the nonpublic school has adopted, advertised, and implemented nondiscriminatory policies and that the nonpublic school is not an alternative to court or administrative agency ordered, or public school district initiated, desegregation.
- (10) The division of elementary and secondary education shall determine that the nonpublic school either has a satisfactory plan to comply, or has complied, with the minimum standards.
- (11) Following the determinations under paragraphs (A)(9) and (A)(10) of this rule, the division of equal educational opportunities will authorize the nonpublic school to advertise for the purpose of soliciting complaints to the division of equal educational opportunities regarding any racial discrimination in the operation of said nonpublic school. Such advertisement shall be:
- (a) In the form prescribed by the division of equal educational opportunities, and
 - (b) Placed once a week for a four-week period in two newspapers of general circulation in those school districts from which pupils are enrolled or sought to be enrolled. Proof of publication of such advertisement shall be submitted to the division of equal educational opportunities ten days after the final date of publication.
- (12) Upon receipt of a complaint of discrimination in response to the advertisement required under paragraph (A)(11) of this rule, the division of equal educational opportunities shall first determine if the facts warrant investigation. If the division's investigation causes it to conclude that the nonpublic school's policies or practices are discriminatory, the nonpublic school shall be notified of the intent not to grant either an approval to operate or a charter to such school and

the right of such nonpublic school to a hearing on such matter pursuant to Chapter 119. of the Revised Code.

(B) Chartered schools and schools with approval to operate

(1) The governing board of the nonpublic school shall adopt and implement nondiscriminatory policies on recruitment, admissions, employment, scholarships/loans/fee waivers, educational programs, and athletics/extracurricular activities and shall assure that the nonpublic school is not an alternative to court or administrative agency ordered, or public school district initiated, desegregation. Copies of such policies shall be submitted for approval to the division of equal educational opportunities.

(2) The duly authorized representative of the nonpublic school shall complete and submit to the division of equal educational opportunities immediately following the first full week of October in each school year the form entitled "Report of Nonpublic School."

(3) The division of equal educational opportunities shall determine through an on-site evaluation or other means that the nonpublic school has adopted and implemented nondiscriminatory policies and that the nonpublic school is not an alternative to court or administrative agency ordered, or public school district initiated, desegregation.

(4) The division of elementary and secondary education shall determine through an on-site evaluation or other means that the nonpublic school maintains compliance with the minimum standards.

(5) If a determination is made that the nonpublic school has not met the requirements of paragraphs (B)(1) to (B)(4) of this rule, and does not within ninety days of notification of such, the nonpublic school shall be notified of the intent to either withdraw the letter of approval or revoke the charter of the nonpublic school and the right of such nonpublic school to a hearing on such matter pursuant to Chapter 119. of the Revised Code.

(6) Upon receipt of a complaint of discrimination by any nonpublic school, the division of equal educational opportunities shall first determine if the facts warrant investigation. If the division's investigation causes it to conclude that the nonpublic school's policies or practices are discriminatory, the nonpublic school shall be notified of the intent to either withdraw the letter of approval or revoke the charter of the nonpublic school and the right of such nonpublic school to a hearing on such matter pursuant to Chapter 119. of the Revised Code.

(7) Nonpublic schools which possess a charter or approval to operate on the effective date of this rule shall perfect compliance with this rule within two years of its effective date.

APPENDIX D

Number and Percent of Private Schools and Students: United States, 1993-94

Characteristics	Schools		Enrollment		
	Total	Number 26,093	Percent 100.0	Number 4,836,442	Percent 100.0
Catholic		8,331	31.9	2,488,101	51.4
Parochial		5,127	19.7	1,409,828	29.2
Diocesan		2,371	9.1	751,175	15.5
Private		833	3.2	327,097	6.8
Other Religious		12,222	46.8	1,629,581	33.7
Conservative Christian		4,530	17.4	610,578	12.6
Affiliated		3,640	14.0	593,647	12.3
Unaffiliated		4,051	15.5	425,356	8.8
Non-Sectarian		5,541	21.2	718,761	14.9
Regular		2,198	8.4	481,423	10.0
Special Emphasis		2,106	8.1	163,251	3.4
Special Education		1,237	4.7	74,087	1.5
School Level					
Elementary		15,571	59.7	2,759,771	57.1
Secondary		2,506	9.6	791,235	16.4
Combined		8,016	30.7	1,285,437	26.6
Size					
Less than 150		14,488	55.5	885,659	18.3
150 to 299		6,677	25.6	1,443,928	29.9
300 to 499		3,112	11.9	1,181,326	24.4
500 to 749		1,239	4.8	735,330	15.2
750 or more		578	2.2	590,200	12.2

Source: U.S. Department of Education, National Center for Education Statistics,
Private School Universe Survey, 1993-94.

Note: Numbers may not add to totals due to rounding or missing values in cells
with too few sample cases.

APPENDIX E

Number and Percent of Private Schools and Students by Religious and Non-Sectarian Category: United States, 1993-94

Characteristics	Schools		Enrollment		
	Total	Number	Percent	Number	Percent
Religious Orientation	Total	26,093	100.0	4,836,442	100.0
Roman Catholic		8,331	31.9	2,488,101	51.4
Amish		405	1.6	12,100	0.3
Assembly of God		507	1.9	69,992	1.5
Baptist		1,990	7.6	271,931	5.6
Calvinist		145	0.6	40,856	0.8
Christian (unspecified)		2,416	9.3	341,305	7.1
Church of Christ		178	0.7	41,875	0.9
Church of God		123	0.5	13,190	0.3
Episcopal		349	1.3	88,079	1.8
Friends		69	0.3	14,839	0.3
Greek Orthodox		29	0.1	5,402	0.1
Islamic		71	0.3	7,514	0.2
Jewish		647	2.5	171,214	3.5
Lutheran Church - Missouri Synod		1,042	4.0	155,168	3.2
Evangelical Lutheran Church of America		108	0.4	15,022	0.3
Wisconsin Evangelical Lutheran Synod		373	1.4	36,538	0.8
Other Lutheran		57	0.2	4,206	0.1
Mennonite		470	1.8	27,028	0.6
Methodist		106	0.4	17,420	0.4
Pentacostal		425	1.6	28,985	0.6
Presbyterian		125	0.5	26,922	0.6
Seventh-Day Adventist		1,072	4.1	67,034	1.4
Other		1,511	5.8	172,771	3.6
Non-Sectarian					
Exceptional Children		713	2.7	55,203	1.1
Montessori		693	2.7	45,303	0.9
Other Non-Sectarian		4,136	15.9	618,255	12.8

Source: U.S. Department of Education, National Center for Education Statistics,
Private School Universe Survey, 1993-94.

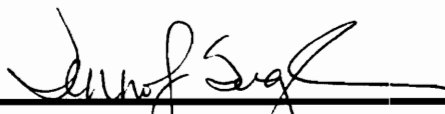
Note: Numbers may not add to totals due to rounding or missing values in cells
with too few sample cases.

VITA

The researcher has been an educator in K-12 schools for over 20 years in the capacities of teacher, counselor, and administrator. The largest portion of her experience has been in overseas education. She was employed by overseas American schools in Africa and South America.

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Jennifer Slighrue