The Land Battle Facing Christian Schools

Presented by Noel W. Sterett at the 2024 CLS National Conference

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The demand for Christian schools is high. Yet new or expanding Christian schools are finding that their development is not welcome in many communities. They are seen as a threat to the property tax base or public school district. This workshop will address how local governments are making it difficult for religious schools to find a place in their communities and what these schools can do about it. The workshop will highlight various laws, including the Religious Land Use and Institutionalized Persons Act (RLUIPA), that protect the religious land use rights of religious schools.

I. Why is the demand for Christian Schools so high?

- The data shows a surge in parents opting their children out of public school.

    - According to Census Bureau data, public school enrollment has fallen by nearly 4% since 2012 while private school enrollment has increased by 2% during the same period. In some states, public school enrollment has decreased by nearly 8% over the last decade.

    - Charter school and homeschooling options have expanded.

    - According to FutureEd, a Georgetown University think tank, in 2023, over 140 school choice bills were introduced in 43 states, and 17 states adopted school choice laws.

    - According to a report by DickersonBakker, nearly 80% of private Christian schools reported increased enrollment since the start of the COVID-19 pandemic, and 43% reported a spike in enrollment over the last two years.

- Christian schools are struggling to keep up with demand and often lack the space and facilities to increase enrollment.

- The history of parents' constitutional right to direct the education and religious upbringing of their children.

  - A century ago, the Supreme Court held that the Fourteenth Amendment protects parents' fundamental rights to direct the upbringing and education of their children.

  - *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer,* a Nebraska law prohibited the teaching of any modern foreign language before high school. The plaintiff, Mr. Robert Meyer, taught German to a 10-year-old boy at a Lutheran church's parochial school. He was convicted under the law, and his appeal was ultimately considered by the Supreme Court. The Court struck down the Nebraska law on substantive due process grounds. The Court held that the student's parents had a fundamental right under the Fourteenth Amendment to control the education of their children.

  - *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). Oregon effectively banned private education for children between 8 and 16. A Catholic school and a military academy sued. The federal trial court preliminarily enjoined the state's enforcement of the law. The Supreme Court affirmed on substantive due process grounds. Here are the key passages:

    - "Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

        - "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

    - *Wisconsin v. Yoder*, 406 U.S. 205 (1971). Wisconsin law required all children to attend school till the age of 16. Amish families wanted their children to stop attending school after the 8th grade and held their children out of school. They were convicted, and their appeal was ultimately heard by the Supreme Court. The Court held that Wisconsin had violated their fundamental parental rights. *Id*. ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.") *Yoder* added that the parents' claim was also supported by their right to the free exercise of their religion.

- Public schools and states have been encroaching on parental rights.

    - In both *Doe v. Madison Metropolitan School Dist*. (WI) and *Figliola v. Harrisonburg City Public School Board* (VA), school policy required school employees to socially transition children at school using cross-gender names and pronouns while hiding it from parents.

    - In *Ibanez v. Albemarle County School Board* (VA), parents challenged a school district's policies and instructional materials which were based on Critical Race Theory.

    - In *B.F. v. Kettle Moraine School District* (WI), the school disregarded parents' requests to not use alternative names and pronouns for their children.

- In *Tennessee v. Cardona*, a federal court enjoined the Department of Education's new Title IX rule which applies to public schools receiving federal funds. The court applied Supreme Court precedent to hold that parents of public-school students "retain a constitutionally protected right to guide their own children on matters of identity, including the decision to adopt or reject various gender norms and behaviors." No. CV 2: 24-072-DCR, 2024 WL 3019146, at *30–31 (E.D. Ky. June 17, 2024). When school officials "insert themselves into constitutionally protected family affairs"—such as whether to change a child's name and pronouns—they must honor, not undermine, the parents' primary role in directing the upbringing of their child. *Id.*

- California law (AB1955) prohibits schools from requiring their employees to notify parents concerning their child's sexual orientation, gender identity, or gender expression unless the child consents or unless otherwise required by state or federal law.

II. How some local governments are making it difficult for new Christian schools to emerge or existing Christian schools to expand.

- When school districts are funded on a per capita basis, every student that leaves results in less money for the school district.

- Some school districts and municipalities are turning to land use and zoning controls to prevent or restrict the emergence of new schools.

- The Fordham Institute reported on how some local governments in Ohio have used dubious zoning and land use decisions to block new charter schools. The report highlights how some failing school districts have refused to sell their

vacant school buildings to new schools. Some have destroyed their buildings to prevent new schools from using them. Some have even adopted deed restrictions to prevent their properties from ever being used by a non-public school.

- As a result of these types of tactics, there are vacant school buildings that are costing taxpayers a lot to maintain and not being used to meet the educational needs of parents and students seeking space for their private religious education.

- Zoning and land use regulations have become a "system of prior restraint." Shelley Ross Saxer, Zoning Away First Amendment Rights, 53 Wash. U. J. Urb. & Contemp. L. 1 (1998).

III. What religious schools can do about it.

- The Religious Land Use & Institutionalized Persons Act, 42 U.S.C. 2000cc et seq. protects the land use rights of religious institutions such as religious schools.

    - Using land for religious education fits comfortably within RLUIPA's definition of "religious exercise."

    - RLUIPA requires local governments to treat religious institutions on equal terms with comparable nonreligious institutions. 42 U.S.C. 2000cc(b)(1).

    - RLUIPA prohibits governmental entities from implementing or imposing land use regulations that substantially burden the religious exercise of a person or institution—including the use of land for religious education. 42 U.S.C. 2000cc(a)(1).

- RLUIPA prohibits governmental entities from totally excluding or unreasonably limiting religious schools within their jurisdiction. 42 U.S.C. 2000cc(b)(3).

- RLUIPA prohibits governmental entities from discriminating against religious schools based on their religious affiliation or character. 42 U.S.C. 2000cc(b)(2).

- Key RLUIPA cases involving religious schools:

    - *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004). School challenged denial of its application to construct an additional building on its campus and to make renovations and improvements to existing buildings under RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc(a)(1).

    - *Reaching Hearts Int'l, Inc. v. Prince George's Cnty*., 584 F. Supp. 2d 766 (D. Md. 2008), aff'd, 368 F. App'x 370 (4th Cir. 2010). Court found a substantial burden where village denied religious school's application for a special use permit to expand, as existing facility lacked sufficient space to meet school's needs.

    - *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229 (10th Cir. 2010). Tenth Circuit affirmed a jury verdict that found that county commissioners had violated RLUIPA's substantial burden, equal terms, and unreasonable limitations provisions when they denied a special use application for a church and church school.

    - *Tree of Life Christian Sch. v. City of Upper Arlington*, Ohio, 905 F.3d 357 (6th Cir. 2018). The city denied Tree of Life a conditional use permit to locate their

school in a zone which freely allowed daycares and not-for-profit hospitals.

- *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83 (2d Cir. 2019) Court found that religious animus motivated zoning amendments used to deny religious school land use approval.

- Other sources of protection:

  - A state Religious Freedom Restoration Act. *See, e.g.*, Illinois's Religious Freedom Restoration Act, 775 ILCS 35/1 et seq. (West 2014). A state RFRA will apply to any government action that substantially burdens religious exercise.

  - State constitutions can provide greater protection for the free exercise of religion than the federal constitution. *See, e.g.,* Alaska, Ohio, Maine, Massachusetts, Maine, and Minnesota.

  - The United States Constitution. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (Court held that government regulation is subject to strict scrutiny if it treats "*any* comparable secular activity more favorably than religious exercise.")