APPENDIX C: LEGAL HISTORY OF THE REGULATION OF PRIVATE SCHOOLS (2000)

Note to readers: The following summary on legal history is taken from the report on State *Regulation of Private Schools* (2000), where it appeared in the Introduction. Although the information has not been updated (and thus does not include more recent history and cases such as *Mitchell v. Helms*,530 U.S. 793 (2000), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)), it is included in this Appendix as a reference for readers.

Under the United States Constitution, parents have a fundamental right to direct the education of their children. In 1925 the Supreme Court recognized that "liberty," protected by the Fourteenth Amendment, includes the right to choose a private education. Confronted with an Oregon statute mandating public school attendance, the Supreme Court ruled the statute unconstitutional. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510 (1925).

In the words of the Court,

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (268 U.S. at 535)

Today, a parent's right to choose a private education is reflected in the statutes of all 50 states. The compulsory school attendance laws typically specify private education as an alternative or exception to public school attendance requirements.

It is also well-established that states have the power to regulate private schools. Based on the "high responsibility for education of its citizens, [a State] may impose reasonable regulations for the control and duration of basic education." *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972). *See also Board of Ed. of Cent. Sch. Dist. No.1 v. Allen,* 392 U.S. 236, 246-247 (1968). The state's interest in an informed and self-sufficient citizenry capable of participating in a democratic society is generally cited to support the regulation of private schools. *Yoder* at 221; *Kentucky State Board v. Rudasill,* 589 S.W.2d 877, 883 (1979).

The right to regulate is not without limitations, however. Since 80 percent of America's private schools are religious institutions, any regulation of these schools must conform to the First Amendment's guarantee of the free exercise of religion. The principle is generally reflected in most, if not all, of the state codes. For example, special provisions are included for church-

related schools, as in the laws of Alabama and Tennessee, or exemptions are provided for schools operated by religious organizations, as in the laws of Wyoming and Nebraska.

A state's excessive regulation may in fact eliminate a parent's right to direct the education of his or her child. In 1923, the Supreme Court struck down a Nebraska statute that prohibited the teaching of German to elementary school age children. The Court determined that the law unreasonably interfered with the power of parents to control their children's education. *Meyer v. State of Nebraska,* 262 U.S. 390 (1923). Similarly, in 1927, the Supreme Court held a Hawaiian law unconstitutional that regulated the teachers, curriculum, and textbooks of private language schools and placed control of the schools in public officers. "Enforcement," the Court said, "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Farrington v. T. Tokushige,* 273 U.S. 284, 298 (1927).

In 1976, the Ohio Supreme Court applied *Farrington* in a constitutional challenge to the state's "minimum standards" governing nonpublic schools. The state court determined that the standards were "so pervasive and all-encompassing that total compliance with each and every standard by a nonpublic school would effectively eradicate the distinction between public and nonpublic education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children." *Ohio v. Whisner,* 351 N.E.2d 750, 768 (1976).

The challenge to state legislators in regulating private schools, then, is to draft legislation that 1) respects the fundamental right of parents to direct the education of their children, 2) protects the state's interest in an informed citizenry but avoids interference with religious beliefs unless compelling interests are at issue, and then only in the least restrictive manner, and 3) avoids comprehensive regulation of private education that would deprive parents of any choice in education.

The public funding of private education is restricted under the United States Constitution. State statutes reflect the numerous decisions handed down by the Supreme Court on the matter. The Establishment Clause of the First Amendment prohibits "government inculcation of religious beliefs." *Agostini v. Felton*, 117 S. Ct. 1997, 2010 (1997). But there is no absolute prohibition against private school children, or even religious institutions, participating in government-sponsored social welfare programs. *Bowen v. Kendrick,* 487 U.S. 589, 609 (1988). The difficulty of applying these principles has produced a wealth of Supreme Court decisions.

The Supreme Court has upheld a New Jersey statute that made transportation equally available to both public and private school children, *Everson v. Board of Education of Ewing Tp.,* 330 U.S. 1 (1947); upheld a New York statute providing free textbooks on loan to parochial school students, *Board of Education of Cent. Sch. Dist. No. 1 v. Allen,* 392 U.S. 236 (1968); invalidated Rhode Island and Pennsylvania provisions that paid salary supplements to nonpublic school teachers of secular subjects, *Lemon v. Kurtzman,* 403 U.S. 602 (1971); struck down a New York statute that reimbursed religious schools for teacher-prepared tests, *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973); upheld an Ohio statute permitting diagnostic and therapeutic services to nonpublic school students but struck down the provision of instructional materials and field trip transportation left within the control of the nonpublic school, *Wolman v. Walter,*

433 U.S. 229 (1977); upheld a New York statute reimbursing nonpublic schools for state mandated recordkeeping and testing, *Committee for Public Education & Religious Liberty v. Regan,* 444 U.S. 646 (1980); upheld a Minnesota statue providing an income tax deduction for tuition, textbooks, and transportation that benefited parents of children attending public, sectarian and nonsectarian schools, *Mueller v. Allen,* 463 U.S. 388 (1983); permitted an Arizona school district under a federal program (*IDEA*) to place a publicly funded sign language interpreter in a sectarian high school to assist a disabled student, *Zobrest v.Catalina Foothills School District,* 509 U.S. 1, (1993); and, upheld placement of public school teachers in parochial schools to provide remedial educational services under a federal program. *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

The state statutes incorporate these Supreme Court decisions on the types of permissible public aid. Twenty-seven states and the Virgin Islands have provisions permitting public funding of transportation; Idaho law dictates that the costs must be recovered. Seventeen states have the power or duty to loan free textbooks to private school students. Some states provide significant assistance for health needs such as immunization, vision and hearing services, and diagnostic testing. (*See e.g.* the laws of Michigan, New Hampshire, and New Jersey.)

While the parameters of state regulation of private schools are to a large extent shaped by our federal constitution, it should also be noted that federal law on occasion directly influences the operations of private schools. For example, federal law prohibits discrimination in the admission policies of nonsectarian schools, (42 U.S.C. § 1981; *Runyon v. McCrary,* 427 U.S. 160 (1976)). And the relationship between state governments and private schools can be forged through federal grant statutes. For example, regulations implementing several federal funding grants direct that states and local educational agencies provide private school children with a genuine opportunity to participate, consult with private school officials and provide comparable benefits for the private school students. 34 C.F.R. 76.650 *et seq., 299.6 et seq.* But the actual regulation of private schools remains the prerogative of the state governments.