

🖨 [Click to print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.law.com/newyorklawjournal/2018/12/05/dysfunctional-law-gives-everyone-rights-and-harms-children/>

Dysfunctional Law Gives Everyone Rights and Harms Children

Recently, much ink has been spilled on New York State's attempt to ensure the Hasidic (Ultra-Orthodox Jewish) school system provides its students with...

By **Michael J. Broyde** | December 05, 2018

Recently, much ink has been spilled on [New York State's](#)



(<https://www.law.com/newyorklawjournal/2018/07/23/lawsuit-filed-to-challenge-exemption-from-minimum-standards-for-ultra-orthodox-schools/>) attempt to ensure the Hasidic (Ultra-Orthodox Jewish) school system provides its students with an adequate secular education, but this is just one of many examples throughout America

of states attempting to regulate private religious schools. Not surprisingly, governmental regulation of the parent-child relationship in the context of religious education is fraught with difficulty. Everyone wants children raised successfully: the state and parents all have an interest in well-educated and healthy children – and parents have the additional right to pass their religious heritage onto their progeny as well.

Sometimes these rights are in conflict. What to do when parents believe that the state's minimal secular education is incompatible with their religious faith is one such hard case. Furthermore, the Constitutional law here makes this problem harder to solve, rather than easier.

The legal story starts ninety-nine years ago, in the aftermath of World War I when Nebraska prohibited teaching German to students. In 1923, the Supreme Court in *Meyer v. Nebraska*, struck this law down. While it allowed the government to regulate many different aspects of the school experience, including ensuring a minimal quality of education, it did not think that the states could regulate what additional things parents could teach their children. Parents have a liberty interest in their children's education.

The story continued in Oregon when, in a fit of anti-Catholic bigotry, the voters by referendum prohibited all private school education, including any and all private religious education. In 1925, in *Pierce v. Society of Sisters*, the US Supreme Court declared this law unconstitutional, again because parents have a liberty interest in the education of their children, including the right to provide them with private education that otherwise meets state standards.

In 1944, in *Prince v. Massachusetts*, the court allowed a state to enforce its curfew rules against children being out late at night or working, even if the children are "working" as part of a church group in ways that their faith demands and parents want. The court

used famous language: “The family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither the rights of religion nor the rights of parenthood are beyond limitation.”

But the 1972 case of *Wisconsin v. Yoder* changed the balance. Wisconsin had – like every state still has – a mandatory attendance law for all children in high school until the age of 16. A group of Amish parents sued, arguing that compulsory education past 8th grade was contrary to their faith. To nearly everyone’s surprise at the time, the court found that the parents’ fundamental right to freedom in raising their children as they see fit outweighed the state’s interest in mandatory high school education of their children. Parents may, for religious reasons, refuse to educate their children in any school – public or private – but make them work on a farm if their religion so demands.

So here is the law as it stands now:

- The state can regulate the educational content of private religious schools to ensure a minimum curriculum and the state can regulate parental conduct to make sure that parents do not endanger their children.
- The state cannot regulate what – above the minimum – is taught in private schools.
- Parents do not have to send their children to any school at all if they religiously object to the compulsory school system.

The practical tension is clear: States can force schools to adhere to its standards, but they cannot force children to go to school. This tension could grow if states consider using the power to set minimums to require private schools to provide (for example) sex education as well.

Consider our Brooklyn Hasidim in a Jewish school without “enough” secular studies as a typical case. In a legal face-off, New York State will prevail in forcing these schools to adhere to the standards set by the state or be closed down. All the aid that the state provides the children (school heating assistance, lunch for poor children, textbooks and much more) will be lost if that result happens. The parents, however, can prevail by

choosing not to send their kids to any recognized school at all. The parents will then educate their children on their farm (or whatever is the Hasidic version of a Amish farm) in Brooklyn.

The state will win by closing the schools and the parents will win by refusing to send their children to any school.

If we are not careful, we could have an absurd standoff: neither the parents nor the state can alone provide the children with the education they deserve. But the children will become the losers in a confrontation, as they will get even less education and assistance if the state and parents both exercise their maximum rights.

So what is the solution here? It is not legal: law gives everyone just enough rights to hurt the poor children, but not enough rights to actually help the children. In cases where religious parents want less education than the state mandates – or even simply refuse to teach that which conflicts with their religious faith that the state labels a minimum – a compromise is needed.

The adults need to negotiate for the benefit of children. The state needs to provide heightened financial inducements and assistance to these schools to raise their standards of secular education. Parents need to realize that they cannot get state aid if they do not meet the state's educational requirement. A compromise can be reached that provides incrementally better education over time, but only if everyone does not invoke their maximal legal rights.

Closing private religious schools should be done only as a last resort when the schools truly endanger children.

In this area of law – like many others — good faith negotiation can produce a world that is better for children, if people really care about the children.

We need to care about children more than we do about abstract rights.

Michael J. Broyde is a law professor at Emory University School of Law where he teaches Family Law. This year he is a senior Fulbright scholar at Hebrew University in Israel.

Copyright 2018. ALM Media Properties, LLC. All rights reserved.