RECENT DEVELOPMENTS

PRIVATE SCHOOLS IN VERMONT: THE "EQUIVALENCY EXCEPTION" TO COMPULSORY PUBLIC SCHOOL ATTENDANCE — *STATE v. LABARGE*

In *State v. LaBarge*[1] dissatisfaction with the Vermont public school system had led Mr. and Mrs. LaBarge to enroll their ten year old daughter, Susan, in the Life in Holiness Christian School, a school offering a "Christian Centered Education."[2] The goal of this newly organized private religious school[3] was to provide students with "Spiritual, and moral values," as well as "academic and physical training."[4] Upon incorporation, the Life in Holiness Christian School had applied, as required by Vermont law,[5] to the Department of Education for conditional approval. A state inspection team visited the school, made an evaluation of the program, and prepared a recommendation for the State Board of Education.[6] Before the Board could act, however, the school withdrew its application. The school could do this because even though it was required to apply for approval, formal state approval was not a necessary condition of doing business in Vermont. The school remained in operation and Susan continued to attend. Subsequently, the Lamoille County State's Attorney commenced a truancy prosecution[7] against the

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1. 134 Vt. 276, 357 A.2d 121 (1976).

2. Articles of Association of Life in Holiness Christian School, Inc. (Aug. 18, 1972).

3. The Life in Holiness Christian School, located in Morrisville, Vermont, was incorporated as a nonprofit organization on August 18, 1972.

4. *See* note 2 *supra*.

5. VT. STAT. ANN. tit. 16, §166(a) (1974).

6. Dep't of Educ., Report of the Visiting Committee to Life in Holiness Christian School (Nov. 28, 1972)(on file with the Dep't of Educ.).

7. To understand the sequence of events in *LaBarge* it is helpful to note that prior to 1970 there was no formal mechanism for state supervision of elementary private school education. While public schools were required to comply with standards promulgated by the Department of Education, private schools were not subject to regulation. To remedy this situation the Vermont General Assembly enacted the Private School Approval Statute. VT. STAT. ANN. tit. 16, § 166 (1974). This statute established a procedure for approving, through certification, private schools that meet statutory and regulatory requirements. Approval was not, however, required as a condition of doing business in the state. Therefore, the state had no authority to prevent the operation of unapproved private schools. Consequently, the state

LaBarges for failure either to send their daughter to public school or to provide her with an equivalent education as required by the Compulsory Attendance Statute.[8] The state's claim was based on the assumption that an unapproved private school could not offer an equivalent education.[9] In defense, the parents claimed that Susan was in fact receiving an equivalent education within the meaning of the statute.

The Vermont Supreme Court upheld the lower court's dismissal of the truancy charge against the LaBarges, thereby abolishing an established procedure for regulating alternative education, namely, truancy prosecution of parents based on the unapproved status of the private school their children attended. As a result, the state must reappraise its entire approach to regulation of private education, for while "[i]t may well be that an 'approved' school always meets the standard of equivalency . . . this does not bar the possibility that 'approval' may be denied on a ground unrelated to the 'equivalency' test."[10] Approval and equivalency are independent concepts. The fact that a private school is unapproved does not necessarily mean that it is not offering an equivalent education.

In addition to the critical distinction between approval and equivalency, the court resolved two procedural issues arising under the truancy laws. Specifically, the court held that the Department of Education must make the determination that the child is not receiving an equivalent education prior to prosecution, and furthermore, at trial the state, not the parent, bears the burden of proof when equivalency is asserted as a matter of defense. To understand the court's resolution of these issues and its distinction between the concepts of equivalency and approval it is necessary to begin with an analysis of the statutory framework against which the *LaBarge* case was decided.

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attempted to indirectly discourage the continued operation of unapproved private schools by initiating truancy prosecutions against the parents of children attending these schools.

8. VT. STAT. ANN. tit. 16, §1121(a) (1974).

9. Reply Brief for Appellant at 3, State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976).

10. 134 Vt. at 280, 351 A.2d at 125.

I. VERMONT'S COMPULSORY ATTENDANCE STATUTE

Vermont's Compulsory Attendance Statute, provides that "[a] person having the control of a child between the ages of seven and sixteen" shall send the child to "public school continually" during the regular school session. The exceptions to this requirement apply to children who are "mentally or physically unable . . . to attend, . . . have completed the 10th grade," are excused by the superintendent, or are "otherwise being furnished with equivalent education."[11] The legal excuse relevant in the *LaBarge* case was the last one, which excuses a parent[12] from truancy prosecution if the child is receiving an "equivalent education" at some place other than a public school.

If a student is continuously absent in apparent violation of the law, a teacher or principal is required to report the absence to local school authorities and the truant officer.[13] The truant officer must then inquire into the cause of the child's absence.[14] If in the course of this informal inquiry he finds that the student's absence does not obviously fall within one of the stated exceptions, such as being confined to bed by illness, the officer must give written notice to the parents that the child is "absent without cause," and should "attend school regularly."[15] After receiving this notice, parents are given an opportunity to provide a legal excuse for the child's failure to attend public school.[16] If an excuse is not furnished and the absence continues, the parent is subject to criminal truancy proceedings which could result in a fine.[17]

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11. VT. STAT. ANN. tit. 16, §1121(a) (1974).

12. The law applies in the same fashion to a custodian, but only the term "parent" will be used throughout this note.

13. VT. STAT. ANN. tit. 16, §1126 (Cum. Supp. 1976).

14. VT. STAT. ANN. tit. 16, §1127(a) (1974).

15. *Id.*

16. *Id.* §1127(b). With the exception of equivalency, other statutes provide that parents may obtain an excuse for each of these exceptions from the superintendent of the public school involved. *Id.* §§1123-1124. The 1967 amendment to the Compulsory Attendance Statute provides that equivalency is a matter to be determined by the Department of Education. *Id.* §1121 (b).

17. *Id.* §1127(b)-(c).

A. *Equivalent Education—A Legal Excuse to Compulsory Public School Attendance*

Prior to *LaBarge,* the Department of Education regulations acknowledged two methods of satisfying the equivalent education exception. One alternative was a home study program; the other, attendance at an approved private school.

1. *Home Study Programs*

State regulations provide that the equivalency exception to compulsory public school attendance may be satisfied by a certified home study program.[18] To obtain the necessary certification, parents must make written application to the Department of Education and submit for evaluation a proposed program of study tailored around a home study plan recommended by the Department.[19] Substantively, the program must provide for instruction in traditional academic courses of study such as reading, spelling, history, science, and mathematics;[20] a curriculum which closely parallels the statutorily prescribed courses of study for public schools.[21] Approval of the home study program results in recognition by the state that the child is participating in an equivalent education program. In sum, assurance that there will be instruction in traditional academic

18. Dep't of Educ., School Attendance, Equivalency Education (Oct. 22, 1974)(on file with the Dep't of Educ.).

19. *Id.*

20. The Calvert Home Study Plan, which has been adopted by the Department of Education as the model for all home study programs, contains this basic curriculum. *See* Calvert School, Inc., The School That Comes to You (Sept. 1973).

21. VT. STAT. ANN. tit. 16, §906 (1974) provides that:

> In the public schools learning experiences shall be provided for pupils adapted to their age and ability in the fields of:
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> (1) Basic skills of communication, including reading, writing, and the use of numbers;
>
> (2) Citizenship, history, and government in Vermont and the United States;
>
> (3) Physical education and principles of health with special reference to the effect of tobacco, alcoholic drinks, and drugs on the human system and on society;
>
> (4) Knowledge of English, American and other literature;
>
> (5) The natural sciences;
>
> (6) Such other knowledge as the state board or a local school board may deem desirable.

courses of study is the sole measure of equivalency in the case of a home study program.

2. *Approved Private Schools*

Attendance at an approved private school is the second method of satisfying the equivalency exception.[22] All private schools are required by law to apply for approval.[23] After receiving the application, the state begins its evaluation process by measuring the school's programs and resources against its articulated goals and objectives.[24] Reflecting the intent of the statute, private school approval regulations present a much more demanding set of standards than those applied in home study evaluations. Specifically, approval is to be granted only "if the board finds that the school has the resources required to meet its stated objectives, including financial capacity, faculty, curriculum, physical facilities, and special services."[25] Prior to *LaBarge* the state assumed that a private school did not offer equivalent education unless all of the approval standards had been met. Thus, as in the *LaBarge* case, failure of a private school to meet not just curriculum standards, but also regulations pertaining to plant and administration, could form the basis for both a denial of approval and a finding of nonequivalency for purposes of truancy prosecution.

II. Resolution of the Issues Presented by *LaBarge*

This statutory and regulatory framework provided a backdrop for both the state's truancy prosecution of the LaBarges and the Vermont Supreme Court's affirmance of the trial court's dismissal of the case. *LaBarge* also presented the court with its first opportunity to interpret the 1967 amendment to the Compulsory Attendance

22. "[S]chools approved by the State Board of Education in Vermont or, if located in another state, approved by comparable authority, offer equivalent education." Dep't of Educ., Regulation Pertaining to Determination of Equivalent Education Pursuant to 16 V.S.A., Section 1121(b) I.A.6 (Oct. 11, 1967)(on file with the Dep't of Educ.).

23. Vt. Stat. Ann. tit. 16, §166(a) (1974).

24. *See* Dep't of Educ., Private School Approval, Preparation of Application Documents (on file with the Dep't of Educ.).

25. State v. LaBarge, 134 Vt. 276, 280, 357 A.2d 121, 124 (1976) (quoting Vt. Stat. Ann. tit. 16, §166(a) (1974)).

Statute, an interpretation which resulted in the resolution of three major issues.

A. *Noninterchangeability of the Concepts of Equivalency and Approval*

Before the *LaBarge* decision the Department of Education assumed the interchangeability of the terms *approval* and *equivalency*. The state founded its claim on the 1967 amendment to the Compulsory Attendance Statute which provides that "[t]he determination of equivalency. . .shall be made by the state department of education."[26] This power, the state argued, necessarily implied that the state also had the discretion to decide, as it did, that only approved private schools could provide equivalent education.

The *LaBarge* court rejected this contention finding "it clear that the Legislature, when it deliberately selected 'equivalent education' in [the Compulsory Attendance Statute], intended to distinguish it from the concept of school 'approval'."[27] The court found further evidence of the distinction between the concepts of approval and equivalency in the state's "recognition of a parent's right to provide an 'equivalent education' to his child at home,"[28] which measures equivalency in terms of curriculum only. The court found the approval standards broader than those of equivalency, stating that "[r]eading 'approval' for 'equivalent education' would subject parents to truancy complaints if the school, for example, failed to acquire sufficient library resources or even library tables and chairs to keep up with the enrollment, or if, for some reason, its financial stability suddenly looked risky to the board."[29]

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26. VT. STAT. ANN. tit. 16, §1121(b) (1974).

27. 134 Vt. at 280, 357 A.2d at 125.

28. *Id.* at 280, 357 A.2d at 124.

29. *Id.* at 280, 357 A.2d at 125. This interpretation also resolved the issue of defective notice. The truancy statute sets forth specific procedures which must be followed as a prerequisite to prosecution. Most importantly, parents must be notified that their child is absent without cause. In *LaBarge*, the truant officer notifed the parents that their daughter was truant because she was not attending an approved school. The court held that this notice as the "only precedent notice, defined the grounds upon which truancy can be charged." 134 Vt. at 279, 357 A.2d at 124. Because the notice was framed in terms of the unapproved status of the school, rather than the parent's failure to provide an equivalent education, it was technically deficient, a result which logically follows from the court's distinction between the concepts of approval and equivalency. Indeed, the court could have disposed of *LaBarge* on

The court's distinction is sound. The approval process is one of certification whereby the state verifies that a private school offers not only a traditional academic curriculum but also measures up to prescribed state standards in a number of nonacademic areas. It provides assurance that students will receive an education in an approved facility which is equivalent in substance and environment to that offered in public schools. Equivalency, however, is a narrower concept relating only to courses of study. This is reflected in the Department's attitude toward home study programs as well as later approval regulations which expressly state that, by offering the statutory courses of instruction, private schools satisfy the equivalency requirements of the compulsory attendance laws.[30] The court, however, went beyond statutory and regulatory language in reaching its decision. It suggested that even if the statutory distinction had not been so clear, the breadth of the approval concept meant that "the state would be hard put to constitutionally justify limiting the right of normal, unhandicapped youngsters to attendance at 'approved' institutions."[31] The court thereby implied that while the concept of equivalency based on curriculum presents a legitimate state interest, approval requirements may not unnecessarily interfere with traditional parental rights.[32]

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the issue of preliminary notice alone.

30. Division of Administrative Services, Dep't of Educ., Private School Approval at 2 (1975)(on file with the Dep't of Educ.).

Before 1975, regulatory language equating equivalency with curriculum was not as clear as present regulatory provisions. The present regulations, specifically referring to the relationship between the statutory courses of study and equivalency, were issued while *LaBarge* was in progress. Consistent with earlier versions, curriculum remains but one factor to be considered in the approval process.

31. 134 Vt. at 280, 357 A.2d at 124.

32. Although the *LaBarge* decision appears to rest primarily on statutory interpretation, the court's language suggests that there may also have been a constitutional basis for the decision. Parents have a constitutionally recognized right to direct the upbringing of their children, a right which limits the state's traditionally plenary power to regulate elementary and secondary education. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925)(state may not limit attendance to public schools only); Meyer v. Nebraska, 262 U.S. 390 (1923)(state may not proscribe the teaching of harmless subjects). The United States Supreme Court appears to have limited this parental right to directing a child's religious upbringing. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972)(a successful first and fourteenth amendment challenge by Amish parents to compulsory secondary education). If the parental interest is in fact limited to the religious upbringing of children, the parents in *LaBarge* would not have had a constitutionally protected right.

State courts vary in their reading of *Yoder*. A recent case, representative of one school

B. *Equivalency Determination is a Prerequisite to Prosecution*

The second issue addressed by the court in *LaBarge* required a procedural interpretation of the 1967 amendment to the Compulsory Attendance Statute. This amendment vested in the Department of Education the responsibility for making an equivalency determination,[33] an appropriate delegation in light of the Department's expertise in the area of education. The question certified in *LaBarge* was whether this determination must be made prior to prosecution.[34] The state argued that the amendment merely established a procedure for determining equivalency whereby parents could apply to the State Board of Education for permission to furnish a child with an equivalent education.[35] The court rejected this construction, and upheld the trial court's dismissal of the action on the grounds that the state had failed to make an equivalency determination before filing charges against the LaBarges. The state must, the court reasoned, make the determination as a preliminary matter to decide whether there are grounds for prosecution.[36]

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of thought, held that state compulsory education laws did not unconstitutionally infringe upon a parent's generalized right of privacy. *See In re* Franz, 390 N.Y.S.2d 940 (1977) (limiting the *Yoder* exception to compulsory education to a parental right to direct the child's religious upbringing).

The language of Chief Justice Barney in *LaBarge* indicated that the court may be inclined to follow an expansive approach to due process similar to that taken by the Ohio Supreme Court when regulation, rather than compulsory education itself, is the subject of challenge. In the case of State v. Whisner, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976) the Ohio court held that the liberty concept, embodied in the fourteenth amendment due process clause, guarantees parents the right to direct their children's education and upbringing, religious or secular. In so holding, the court applied a strict scrutiny standard of review to state regulations so pervasive in scope that they effectively suffocated independent thought and educational philosophy. If the *LaBarge* court was influenced by constitutional considerations of this nature, *LaBarge* is important because it suggests that curative regulations promulgated by the Department of Education may be subject to significant constitutional limitations.

33. Before the addition of the 1967 amendment, the issue of equivalency was a matter of defense only, a question for the jury under proper instruction from the court. *See* OP. ATT'Y GEN. 84 (1952); Brief for Appellant at 11, State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976).

34. The following question had been certified by the trial court:

> In a prosecution under [the Compulsory Attendance Statute], was the trial court correct in dismissing the Information on the representation by the State that the Dept. of Education had made no determination of "equivalency" as that term is used in 16 V.S.A. § 1121(b), prior to the filing of this complaint?

134 Vt. at 277, 357 A.2d at 123.

35. Brief for Appellant at 11, State v. LaBarge, 134 Vt. 276, 357 A.2d 121 (1976).

36. The requirement of notice also provided a basis for the need of a prior determination

The court left unanswered the administratively important procedural matter of which party, the parent or the state, must initiate the equivalency determination. In other words, the question remains whether the parents must formally notify the Department of Education that their child is receiving an equivalent education at someplace other than a public school before the Department has a duty to make an equivalency determination.

The court's holding that the state must make a determination prior to prosecution implies that the parent does not bear the burden of initiation. In *LaBarge,* the parents had not taken any formal procedural steps to initiate the process yet the state was still required to make the determination as a prerequisite to prosecution. To relieve parents of the responsibility for initiating an equivalency determination, and to place this administratively inconvenient and inefficient burden upon the state, would depart from the usual procedure for obtaining an excuse under the attendance law. In an analogous situation, presented in another truancy case, *State v. Maguire,*[37] the burden of initiation was placed squarely on the parents. In *Maguire* the parents relied on the illness exception to compulsory public education as a defense to truancy prosecution. They argued that the state had the burden of showing that the child's absence was not caused by illness and that an investigation had to be made prior to prosecution. The court agreed that the state had a duty to investigate[38] but found that this duty was not triggered until the superintendent received formal notification of the student's illness. Failing notice, there was no duty to investigate and the child was considered absent without cause. Moreover, the approach developed in *Maguire* has been extended by regulation. For example, regulations require that parents make a written application for permission to begin a home study program as a prerequisite to evaluation of the proposed plan for purposes of equivalency certification.[39]

The *LaBarge* court's departure from accepted procedure for obtaining a legal excuse is not compelled by the statute or the unique nature of the equivalency exception. Although the state's

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of equivalency. *See* note 29 *supra.*

37. 100 Vt. 476, 138 A. 741 (1927).

38. *Id.* at 482, 138 A. at 744. *See* VT. STAT. ANN. tit. 16, §1124 (1974).

39. *See* note 24 *supra.*

expertise and knowledge justify placing the burden of an equivalency determination on the state, the duties of notice are founded on a different type of knowledge. The Department of Education has the knowledge and expertise to make an equivalency determination when one must be made. The parents, on the other hand, possess the knowledge as to whether or not the determination needs to be made, that is, whether they intend to rely on the legal excuse of equivalency in the event of truancy prosecution. Furthermore, under *LaBarge*, the state appears to be left with the necessity of making an equivalency determination prior to every truancy prosecution despite the lack of notification from the parents that their child is receiving an equivalent education. To do otherwise would leave the state's case vulnerable to dismissal for the defendant could claim equivalency, for the first time, as a defense at trial. In that event, the state's case would fall because of the court's holding that the equivalency determination must be made as a prerequisite to prosecution.

There is no reason why the burden of initiation in an equivalency situation should be treated in a different manner from the other exceptions. Parents should be required to notify the Department of their intention to rely on the equivalency exception. The Department would then rightly have the duty to make an equivalency determination prior to prosecution. This approach is not only consistent with precedent, administratively it is more efficient and workable.[40]

C. *Proof of Nonequivalency as Part of the State's Case-in-Chief*

The question of who has the burden of initiating and making the initial equivalency determination is separate and distinct from the issue of which party has the burden of proving equivalency at trial. With regard to the allocation of the burden of proof, Vermont law follows the general rule of statutory construction[41] which provides that exceptions that neither "define nor qualify the offense

40. Legislation drafted, but not introduced, by the Department of Education for consideration by the 1977 Biennual Session of the Vermont General Assembly would amend VT. STAT. ANN. tit. 16, §1121(b) (1974) to provide expressly for parental application for equivalency determinations (on file with the Dep't of Educ.).

41. Annot., 153 A.L.R. 1218 (1944).

created by the enacting clause"[42] need not be negatived by the state as part of its case-in-chief. Because exceptions to an offense are matters of excuse only, they must be proved by the defendant at trial.[43]

The traditional application of this rule is illustrated by *State v. McCaffrey,*[44] a late nineteenth-century truancy prosecution brought against a parent for the failure of his son to attend public school regularly. The defendant in *McCaffrey* did not contend that his son had received the "same education"[45] during his absence from public school. Instead he claimed that the state must "negative the exceptions in the statute;"[46] specifically, he contended that the state must prove that the child was not being furnished with the required education. The court held that the offense of truancy was "committed . . . whenever it was established that the child was not in attendance upon school in such a manner as would make twenty-six continuous weeks from the beginning of the first term in the school year."[47] The exceptions did not describe the offense, but referred to matters peculiarly within the knowledge of the defendant. Therefore, they must be proved by him as a matter of defense.

The state in *LaBarge* placed great reliance on the *McCaffrey* decision but the court distinguished it because the 1967 amendment makes equivalency a matter solely within the knowledge of the Department of Education. Consequently, under modern principles of criminal law which have developed since *McCaffrey,* the general rule is abandoned and the state must assume the burden of proof where there is a "manifest disparity in convenience of proof and opportunity for knowledge."[48]

Under the *LaBarge* decision, equivalency is the only legal excuse the state must negate. At first blush this disparate treatment would seem unreasonable and inconsistent. However, it must be

42. State v. McCaffrey, 69 Vt. 85, 90, 37 A. 234, 236 (1896).

43. *Id.*

44. 69 Vt. 85, 37 A. 234 (1896).

45. The requirement of "same education" was the statutory predecessor of the present requirement of "equivalent education." LAWS OF VT., no. 26, §1 (1894).

46. 69 Vt. at 90, 37 A. at 235.

47. *Id.*

48. Morrison v. California, 291 U.S. 82, 91 (1934).

noted that in response to the 1967 amendment the state developed a method of evaluation which is uniquely within the Department's ability, that is, a thorough evaluation by trained Department personnel, of the substance and quality of the program offered by a private school. To require the defendant to duplicate that evaluation would be to impose an almost insurmountable burden at considerable cost. If a parent relied on another exception, for example, illness, access to the necessary medical testimony would not be exclusively available to the state, but rather equally available to both parties. In sum, the unique nature of equivalency, with the state's ready access to the necessary expertise supports the court's requirement that in a criminal truancy prosecution the state bear the burden of proving its determination of nonequivalency.

Conclusion

LaBarge involves more than an interpretation of the Compulsory Attendance Statute requiring an equivalency determination prior to truancy prosecution and a shift in the burden of proof. It contains important implications for the future of alternative education in Vermont. *LaBarge* has restrained the state's power to regulate alternative schools in that the state may not, under existing compulsory education laws, limit attendance at private schools to approved private schools only. Rather, it must be prepared to demonstrate that the unapproved school does not provide an equivalent education within the meaning of the equivalency exception as defined by the court. Consequently, until equivalency standards independent from approval standards are developed for evaluating private schools, the state cannot use truancy prosecution as a mechanism for controlling the quality of education in alternative schools. Moreover, if the state attempts to develop independent equivalency standards, it should be sensitive to the court's implication that there may be constitutional limitations on state regulation of private education.

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