

CAPE OUTLOOK



High Court Creates Chapter I Crisis

The U.S. Supreme Court's July 1 decision striking down programs that assign public school teachers to instruct students in parochial schools surprised private school supporters and fundamentally changed the way private school students will benefit from the twenty year old Title I / Chapter I program.

The High Court ruled 5-4 in *Aguilar v. Felton* that NYC's Chapter I program which assigns public school teachers to provide remedial instruction to students in religious schools, violates the First Amendment's separation of church and state. In another decision the same day, the Court ruled 5-4 in *Grand Rapids v. Ball* that a shared-time program that assigned public school teachers to teach remedial and enrichment courses to students in religious schools is unconstitutional.

Both rulings focused on the manner in which Chapter I services are delivered to private school students by local education agencies, and both concluded that "on-premises" services are unconstitutional. The Court did not invalidate private school participation - private school students continue to be eligible for and entitled to equitable Chapter I services under the law.

The question in both of these cases was whether the delivery of Chapter I services on private school premises violated the Establishment Clause of the First Amendment to the Constitution. The Court found that such delivery did not meet the criteria of the 3-part test traditionally used by the Court to determine the constitutionality of education programs involving church and state: 1) that the program have a secular purpose 2) that it neither advance nor inhibit religion and 3) that it avoid excessive government entanglement with religion. The Court ruled in *Aguilar* that on-premises Chapter I personnel violated this test of the Establishment Clause because a) the need for public school educators to monitor the religious content of instruction on private schools results in excessive entanglement b) The Chapter I aid directly enhances the mis-

sion of sectarian schools and thereby promotes religion, c) public school teachers instructing in private schools may unwittingly inculcate religious values because religion permeates the institution and d) such aid can convey the message that the state supports religion.

Writing for the majority, Justice William J. Brennan said "the symbolic union of church and state... threatens to convey a message of state support for religion to students and to the general public." In a dissenting opinion Justice Warren E. Burger said the court's holding "borders on paranoia" and "exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools."

Reactions to the Decision

Because the new school year started two months after the decision was handed down, public and private school administrators have been struggling to find constitutionally permissible ways to deliver Title I services to eligible private school students. Private school representatives met July 17 in an emergency meeting sponsored by CAPE and again on August 12-14 for a two and a half day meeting sponsored by the US Catholic Conference to discuss the options and the concerns of schools in meeting the new requirements.

Among alternatives being considered by school districts are: providing instruction in motorized and non-motorized vans, in stationary trailers, on neutral sites such as libraries and community centers, through educational television and at public schools (by busing private school students).

The quest for effective and efficient delivery systems raises a second important question - that of cost. While officials do not know how much new systems will cost until they are in place, the Education Department has directed that the extra costs for providing alternative services come "off the top" of a district's total Chapter I allocation.

Since early in July, state officials have been waiting for federal guidance. In a July 16 letter to the Chief State School Officers, Secretary of Education William Bennett emphasized that the "requirement to serve private school students on an equitable basis remains in effect and will be enforced by this department." In an interview later that month Bennett warned that, depending on the "facts and circumstances", school

Secretary Advocates Choice through Voucher Plan

Speaking last month to the Knights of Columbus in Washington, DC Secretary of Education William Bennett announced his proposal for an educational voucher plan which would "allow local school authorities to convert Chapter I funds into a voucher program. Such a program would allow parents to use those funds in any school, including private ones; and we are confident that this Supreme Court will find such a program passes constitutional muster."

Such aid is now given to school districts under Title I of the Elementary and Secondary Education Act of 1965. The Supreme Court ruled July 1 that local educational agencies cannot use Title I money to send teachers into religious schools.

According to the Secretary the legislation is written so that local school boards would be given the option of converting their Chapter 1 program for educationally disadvantaged children into a voucher program. Under the plan, parents would be given a voucher totalling approximately \$579, which they could use to send their children to the private or public school of their choice.

In an August meeting with private school representatives on the proposed voucher bill, Undersecretary of Education Gary Bauer said the legislation is being reviewed by the Office of Management and Budget and is expected to be introduced "soon after Congress returns in September." The Administration acknowledges that the proposal will face a difficult challenge on Capitol Hill but the Secretary believes that in light of the *Aguilar v. Felton* decision, which invalidated the way Chapter I services were being delivered to eligible private school students, support for vouchers will gain momentum in Congress.

CAPE and member organizations look forward to reviewing this long anticipated legislation which will raise a number of important considerations for private schools.

Senate Passes Bill to Award Legal Fees in Special Ed Suits

In what has been called by advocates for the handicapped a victory for handicapped parents, the Senate on July 30 passed by voice vote a bill to amend the Education for All Handicapped Children Act to allow attorneys' fees to parents of handicapped children who win special education court cases. The measure, S.415, was introduced by Senator Weicker (R-CT) in response to the U.S. Supreme Court's decision last year in *Smith v. Robinson* in which parents of handicapped children were denied attorneys' fees.

The key provisions in S.415 require parents to exhaust administrative remedies under the Education of the Handicapped Act (P.L.94-142) before they file suit and would limit payments to public interest groups to actual costs. It would allow parents to recoup courtroom expenses and those related to due-process hearings that precede them. The legislation is retroactive to the Court's decision.

Despite the provision in the Senate bill which limits the award of attorney's fees to those who receive "public funds", CAPE's member association, the National Association of Private Schools for Exceptional Children (NAPSEC) is supporting the Senate passed bill. NAPSEC will be working this fall to have a bill sent to the President.

The House has been awaiting Senate action before taking up the bill. The House companion bill, HR 1523 (Williams, D-MT), is stalled in the Education and Labor Committee which has postponed its markup of the bill. It was reported by the Subcommittee on Select Education in early April.

Recognition Project Progress Report

The Report of the 1985 Exemplary Private School Recognition Project is nearing completion and is expected to be ready for distribution by the latter part of September. Author James Howard, an advisory member of the Project's Steering Committee and former

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editor of the monthly *Basic Education*, has written profiles of six representative exemplary schools to help illustrate the range, variety and distinctive strengths of all 65 recognized schools. In addition he explains briefly the unique nature of the private sector of education and describes the process of selection. He concludes by stating the case for continuing this and the public school project and by noting that dialogue among principals of exemplary schools is a significant contribution to the development of public judgement, upon which the lengthy process of school improvement depends.

Capenotes

Among its recent activities on behalf of its constituency, CAPE:

...submitted testimony to the Senate Finance Committee on the charitable contributions sections of the tax reform proposal. CAPE wrote that giving to nonprofit organizations would decline substantially should Congress enact the President's recommendations. Although efforts of the nonprofit community have forced the Treasury Department to change some of the provisions in the initial plan, the latest Administration version includes provisions which undermine charitable giving.

...submitted testimony to the Senate Committee on Environment and Public Works for oversight hearings on the Asbestos School Hazard Protection Act. In related activity, CAPE staff has been meeting with EPA to discuss the process for the FY 86 grants and loan program and the formula for determining a school's financial need.

...Board of Directors and State CAPE representatives will meet in Washington for the annual fall board meeting on October 21-22.

Legislative Update

Just before Congress departed for its August recess, members completed the FY '86 budget resolution, ending a 7 week impasse on Social Security adjustments and defense spending.

In the budget for education, some programs including Chapter I, Indian education, vocational education, programs for the handicapped and Head Start are allowed a 5% increase for inflation. But the budget also calls for \$400 million in unspecified cuts in discretionary education programs to be determined by the House and Senate appropriations committees. And \$100 million is specified to be cut from the guaranteed student loan (GSL) program. The Child Nutrition program was spared from big budget cuts and it is one of 2 entitlement programs to receive an increase in the budget resolution. School lunch programs are expected to receive an increase of \$100 million. On the

downside, the budget resolution also includes a 14% cut in postal subsidies for nonprofit organizations. CAPE is working with 2 coalitions to counter this potentially damaging action.

The House is due back from the August recess on September 4; the Senate on the 9th.

Recent Action...

School Excellence and Reform Act, HR 2840 was introduced on June 21 by Rep. Augustus Hawkins (D-CA) to promote educational excellence and improve access to education for poor and minority youth. The bill authorizes \$2 billion for FY 87. Programs funded would include general improvement and excellence, including math, science, foreign language, communication skills and technology, early childhood, day care, in-service teacher training, dropout prevention, effective schools and improvement of secondary school basic skills. While private schools are not included as eligible participants in the bill as introduced, CAPE and its member associations are working to have private schools included during Committee consideration of the legislation. Hearings are set in the House Education and Labor Committee for September 18.

In the Senate, a companion bill is expected to be introduced this fall by Chris Dodd (D-CT).

Civil Rights Restoration Act, HR 700; S.272, S.431

These bills were introduced in response to the U.S. Supreme Court's decision in *Grove City v. Bell*. The House Education and Labor Committee marked up HR 700 (Hawkins, D-CA) on May 21 and the House Judiciary Committee marked up the bill on May 22. Because the House bills contained different provisions related to exempting religious institutions and to language on abortion, the bill is pending in the House Rules Committee.

The Senate Labor and Human Resources Committee July 17 held hearings on civil rights issues since the *Grove City* ruling. Another hearing is set for September 20. A markup has not yet been scheduled and it appears that the Senate is holding off until the House completes action. The issue is likely to be drawn out into the 2nd session of the 99th Congress.

Tax Reform...

Both the House Ways and Means and Senate Finance committees will continue to work on proposals for overhauling the tax code. Hearings have been held throughout the summer. The House is expected to begin marking up a bill in September and the Chairmen of both tax writing committees remain hopeful that Congress will send a bill to the President this year. President Reagan has promised an "all-out offensive" this fall on his tax package.

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districts that do not provide equitable services to parochial schools risk losing their federal compensatory education funds. The Department of Education issued guidance in the form of questions and answers to state education authorities on August 15.

Immediate v. Delayed Implementation

There is uncertainty even as the school year begins as to whether the Court's decision requires school districts to have new Chapter I programs in place this fall or whether they can expect delayed implementation. Technically, the Court's order becomes effective 25 days after the decision. However, the decision of the Court of Appeals for the Second Circuit, which the Supreme Court affirmed in *Aguilar v. Felton*, allows for an orderly transition period by instructing the District Court to afford sufficient time for New York City to propose and the Department of Education to approve an alternative plan. And because it seems apparent that the High Court did not fully consider the difficulties inherent in providing alternative Chapter I programs for large school districts, many educators believe that the courts will allow school districts time to plan and implement new programs.

In mid-August the New York City Board of Education petitioned the federal district court for a one-year delay in modifying its current Chapter I program. Private school educators are hoping that the New York District Court will grant a reasonable delay and that it will become a model for all school districts.

And educators are waiting for the results of other pertinent legal proceedings before implementing new Chapter I services. Some guidance has been afforded by an August 6 ruling, in which a federal judge in Missouri lifted his freeze on a decision in a Chapter I by-pass case, and ordered school districts immediately

to implement the Supreme Court's decision. Educators are also anxious about the outcome of a pending legal case in Kentucky in which Americans United for Separation of Church and State have asked the court to implement the Supreme Court's ruling nationwide. The Americans United petition requests that the Secretary be prohibited from funding any Chapter I program that violates the High Court's ruling. The judge is expected to rule in mid-October.

In another action Americans United for Separation of Church and State is suing Education Secretary Bennett. According to its Executive Director, the group is charging the Secretary with encouraging state and local schools boards to "deliberately delay delivery of vital education services and advocating a "gross mishandling of ... scarce funds by skimming administrative costs off the top of the allocations."

The implications of the July 1 decisions may go beyond Chapter I programs. School districts are now aware that other on-site federal programs may be subject to the same Constitutional prohibition that has been applied to the Chapter I program. The Department of Education in its guidance to states has interpreted the Supreme Court decision in its narrowest terms. But lawyers on both sides of the case agree that all other federal programs with instructional components are implicated by the decision. Until the courts settle challenges to other programs, schools districts which do not apply the decision to programs other than Chapter I will be within the federal guidelines.

Whether these decisions represent an enduring setback for religious schools remains to be seen. Indeed, many observers suggest that, with both of the High Court's July 1 rulings decided by bare 5-4 majorities, the question of whether federal programs can be conducted on religious school premises has not been settled forever.

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