

Council for American Private Education

CAPE outlook

Voice of America's private schools

Amicus Brief Filed in Academic Freedom Case

The nation's private school community joined forces last month to affirm the right of private schools to make curriculum decisions free from government control and to help the CAPE affiliate in Puerto Rico resist an attack on academic freedom.

CAPE cosigned an amicus brief developed by the National Association of Independent Schools (NAIS) in a case before the U.S. Court of Appeals for the First Circuit involving the Asociación de Educación Privada de Puerto Rico (PR CAPE). At issue is the constitutionality of a statute and regulation of the Commonwealth of Puerto Rico concerning the selection of textbooks in private schools. In December 2005, a district court, ruling in favor of the PR CAPE, found that the commonwealth's restrictions were unconstitutional and violated the First Amendment right of schools to free speech and academic freedom. Commonwealth officials decided to appeal the decision, and the appeal was argued October 31.

Rule 11 and Law 116

In May 2002, the Department of Consumer Affairs of the Commonwealth of Puerto Rico (DACO for its Spanish acronym) approved Rule 11 of Regulation 6458, which requires private schools to inform parents which books on the booklist for the coming year "have different editions, what the change [in edition] specifically consists of, and whether it is a significant change or not, as defined by these regulations." When the changes are not significant, the school must inform parents that they have the option of purchasing the previous edition, thereby opening the way for students in the same class to have various editions of the same textbook.

The regulation defines "significant changes" as "historical, technological, scientific and/or cultural changes integrated in the new edition of a book that are

significant and as such cause the total or partial revision of one or several chapters or sections and/or the inclusion of one or several chapters or sections." The rule goes on to explain, in considerable detail, that the exclusion of chapters or sections, the reordering of chapters or sections, or the addition of one or several sentences to a chapter or section does not constitute a significant change. When a dispute arises, the final administrative say as to whether or not a change is significant is left to the secretary of DACO.

In other action relating to textbook purchases in private schools, the legislature of Puerto Rico enacted in May of 2004 Law 116, entitled the Law for the Acquisition of School Textbooks, which requires private schools to hold an annual assembly at which parents, or a council or association of parents, must approve a textbook budget for each grade for the following school year.

Vital Interest

The amicus brief prepared by NAIS and cosigned by CAPE explains that the two groups "share a vital interest in high-quality private education and the freedom of private schools to pursue their diverse missions." Both associations are "strongly committed to preserving what have been bedrock principles for private schools for nearly a century—academic freedom and the schools' right to make autonomous curriculum decisions free from intrusive governmental regulation." The brief asserts that the statute and regulation in question "represent unprecedented incur-

sions into private schools' choice of textbooks and other educational materials—choices that are at the core of the schools' First Amendment rights."

The NAIS/CAPE document describes

Rule 11 as a "content-based restriction that strips private schools of the ability to choose and control which textbook shall be taught in class." It says Law 116 deprives "private schools of academic freedom by denying school administrators the final say over the school's textbook budget." Both restrictions "represent unprecedented—and unconstitutional—interference with the basic curricular judgments of private schools."

Citing several court decisions in defense of academic freedom, the document states, "The importance of academic freedom in the private school setting cannot be doubted." In a society that "comprises a multitude of diverse communities with widely varying conceptions of the best ways to raise and educate children," private schools "play a vital role" in providing "a wide variety of schools with a wide variety of missions." Throughout the nation's history, notes the brief, the "right of citizens to form private schools with distinct missions of their choosing has been an important and distinctive feature of American education."

Content-Based Restriction

NAIS and CAPE argue that Rule 11 is a content-based restriction subject to strict scrutiny, "the most demanding standard of review under the First Amendment."



continued on page 2

CAPE member organizations:

- Agudath Israel of America
- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Evangelical Lutheran Church in America
- Friends Council on Education
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Oral Roberts University Educational Fellowship
- Seventh-day Adventist Board of Education
- United States Conference of Catholic Bishops
- 28 Affiliated State Organizations

a coalition of national associations serving private schools K-12
Executive Director: Joe McTighe

Outlook is published monthly (September to June) by CAPE using an Apple Power Mac G4. An annual subscription is \$20. ISSN 0271-1451

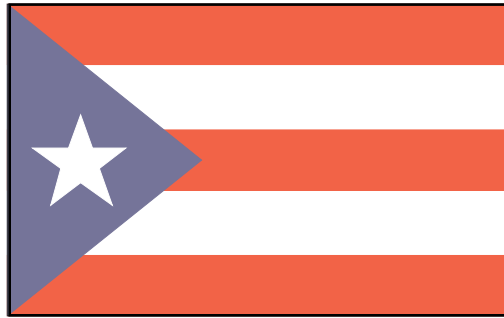
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continued from page 1

The amicus brief notes that Rule 11 grants the secretary of DACO “the power to regulate which textbooks a private school may require parents to buy, based solely on the book’s content.” In fact, the key decision about whether a change in a textbook edition is significant “is itself based on the content of the change.”

Pointing out that the selection of a particular textbook “reflects the message a school wishes to convey to students in the classroom,” the brief contends that what the secretary of DACO decides is insignificant may, in fact, be of “great pedagogical or philosophical significance to a particular school in carrying out its mission.” The document cites several scenarios in which “seemingly minor changes in the text may be precisely what makes a book’s new edition acceptable to a school and consistent with the message the school wishes to convey.”



Infringement of Free Speech

In arguing that Rule 11 infringes on the academic freedom and free speech rights of private schools in Puerto Rico, NAIS and CAPE affirm the findings of the district court that textbooks are “an essential pedagogical tool employed daily in classrooms to deliver the substantive content of educational lessons,” are “an integral part of curriculum and lesson plan development,” and are “selected by private schools to be aligned with the school’s particular vision, mission, philosophy, curriculum, and methodology.” Further, the brief argues that “[i]n the overwhelming majority of school settings, for obvious reasons, textbooks are required, and all students in a single class are required to use the same text.” In addition, “it is the teacher and/or the school’s administrators who generally select the required textbook...which involves the professional educational judgment school officials and teachers are trained to make.” A decision by some parents to disregard a school’s textbook selection would put teachers in the pedagogically untenable position of teaching “classes of students who have textbooks the contents and pagination of which differ.”

Bristling with Problems

The brief contends that giving DACO officials the authority to determine the significance of a textbook change “bristles with First Amendment problems.” First, the regulation provides a circular and open-ended definition of “significant change,” inviting arbitrary decision-making.

Second, DACO officials, who are experts in consumer protection, are not necessarily qualified to make judgments about the significance of a change in a textbook. Third, the regulation “equates the significance of change with the sheer quantity of change,” meaning that a “small change can never be a significant one.” Finally, NAIS and CAPE say they are not aware of “any law, regulation, or rule in any American jurisdiction remotely similar” to the regulation in question. “The complete absence of precedent for Rule 11

is further reason to doubt its constitutionality. It seems to have no forerunner in the history of American education.”

Law 116

Turning to Law 116, which requires private schools in Puerto Rico to secure “the consent of the association or counsel of parents or of an assembly of parents to determine the maximum budget applicable for each school grade for the acquisition of said books required in each school year,” the brief asserts that it also violates the academic freedom and free speech rights of private schools. Holding that “it is wholly inconsistent with principles of academic freedom for the government to decree that a school must give a parents organization a veto power over the budget,” the brief reminds the court that parents “always retain the power to decide which private school their children will attend or whether their children will attend private school at all.”

NAIS and CAPE contend in the brief that Law 116 “stands in stark contrast to the way private schools are regulated throughout the country outside of Puerto Rico.” The commonwealth’s decision to stand alone in promulgating a law like 116 suggests that it has “gone too far.”

One of the core issues in the NAIS document is academic freedom. The brief quotes from a variety of court decisions regarding the meaning of the term, but perhaps the most apt and pointed definition comes from Justice Felix Frankfurter, who in the 1956 Supreme Court decision *Sweezy v. New Hampshire* quoted a statement by university scholars in South Africa regarding “the four essential freedoms” of a university: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

The U.S. Court of Appeals for the First Circuit heard oral arguments in the case October 31. The court is expected to issue a decision sometime in 2007.

New House Leaders Understand Private Education

House Speaker-designate Nancy Pelosi (D-CA) and House Education and the Workforce Chairman-designate George Miller (D-CA) know quite a bit about private education, and their knowledge comes from first-hand experience. Both Pelosi and Miller have attended private schools, as have their children.

“My husband and I, and our five children, have attended over 100 years of Catholic school education,” said Pelosi in a news release issued earlier this year in connection with Catholic Schools Week. “I can tell you firsthand that Catholic schools provide exceptional education.”

And in a statement on the House floor in 2005, Representative Miller said he was “very proud” of his time in Catholic schools. He once attended Bellarmine College Prep in San Jose. “In the Miller families, Catholic schools run very deep,” he said, noting that his grandfather, father, sisters, sons, and grandchildren all went to Catholic schools. “We understand the importance of this education. We understand the importance of the moral education and what we can take away from our time in Catholic school,” he said.

More Than Three Rs

Pelosi said Catholic schools “contribute to a student’s intellectual, ethical and spiritual development.” Saying she relies “every day on the values and the sense of responsibility that were deepened” through her Catholic schooling, the incoming speaker said education is more than reading, writing, and arithmetic, “it is also about teaching each child to live and work with integrity and in a way that serves others.” She said Catholic schools “teach their students that our personal faith means public obligation. Simply put, faith means we have work to do.”

Pelosi, who after the elections pledged that Democrats would lead the House with “integrity, civility and fiscal responsibility,” said in her Catholic Schools Week comments last February

that the teachers, parents, and students in those schools “bring our nation closer to the ‘beloved community’ it was meant to be.” She added that such schools “deserve our nation’s gratitude.”

Faith in Every Student

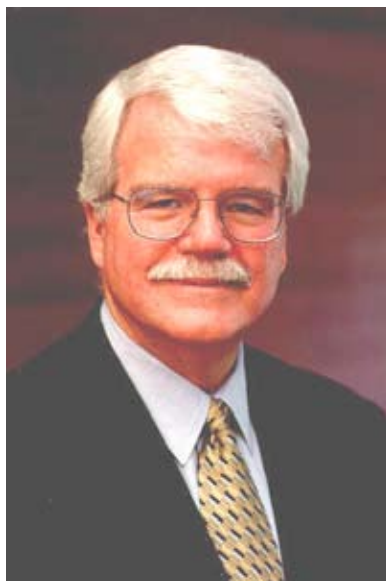
Representative Miller, who pledged recently that Democrats will work in a bipartisan way with Republicans in the new Congress to “take our country in a new direction,” spoke eloquently in support of Catholic schools back in February of 2005. He said the very core of Catholic education is faith in every student and a recognition of the dignity of every person, “recognizing whether they be poor, whether they be rich, whether they be working or unemployed, whether they be young or old, each of us carries with us a dignity given to us by God and recognizing our responsibility to one another.” Catholic schools teach that people must work in community and have obligations to one another, Miller said, “obligations to reach down and give a hand” to people in need.

A year later in February 2006, Miller offered additional comments on the House floor in praise of Catholic schools, acknowledging “the magnificent and incredible contribution they make to our communities and to building the lives of young people in the fullest sense of the word.” He said the schools focus not just on academic performance but also on community service, developing character and moral values, and teaching students to accept community diversity. “These are characteristics, these are values, these are principles that we hold dear as a nation, and Catholic schools have been fundamental to building those within the young people that attend these schools.”

The day after the November elections, the soon-to-be chairman of the House committee that deals with education said that the reauthorization of the *No Child Left Behind Act* would be one of his committee’s top three priorities.



Rep. Nancy Pelosi (D-CA)



Rep. George Miller (D-CA)

Choice Upswing

Opportunities for parents to choose their children’s schools have expanded between 1993 and 2003, according to a report released last month by the National Center for Education Statistics. And school choice “appeared to be associated with the satisfaction level parents had with their children’s schools.” As the report puts it: “Students enrolled in assigned public schools tended to have parents who were less satisfied with the schools than students enrolled in either a chosen public school or private schools.”

Between 1993 and 2003, the share of students enrolled in assigned public schools decreased from 80 to 74 percent, while the percentage of students in chosen public schools increased from 11 to 15 percent. Within the private school sector, the share of students in religiously affiliated schools stayed at 8 percent during the 10-year period, while the share of students in schools not affiliated with a religion increased from 1.6 to 2.4 percent.

In 1993, 1999, and 2003, the three years covered in the report, parents of students in private schools were more satisfied with their schools than parents of students attending public schools, whether assigned or chosen. In 2003, for example, 54 percent of students enrolled in assigned public schools had parents who were very satisfied with the schools, compared to more than 72 percent of parents of children in private schools. Private school parents were also significantly more satisfied than public school parents with teachers, academic standards, and order and discipline.

On another front, private school parents “were more involved in their children’s schools than students enrolled in public schools (assigned or by choice).”

Trends in the Use of School Choice: 1993 to 2003 is available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007045>.

Return service requested

CAPE notes

★ *Fast Fact About Private Schools:* The nation's private school classrooms are less segregated than public school classrooms. That's just one of the findings of a study on school segregation released recently by the Milton & Rose D. Friedman Foundation. The new report examines the results of "all available studies using valid empirical methods to compare segregation in public and private schools, both in general and in the context of school voucher programs."

One of the studies, examining twelfth-grade classrooms across the nation, found that "[p]ublic school classrooms were more likely than private school classrooms to be racially homogeneous (54 v. 41 percent)." The Friedman report also found that "private schools participating in voucher programs in Milwaukee, Cleveland, and Washington, D.C., are much less segregated than public schools" in the same cities.

In a summary of its findings, the report states, "Examining the widespread claims that private schools have high segregation levels and vouchers will lead to greater segregation, this report finds that both assertions are empirically unsupported."

Freedom from Racial Barriers: The Empirical Evidence on Vouchers and Segregation by Greg Forster, Ph.D., is available online at <<http://www.friedmanfoundation.org/segregation.pdf>>.

★ CAPE's condolences go to our friends at the Friedman Foundation and to the Friedman family on the death of

Milton Friedman, the Nobel Prize winning economist who developed the free-market theoretical underpinnings for the school choice movement.

★ An updated guide from the Office of Non-Public Education at the U.S. Department of Education explains how private school students are entitled to equitable benefits under certain provisions of the *No Child Left Behind Act*. According to a USDE notice, the revised publication includes "a summary of the obligations of local school districts in providing equitable services; a description of the 12 major programs providing equitable participation; and details about other federal education opportunities for the private school community."

The publication, entitled *The No Child Left Behind Act of 2001: Benefits to Private School Students and Teachers*, is available online at <<http://www.ed.gov/nclb/choice/schools/privbenefits/pub.html#title>>.

★ Sixty-five outstanding elementary and middle school administrators were honored October 26 and 27 as 2006 National Distinguished Principals by the U.S. Department of Education and the National Association of Elementary School Principals. The NDP program was established in 1984 to recognize public and private school principals who make superior contributions to their schools and communities. Private school honorees are selected by a special committee that CAPE

helps organize.

CAPE salutes all award recipients, including those from private schools: Patricia A. McNamee, Good Shepherd Catholic School, Orlando, FL; Robert J. Ziegler, Saint Michael Lutheran School, Fort Myers, FL; Paul E. DeZarn, St. Raphael the Archangel School, Louisville, KY; Robert C. Herring, Nativity School, Cincinnati, OH; Noel L Hesser, Gloria Dei Lutheran School, Sacramento, CA (now assistant principal at Christian Brothers High School, Sacramento).

★ The U. S. Supreme Court announced November 27 that it would not hear a case challenging a law in Maine that prohibits the use of public tuition funds in religious schools while allowing their use in other private schools. The law provides tuition support for parents who live in towns too small to operate a public school.

"It's appalling that the nation's highest court is allowing blatant government discrimination against parents who choose religious schools to continue," said Dick Komer, senior litigation attorney for the Institute for Justice, which represents eight families in the case. "Maine offers school choice to everyone except parents who choose religious schools. Under the federal Constitution, that's religious discrimination, and we will continue to seek out every opportunity to secure a ruling from the Court that states may neither favor nor disfavor religious options in publicly funded programs."