

Council for American Private Education

CAPE outlook

Voice of America's private schools

U.S. Supreme Court Hears Religious School Case

Do federal employment discrimination laws apply to teachers in religious schools? That's the question the U.S. Supreme Court wrestled with October 5 during oral arguments in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, a case of far-reaching

consequences concerning the unclear boundaries between church and state.

At issue is the "ministerial exception" to employment statutes, which, for example, allows a church to exclude females from the priesthood without being subject to gender discrimination lawsuits. Courts have long recognized that the First Amendment prohibits the government from telling religious organizations who should serve as pastors or rabbis but have been less certain about exempting other religious employees from legal protections.

As the brief for the petitioner put it, "Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship."

Background

Cheryl Perich was a "called" or commissioned fourth-grade teacher at Hosanna-Tabor Church and School in Redford, MI, a congregation affiliated with the Lutheran Church Missouri-Synod, a member of CAPE. The Synod has clear standards for commissioned ministers and a scriptural

basis for a longstanding teaching that disputes be resolved within the church.

Perich was diagnosed with narcolepsy in 2004, and after an extended absence through the fall semester as well as ensuing "in-subordination and disruptive behavior," she was eventually let go and her call rescinded.

In violation of church teaching regarding the internal resolution of disputes, Perich filed a charge with the Equal Employment Opportunity Commission (EEOC), and the EEOC sued the church, alleging that it violated the *Americans with Disabilities Act* (ADA) by retaliating against Perich. The suit sought reinstatement of Perich as a commissioned minister as well as back pay, damages, and new "policies, practices, and programs" at the church.

A district court sided with the church, but the U.S. Court of Appeals for the Sixth Circuit vacated the lower court's decision, reasoning that "parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception."

At Issue

The issue before the Supreme Court is how and where to draw the circle that encompasses employees subject to ministerial exception. The brief for the church, represented by attorneys for the Becket Fund for Religious Liberty, as well as University of Virginia Law School professor Douglas Laycock, argued that the teacher in question falls within that circle because she

taught religion, led prayer and worship, was "required to integrate faith into secular subjects," and served as a commissioned minister. Having the civil courts reinstate her as a minister would "run roughshod over the Lutheran system for resolving internal religious disputes," would "entangle the courts in the religious question of her fitness for ministry," and would "result in the government dictating to the church who will teach its religious message."

Taking the other side, the Department of Justice and the EEOC argued in their brief that the ADA "forbids employers—including religious employers like petitioner—from retaliating against their employees for complaining about or reporting discrimination." The government claims that the anti-retaliation provisions of the ADA are not unconstitutional when applied to religious employers.

Oral Arguments

Oral arguments centered on the proper boundary between government infringement in religious affairs and the protection of the legal rights of individuals. Representing the United States, Leandra R. Kruger, assistant to the solicitor general, took the position that religious freedom must accommodate the right of government to protect employees from being fired illegally. She essentially dismissed the fact that the setting for this employment dispute was a religious organization deserving, in this instance, of special consideration under the Constitution. That point caused Justice Antonin Scalia to remark: "That's extraordinary. That is extraordinary. We are talking here about the Free Exercise Clause and about the Establishment Clause, and you say they have no special application?"

Justice Samuel A. Alito Jr. inquired whether Ms. Kruger accepted "the proposition that one of the central concerns of the Establishment Clause was preventing the

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 Christian Teachers and Schools
 - 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
 - Wisconsin Evangelical Lutheran Synod Schools
 - 33 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. An annual subscription is \$35. ISSN 0271-1451

13017 Wisteria Drive #457
Germantown, MD 20874
(tel) 301-916-8460
(fax) 301-916-8485
(email) cape@capenet.org

www.capenet.org

ESEA Bill Would Exclude Private Schools from BRS Program

The Senate Health, Education, Labor and Pensions Committee last month approved an overhaul of the *Elementary and Secondary Education Act* that includes a provision to redesign the Blue Ribbon Schools program and limit award recipients to public schools. Since the early 1980s, the program has been a symbol of the excellence and diversity of American education by honoring exemplary public and private schools. The bill now goes to the full Senate.

Under Section 1117 of the soon-to-be numbered bill, states would be invited to designate the top five percent of public schools as blue ribbon schools based on several quantifiable

criteria, including the percentage of students who are on track to be college and career ready in language arts and mathematics. Such schools would be eligible for increased autonomy over their budget and staff as well as greater flexibility in the use of federal funds.

CAPE has contacted HELP Committee members on this issue and on provisions relating to ESEA in general, urging inclusion of language to ensure that funds generated by the count of students in a district who attend private schools be reserved for the benefit of those students (in programs that provide such benefits) before a state or district elects to “flex” funds or direct them elsewhere.



continued from page 1

government from choosing ministers.” Kruger responded that when the government applies anti-retaliation laws to religious organizations, it is not choosing a minister.

Justice Elena Kagan asked whether a church “has a right that’s grounded in the Free Exercise Clause and/or the Establishment Clause to institutional autonomy with respect to its employees?” Kruger replied, “We don’t see that line of church autonomy principles in the religion clause jurisprudence as such.” Echoing Scalia’s earlier response, Kagan said she too found it “amazing” that the position of the Justice Department was that “neither the Free Exercise Clause nor the Establishment Clause has anything to say about a church’s relationship with its own employees.”

Asked by Justice Stephen G. Breyer if the government could tell the Catholic Church that it has to have women as priests, Kruger said, “The government’s general interest in eradicating discrimination in the workplace is simply not sufficient to justify changing the way that the Catholic Church chooses its priests.” But that response led to some tough questions and comments about the rationale for the government’s distinction between the Catholic teaching against female priests and the Lutheran teaching that disputes should be resolved within the church. Commenting on that issue, Chief Justice John Roberts said the government was “making a judgment about how important a particular religious belief is to a church.”

Fair Is Fair?

During his turn at the lectern, Walter Dellinger, who represented Perich, said at one point

that after the court in *Agostini v. Felton* allowed government-funded services in religious schools, the consequence was that such institutions “should comply, in some instances, with the same rules.” That prompted a quick response from Justice Scalia: “Do Lutheran schools and Catholic parochial schools share public funds the same way public schools do?” Dellinger admitted they don’t, and Justice Breyer, also picking up on Scalia’s question, definitively concurred, “You bet they don’t.” Scalia stayed with the point, telling Dellinger, “Don’t tell me that fair is fair... just like everybody else. That’s not true.”

Attorney Douglas Laycock, who represented the church, said that in this case it is easy to determine whether Cheryl Perich is covered by the ministerial exception or not. “She’s a commissioned minister in the church. She holds ecclesiastical office. She teaches the religion class.”

Justice Sonia Sotomayor asked Laycock whether society has “a right at some point to say certain conduct is unacceptable, even if religious?” In effect he responded that it has that right in certain compelling circumstances, but not when it comes to “selecting and removing ministers.”

Justice Scalia got to the heart of the case when he succinctly captured a segment of Laycock’s argument: “I think your point is that it’s none of the business of the government to decide what the substantial interest of the church is.”

A decision by the court, expected sometime next year, will determine whether it is indeed the government’s business to tell the church what it can and can’t do when it comes to religious employees.

Duncan Dialogues with Private School Leaders

Education Secretary Arne Duncan acknowledged the “extraordinary work” that private school educators are doing “to help children fill their tremendous academic and social potential.” His remarks came at the annual private school leadership conference September 28, sponsored by the Education Department’s Office of Non-Public Education (ONPE).

In an exchange with heads of private schools that help needy children in public schools through summer and after-school enrichment programs, Duncan said their work was “desperately needed.” Recalling his personal education at “an amazing private school,” he said there is much that public and private schools can learn from each other and that more outreach from both sides was needed. “As we try to transform the quality of public education, the voice of your movement I think can help us get where we need to go,” he said.

Engaging private schools and related institutions in support of students in public schools emerged as a recurring theme in Duncan’s remarks. During a dialogue with another panel of leaders from the private school community, the secretary said faith-based institutions and non-profit social service agencies could run tutoring programs, mentoring programs, or even after-school Bible study in public schools. “Where is the nonprofit, where is the church, where is the social service agency?” he asked.

The secretary said that when he was head of the Chicago public schools, he asked the Catholic Archdiocese to run charter schools. In a similar vein, he challenged attendees to have their communities consider taking over charter schools or turning around low-performing public schools. “I would invite you to think about what this collective brain trust can do to step up and say we are going to put our reputation, our resources on the line and we’re going to go to those under-performing schools, we’re going to go to those high-poverty communities, and we want to help run the schools.”

Panel members hit on several topics during their dialogue with Duncan. The first was the need to protect the autonomy of private schools so they can operate according to a specific mis-

sion. Duncan said he was “committed to maintaining that autonomy, so you have no worries there.” Noting that he has no interest in micro-managing any school, he added, “You should absolutely keep that autonomy, and if you ever see us somehow sliding into overreach or whatever it might be, please push back on us very, very hard.”

Another panelist observed that faith-based schools can make a unique contribution to changing the lives of children in that they attempt to draw from God’s love to engage students “life on life” through encounters with caring teachers. Duncan said he witnessed the power of person-to-person transformation through the work of his mother, who conducted a tutoring program for underserved children.

On the issue of how the administration might help vulnerable inner-city private schools continue to serve their students, Duncan ruled out support for vouchers but said he had pushed hard to secure provisions that apply to private schools in the school construction segment of the proposed *American Jobs Act*. “I just thought these are our kids, these are our schools,” he said. He also seemed open to addressing, through regulation or waivers, the fact that private school students are not seeing their fair share of services under ESEA because of funds being diverted to other purposes off the top of a district’s allocation. “That would be very helpful,” he said. He urged private school leaders to press the department to be “better partners” and “more creative” when it comes to waivers and ESEA reauthorization.

Asked about improving provisions for private school students under the *Individuals with Disabilities Education Act*, Duncan said it is important to figure out how to deliver IDEA services to all children in a more “thoughtful, collaborative, timely way.” He urged private school representatives to push department officials to secure improvements in services through guidance and, if necessary and appropriate, tough enforcement.

The discussion with Secretary Duncan constituted one component of the ONPE conference, which featured a wide range of topics, including the Teaching Ambassador Fellowship program and instructional resources available from NASA.



Secretary of Education Arne Duncan addresses private school leaders September 28 in Washington, DC. (Photo: Paul Wood, U.S. Department of Education)

Enrollment Trends

Enrollment in grades PK-12 in the United States increased 8 percent between 1995 and 2008 and is expected to increase another 5 percent between 2008 and 2020, according to a new report from the National Center for Education Statistics. But the patterns vary by type of school.

Enrollment in public schools increased 10 percent from 1995 to 2008, while enrollment in private schools decreased 4 percent. Similarly, public school enrollment is projected to increase 7 percent between 2008 and 2020, while private school enrollment is expected to drop 8 percent.

The roughly 55 million PK-12 enrollment figure for schools throughout the country in 2011 could grow to 58 million over the next nine years if the models at play in *Projections of Education Statistics to 2020* hold true. Public schools would see enrollment jump from 49 to 53 million, and private school enrollment would move from 5.32 to 5.27 million.

The number of high school graduates in the nation increased by 32 percent between 1995–96 and 2007–08, while the number of private high school graduates increased by 27 percent.

In the 14 years (1995 to 2008) of actual, rather than projected, enrollment figures included in the report, the share of private school students in the country ranged from 11.7 percent to 10.4 percent. For the years of projected enrollment (2009-2020) the share is expected to range from 10.0 to 9.1 percent

NCES uses a projection model that assumes, in the words of the report, that “future trends in factors affecting enrollments will be consistent with past patterns.” But policies, programs, perceptions, the economy, and other factors regularly influence the decisions that parents make about schools. In other words, past demography is not destiny, and projections may not prove true.

Return service requested

CAPE notes

★ Steve Jobs, the inspired leader of Apple, was also a visionary when it came to education reform. In a 1996 *interview with Wired magazine*, Jobs said, “I’m one of these people who believes the best thing we could ever do is go to the full voucher system.” He went on to say that technology is not the solution to our problems in education and praised his daughter’s private school as “the best school I’ve seen in my life.”

★ The Pennsylvania State Senate last month approved Senate Bill 1, creating an opportunity scholarship program for low-income students and expanding the state’s Educational Improvement Tax Credit (EITC). The bill, which passed 27-22, enjoyed bipartisan backing by Senators Jeffrey Piccola (R) and Anthony Williams (D) and also reflects proposals endorsed by Governor Tom Corbett.

Williams, who represents South Philadelphia and surrounding areas, said, “This is a victory for children and families across Pennsylvania. Families should not suffer because their local school is not providing their child with a quality education.” He added: “I cannot, in good conscience, continue to go along with the status quo of approving education funding and praying that things change. We’ve waited too long and talked for too long about change. Change must be immediate, and that change began today.”

Starting in 2012-13, the bill would provide scholarships to low-income children

who had attended in the previous school year a public school in the bottom 5 percent of performance. Children eligible to attend kindergarten in such schools would also qualify for the scholarship. Starting in 2013-14, any low-income child residing in the attendance area of a low-performing public school would be eligible.

The bill would also lift the cap on the EITC program from the current \$75 million to \$125 million by 2014.

“Senate Bill 1 is a landmark piece of legislation that will give more Pennsylvania families broader access to educational options than ever before,” said Otto V. Banks, executive director of the REACH Alliance.

Betsy DeVos, chairman of the American Federation for Children, expressed gratitude for the hard work of Sens. Williams and Piccola, but cautioned, “Now the responsibility rests with the House to make sure that it hasn’t been in vain.”

★ The U.S. Department of Education recently announced the Green Ribbon Schools program, which will “recognize schools that save energy, reduce costs, feature environmentally sustainable learning spaces, protect health, foster wellness, and offer environmental education to boost academic achievement and community engagement.”

Each state may nominate up to four schools, including private schools. Nominations for the first round are due in early 2012. For more information about the

program, visit <<http://www2.ed.gov/programs/green-ribbon-schools/index.html>>.

★ The Education Department’s Office of Non-Public Education (ONPE) and Office of Special Education Programs (OSEP) have released a new Web page focusing on issues surrounding services under the *Individuals with Disabilities Education Act* (IDEA) to children placed by their parents in private schools. Current resources on the site include a Q&A document and a recording of a recent webinar on the topic. The site’s URL is a beast, but we’ve simplified it as follows: <<http://bit.ly/s506fb>>.

★ Five private school principals were among the 61 outstanding elementary and middle school administrators who were honored October 21 at an awards banquet in Washington, DC, as 2011 National Distinguished Principals. The NDP program, sponsored by the U.S. Department of Education and the National Association of Elementary School Principals, was established in 1984 to recognize public and private school principals who make superior contributions to their schools and communities. The private school awardees were: **Randy H. Einem**, St. John’s Lutheran School, Orange, CA; **Christi A. Lines**, St. Paul’s Lutheran School, Waverly, IA; **James Mulé**, St. Amelia School, Tonawanda, NY; **Yvonne R. Schwab**, St. James the Less Catholic School, Columbus, OH; **Kathryn B. Wood**, Queen of Angels Catholic School, Roswell, GA.