

Lawsuit raises school choice issue

03-04-2022, Rutland Herald, by Jim Sabataseo

A new lawsuit arguing it should be easier for public funds to flow to religious schools has been filed just as lawmakers are considering legislation that would add guardrails to that very process.

Last week, the Alliance Defending Freedom, a nonprofit Christian advocacy group, filed a lawsuit in Vermont's district court on behalf of the Williams family and the Catholic Diocese of Burlington, dealing with the family's being denied tuition benefits to attend a local religious school.

The Williams family live in Chittenden, one of two towns in the Barstow Unified Union School District, and send their children to Mount St. Joseph Academy, an independent Catholic school in Rutland.

In Vermont, a student living in a town without its own high school, like Chittenden, is able to apply for a tuition voucher to attend one elsewhere. For a student tuitioned at a public school, a town pays the receiving district the equivalent of that district's average per pupil costs. For independent schools, a student receives a voucher worth up to the average announced tuition for Vermont public schools or the independent school's tuition, whichever is less.

For more than 20 years, religious schools have been excluded as a school choice option, which means families like the Williams have had to pay tuition out of pocket.

Following the 2020 U.S. Supreme Court decision in *Espinoza v. Montana Department of Revenue*, which ruled that religious schools cannot be excluded from participating in publicly funded programs that provide financial assistance to students attending private schools, Schmitt said the Williams family requested tuition reimbursement. The district, after consultation with the Agency of Education, denied the request.

The family made another request after the 2nd Circuit Court of Appeals ruled in favor of families from Rice Memorial High School in Burlington who were seeking a similar tuition benefit. After being denied yet again, they took legal action.

"Ultimately, where it stands now is the school district is refusing to provide equal access to these tuition benefits to MSJ students, but they'll give them to any other student who goes to a secular private school," said attorney Paul Schmitt, who is representing the family.

Schmitt argued that denying the family's request violates the First Amendment of the U.S Constitution.

Complicating the issue is a ruling by the State Board of Education last year, which ordered three school districts to pay tuition requests made by families living in choice towns who were seeking to attend Catholic

schools. At the time of the ruling, the board argued that excluding the schools would essentially be discriminatory, but it also stressed that its ruling was not setting precedent.

While that ruling has ostensibly put religious schools back on the table, AOE guidance on the matter historically has been muddy. Last year, for example, the agency released a best practices document for schools but has since withdrawn those recommendations, according to representative Ted Fisher.

In an email, Fisher declined to comment on the lawsuit, stating “The Vermont Agency of Education does not comment on pending litigation.”

Jeanne Collins, superintendent of the Rutland Northeast Supervisory Union, which includes BUUSD, also declined to comment.

Schmitt was critical of the agency recommendations released last year in the wake of the 2nd Circuit ruling, which advised schools to adjust reimbursements to account for any funds going to religious instruction or worship.

“It’s, frankly, unfair and wrong for the district to provide a different benefit to this religious school than they do all the secular, private schools,” he said.

However, a bill in the Vermont Senate aims to place tighter restrictions on the flow of public dollars to religious schools.

The bill, S.219, would require religious schools to certify they have “adequate safeguards” to ensure public tuition money will not be used “to support religious instruction or worship or the propagation of religious views.”

The bill also would require schools to comply with federal and state antidiscrimination laws protecting, for example, LGBTQ+ students or those needing special education services.

Sen. Brian Campion, D-Bennington, the bill’s sponsor and chair of the Senate Education Committee, said the legislation would provide clear guidance to school districts, which, he said, is currently lacking.

“This is the kind of clarification that this bill brings to people and, hopefully, will prevent these kinds of lawsuits in the future,” he said.

Under S.219, schools that do not certify they have those safeguards in place will not be counted as a state-approved independent school making them ineligible for public-tuition funds.

Campion acknowledged it may be difficult for schools to parse out how much money is applied to religious instruction or worship but said he expected many would make an effort to comply, adding that increases in student enrollment might be a good incentive to do so.

“It may be that some (schools) violate the contractual agreement. I hope not. But if they were to, then they ... lose those public funds,” he said.

According to Campion, S.219 has been referred to the Senate Appropriations Committee and will likely make it to the Senate floor within a couple of weeks.

Schmitt, however, called the proposed legislation “unconstitutional,” citing the First Amendment’s Establishment Clause.

“Once you give the money to a family, or once you let a family have a choice, you can’t follow their choice and then take some of the benefit back because you don’t like the stuff that the school does because it’s religious,” he said.

Schmitt also addressed concerns about discrimination, calling it “a solution in search of a problem.”

“There aren’t any actual instances that they point to and they just assert, baselessly, that religious schools are going to be a problem in this way,” he said.

Schmitt argued lawmakers were adding a “poison-pill condition” to the bill designed to make participation in the school-choice program “so unpalatable that the religious schools will just go away.”

Ultimately, for Schmitt, it’s a matter of choice.

“School choice is about letting these families send their kids to the school that’s the best fit,” he said. “And taking away some people’s choices doesn’t solve any kind of equity problem or anything else.”

Peter Teachout, a law professor at Vermont Law School, said despite federal rulings on the matter, school choice is complicated in Vermont because of the “compelled support” clause in the state constitution, which prohibits the state from providing taxpayer support to independent schools without the aforementioned “adequate safeguards.”

Teachout added that Vermont constitutional law and the Supreme Court’s ruling in *Espinoza* are not inconsistent — both hold the state can’t deny taxpayer-supported funding based simply on the religious status of a school.

“That’s all the courts have held so far. That’s all the federal constitution requires. It’s all the state constitution requires,” he said.

Teachout, who recently testified before the Senate Education Committee on S.219, said the bill provides “clear rules of the game” by providing those safeguards.

He argued provisions against using tax dollars to support religious worship and instruction are in line with the Vermont Constitution and the Establishment Clause of the U.S. Constitution.

“Once taxpayers are required to support with their tax dollars the propagation of religious views, you’re getting into pretty dangerous territory,” he said.

He noted the current makeup of the Supreme Court, with its conservative majority, seems poised to further remove the lines between church and state.

If protections against state money being used for religious instruction and worship were to be further rolled back, Teachout predicted what he called a “radical consequence” wherein the state constitution — which, he said, is binding on all state officials — would not allow money to fund any independent schools, limiting school-choice options to only public schools.

“Nobody wants that,” he said.

Schmitt said he hopes the court will take up the issue within the month. In the meantime, he said he’ll seek an injunction to ask that the Williams family receive the full tuition benefit they argue they are entitled to.