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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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### THE RELIGION/PUBLIC EDUCATION CONTROVERSY 2017: EMERGING ISSUES

BY: RICHARD S. VACCA

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## Overview

The body of law involving religion in public schools is sizable. Issues involving the First Amendment's Establishment and Free exercise Clauses continue to foment controversy in our nation's public school systems—especially issues involving the Establishment Clause. While prayer and Bible reading, the flag salute, moments of silence in schools, extra-curricular clubs, religion in the curriculum, and others have dominated the legal and policy landscape, more recent religion issues continue to spring up. In my opinion issues involving use of public tax funds to provide student vouchers and scholarships, charter schools, use of public school facilities by local faith groups, parental objections to the content of courses taught and required student reading lists are emerging from what I propose is a confluence of three interrelated child centered/child benefit factors.

First, as communities (rural, suburban, and urban) continue to experience a growth in ethnic, cultural, and religious diversity, public school systems are, in a “spirit of accommodation,” working to rethink and revise policies governing all aspects of school system operation (*e.g.*, the curriculum, extra-curricular activities, faculty and student dress codes). The effort is aimed at creating welcoming schools and, at the same time, increasing parent and student engagement.

Second, realizing that they cannot financially do it alone, local school boards are reaching out to community resource providers to cultivate collaborative partnerships with other agencies, as well as with private sector companies, to provide specialized student services (*e.g.*, mentoring, employment internships, personal health counseling, after school programs and activities). In fact, some local school boards already contract with private companies (public/private partnerships) to provide special alternative schools and programs (including mental health support, social/emotional skills, ethical decision-making, building relationships, conflict resolution, as well as general academic skills)—especially for students with behavioral problems who are at risk of school suspension, or expulsion.

Third, debates involving parental choice, charter schools, vouchers and scholarships are once again heating up as advocates make demands for action—especially for students currently enrolled in underachieving public schools.

## Judicial Review: Seeking a Balance

Over the years the United States Supreme Court created several standards of judicial review applicable to situations where public school/religion issues are involved. In my view the evolving nature of the long line of decisions established a critical, albeit tenuous, *balance* between governmental *neutrality* (Establishment Clause) and an emerging theory of *accommodation* (Free Exercise Clause). Because of the limited space of this commentary, a representative sampling of leading cases follows.

In 1971, the Supreme Court fashioned the seminal standard of judicial review for courts below to apply when faced with future public education/religion issues. The case before the court, Lemon v. Kurtzman (1971), and its companion case Early v. DiCenso (1971), involved a state statute which authorized the State Secretary of Education to purchase (public funds) specified secular services (*e.g.*, teacher's salaries) from nonpublic schools. In holding the law unconstitutional the Court fashioned the following three-pronged standard: (1) Does the statute have a secular legislative purpose? (2) Does the primary

effect of the act either advance or inhibit religion? (3) Does the act excessively entangle government and religion? It is this standard that has been consistently applied over the past four decades.

More than a decade later, in a later non-school case, Lynch v. Donnelly (1984), the Supreme Court held that government had over stepped the reasonable bounds of neutrality by giving the impression of government “endorsement.” In essence the Court was asking: What would a reasonable and neutral observer think (*perception*) when viewing the display? When does an activity appear to be government sponsored or sanctioned? In my opinion the second prong (*primary effect*) and third prong (*entanglement*) of the Lemon standard, *plus* the *endorsement* test of Lynch, became major outcome determiners in subsequent cases.

In other leading decisions the Supreme Court added “historical context,” potential “peer pressure” and possible “coercion” as elements of analysis to consider in deciding school/religion cases. See, *e.g.*, Marsh v. Chambers (1983), Board of Education v. Mergens (1990), and Lee v. Weisman (1992).

### **Smith, et al. v. Jefferson County Board of School Commissioners (6<sup>th</sup> cir. 2015)**

Recently, I came across a decision handed down by the United States Court of Appeals for the Sixth Circuit. The situation involves a challenge to a contractual arrangement between a local board of education, which had abolished its alternative school (because of budgetary problems), and a local private Christian school where the public school alternative education students were taught (secular instruction). The court’s decision’s seventeen pages reads like a restatement of religion/education jurisprudence - a treasure trove of important information.

#### *Facts*

In 2002-2003, the Jefferson County, Tennessee school system operated its own alternative school. In 2003, because of budget cuts, the Jefferson County school board voted to eliminate its own alternative school for the upcoming school year, and contracted for services with Kingswood School, Inc., a nonprofit entity licensed by the State Department of Mental Health and Developmental Disabilities. The contract called for Kingswood to provide alternative education services for Jefferson County students. State law required local school districts to provide alternative education services for students in the seventh through twelfth grades. The parties later stipulated that the “sole motivation” was to reconcile the school board’s budget.

Two teachers in the Jefferson County alternative school were notified that their positions would no longer exist because of the new contractual arrangement. They were told that the school board would make every effort to place them for the coming school year in an area of their certification. Subsequently, one of the teachers rejected two teaching positions offered and asked to be placed on a preferred employment list for administrative or principal positions. Unemployed for seven months, she ultimately accepted a school principal’s position in the system. Unemployed for two months, the second teacher, having received no teaching offers, returned to a former job at a youth center.

Beginning in the 2003-2004 school year and continuing until 2009, Jefferson County middle school and high school students attended Kingswood if they had been suspended or expelled from their public school. For the 2009-2010 school year, high school students remained at Kingswood , while middle school students returned to their respective public school.

Kingswood was responsible for hiring, firing, evaluation, and supervising staff in its alternative school. Also Kingswood was responsible for managing finances, running day-to-day operations, communicating with parents, providing report cards, and determining the term of some student's suspensions from their respective public school. During the life of the contract with the Jefferson County school system, Kingswood also worked with four other public school systems.

Kingswood had two separate programs—a day program and a residential program. The residential program maintained a religious character and included deliberate religious instruction. The day school program, recognized by the State of Tennessee as a model program, did not feature direct religious instruction. Day students did attend, on occasion and on a voluntary basis, assemblies in Kingswood's on-campus chapel. While the chapel contains "religious imagery" there is no evidence that the assemblies included religious content. However, day students and their parents were not entirely insulated from all signs of a religious environment. For example, a student progress form, report cards, and Easter letter sent home to parents contained a passage from the Bible. The Easter letter also had a statement about the school's Christian environment.

The school's annual report contained references to "religious training," instilling in each child a "personal faith in God," and the "saving grace of Jesus Christ." The school's website also contained religious references. The record showed that none of the communications appear to have targeted Jefferson County Students and were in use before the Jefferson County students arrived. And there was no indication that any Jefferson County student or parent had complained.

All classes were taught in a separate building where there were no religious symbols or messages. All Jefferson County students were enrolled exclusively in the day program and were taught by "state licensed" teachers hired by Kingswood.

#### *District Court Action*

Initially, three teachers who lost their jobs when the alternative school contractual arrangement with Kingswood was implemented brought an action in federal district court against the school board of Jefferson County and various school board members. In their suit they claimed violations of due process under the Fourteenth Amendment, the First Amendment's Establishment Clause, and similar rights under the Tennessee constitution and statutes. They sought declaratory and injunctive relief, plus monetary damages for lost wages. Subsequently, one plaintiff was dropped from the law suit for lack of standing.

The district court dismissed the action on summary judgment in 2006, holding that the plaintiffs lacked standing. After a Sixth Circuit panel initially ruled in the case a rehearing was granted *en banc*. The Sixth Circuit Court ruled that the plaintiffs had standing as municipal taxpayers to raise the Establishment Clause claim. The Court affirmed the grant of summary judgment against the plaintiff teachers on both the procedural and substantive due process claims, and that individual board members were entitled to legislative immunity. The Court then remanded the case to the district court to consider the Establishment Clause claims under both the United States and the state constitutions. Smith v. Jefferson County Board of School Commissioners (6<sup>th</sup> Cir. 2011)

In May 2013, the district court held that the school board had violated the Establishment Clause and permanently enjoined the school board from contracting with Kingswood or another "religious entity"

for the operation of its alternative school. Also, plaintiff teachers were awarded damages for lost wages during the 2003-2004 school year. Kucera v. Jefferson County Board of School Commissioners (E.D. Tenn. 2013) The Jefferson County School Board appealed the decision.

#### *Sixth Circuit Court Rationale and Decision*

The Sixth Circuit Court began its *de novo* review by addressing the trial court's determination that the Kingswood day and residential programs were not "meaningfully distinct." The Sixth Circuit disagreed and found that the two programs are "meaningfully distinct." The Court agreed with the district court that Kingswood is a "self-proclaimed religious entity" and "religious institution." However, it was also shown that Kingswood had secular elements, at least in the day program, and did not involve religious activities.

The Sixth Circuit Court then undertook an extensive and detailed analysis of the Establishment Clause where it incorporated many of the benchmark decisions from the United States Supreme Court—as well as decisions from its own Sixth Circuit jurisprudence and other appellate courts. In my view, of all the potential standards of review to apply to the facts, the *primary effect* (benefit) and *excessive entanglement* prongs of Lemon (1971), plus the *endorsement* (reasonable observer perception) test in Lynch (1984), and an absence of *coercion* and *proselytizing* of students proved most influential.

Viewed in the context and circumstances of budgetary restrictions, plus the school board's legal obligation to provide its students with an alternative school, the Sixth Circuit Court concluded that the mere status of Kingswood as a religious organization did not give rise to "government endorsement." In the Court's opinion, it was clear that taxpayers, the school board, students, parents benefited from the relationship with Kingswood while being slightly exposed (*e.g.*, in chapel assemblies, seeing some religious depictions) to "religious content."

While under the terms of the contract "money changed hands" between the two entities (agreement to obtain and provide specific and essential secular services), it did not amount to showing a "religious preference" nor did it amount to "government aid." The Sixth Circuit therefore concluded that the relationship between the school board and Kingswood did not "involve excessive entanglement between church and state." In the Court's view in the resulting relationship neither party to the contract "became entangled in the affairs of the other."

#### *Decision*

Finding no violation of the First Amendment's establishment clause, the judgment of the district court is reversed. The injunction against the school board, the award of damages, and the award of attorney's fees are vacated.

Subsequently, *certiorari* was denied by the United States Supreme Court. See, Kucera v. Jefferson County Board of School Commissioners (2016)

#### *Concurring Opinion*

The concurring judge agrees in part that the decision of the school board to contract with Kingswood does not violate the Establishment Clause. However, referencing and incorporating the Supreme Court's leading decisions, her reasoning differs from that of the lead opinion. While she agrees that the

endorsement test applies, she states that she does so only because the Court is “constrained to do so.” In her view, “[t]his is an employment-contract dispute masquerading as an Establishment Clause case.”

The concurring judge then undertakes a detailed application of the Supreme Court’s leading decisions and acknowledges how for more than four decades “courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times.” She acknowledges that because cases are “fact specific” the Supreme Court’s subsequent revisions and applications of the Lemon (1971) *three-pronged* standard and the Lynch (1984) *endorsement* (reasonable observer/perception) test have produced different results.

Utilizing such Supreme Court decisions as Stone v. Graham (1980); Marsh v. Chambers (1983); Lee v. Weisman (1992); Santa Fe I.S.D. v. Doe (2000); Town of Greece v. Galloway (2014); and others the concurring judge posits what she describes as a “doctrinal shift” away from the endorsement test with the emergence of a two-pronged test focusing on: (1) historical context, and (2) potential coercion—a test she suggests the Court now favors.

In her view, because the lower courts still are bound to follow the Supreme Court’s *endorsement* test until the Justices otherwise decide, the concurring judge concludes by stating: “[a]pplying that test here, I agree that no reasonable observer would regard the School Board’s action as an endorsement of religion. Because there is no Establishment Clause violation, Plaintiffs are not entitled to damages or attorney’s fees.”

### **Policy Implications**

Past commentaries usually end with my iteration of specific policy implications found in the court’s decision. However, because the situation in the Jefferson County case is unique, timely, and fact specific, and the Sixth Circuit’s detailed judicial analysis is so comprehensive, it would be presumptuous of me to draw specific conclusions regarding future policy formulation. I therefore encourage the reader to read both the lead and concurring opinions to gain an individualized perspective on potential policy implications. As I stated at the outset, this Sixth Circuit decision is a treasure trove of information for school system policy makers.

*Final Comment:* While accommodation of diverse religions is a goal in today’s multi-cultural society, it is wise for today’s public school officials to harken back to Justice Black’s admonition in Everson v. Board of Education (1947), a case where the Court upheld a local school system’s authorized reimbursement of parents for transportation of their children to public or private schools, when he said: “[n]either a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.”

### **Resources Cited**

Board of Education v. Mergens, 496 U.S. 226 (1990)

Everson v. Board of Education, 330 U.S. 1 (1947)

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Lee v. Weisman, 505 U.S. 577 (1992)

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Lynch v. Donnelly, 465 U.S. 668 (1984)

Marsh v. Chambers, 463 U.S. 783 (1983)

Santa Fe I.S.D. v. Doe, 530 U.S. 290 (2000)

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Stone v. Graham, 449 U.S. 39 (1980)

*Richard S. Vacca*  
Senior Fellow CEPI

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