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SUBJECT: Rule 51 - Constitutionality of leasing classrooms in nonpublic school buildings

REQUESTED BY: Joe E. Lutjeharms
Commissioner of Education

WRITTEN BY: Don Stenberg, Attorney General
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The Nebraska Department of Education (the Department) has requested a formal opinion regarding a proposed amendment to 92 NAC 51 (Rule 51). Specifically, the Department has asked whether a proposed revision of Rule 51 which included the current section 004.04C would violate Article I, Sec. 4, of the Nebraska Constitution or the First Amendment of the United States Constitution.

Section 004.04C of Rule 51 allows public schools to lease classrooms in nonpublic school buildings in order to provide special education services:

> A school district may lease a classroom in a nonpublic school building. If properly drafted, the lease transforms the classroom into a public school classroom during the times covered by the lease. The board of education of a public school district may offer the special education programs enumerated in Neb.Rev.Stat. 79-3320 in a leased classrooms [sic] in a nonpublic school building. It does not, however, have an unqualified legal duty to do so.

I. Background

The Nebraska Department of Education receives funding from various federal education programs to provide for the special education needs of certain children including the handicapped. The Department distributes the funds pursuant to federal regulations, Nebraska statutes and the Department's own regulations. These funds are distributed statewide to educational units who have submitted applications requesting funding for special education programs.

The Department's regulations allow educational units to lease classrooms in nonpublic school buildings. Some of these classrooms may be leased for certain blocks of time during the regular school day or after normal school hours. Others may be leased for the entire day to provide for a separate time for each grade to have individualized instruction.

II. Applicable Law

In addressing the questions presented, there are several relevant constitutional and statutory provisions which must be considered.

1. Nebraska Revised Statutes section 79-3320 (Reissue 1987) provides:

> It shall be the duty of the board of education of every school district to provide or contract for special education programs and transportation for all resident children who would benefit from such programs.

2. The First Amendment to the United States Constitution (applicable to the states under the Fourteenth Amendment) provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . ."

3. Article I, §4 of the Nebraska Constitution provides:

> No persons shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted . . . .

III. Analysis

As a starting point, it is clear the Department must provide for special educational services for students enrolled in private elementary and secondary schools. Section 79-3320 provides that the board of education of every school district has the duty to provide for special education programs "for all resident children who would benefit from such programs." (Emphasis added). Furthermore, federal regulations providing for special educational services, including but not limited to Chapter 1, Chapter 2 and Title II, require that the Department provide such services to private school children. "The local education agency . . . shall . . . make provisions for including special educational services . . . in which (educationally deprived children enrolled in private elementary and secondary schools) can participate." 20 U.S.C.S. §2727.

The Department must comply with federal statutes in order to continue to receive federal funds. In addition, the Department must use its state funds in compliance with state statutes to meet the needs of all its resident children. Thus, the Department has an affirmative obligation to meet the educational needs of the state's children enrolled in nonpublic schools.

Furthermore, federal laws provide a bypass provision should the state fail to meet its obligation to provide for the special education needs of children enrolled in private schools. Such bypass is triggered where either the local educational agency is prohibited by law from providing for participation by private school children or the agency simply fails to do so. In such a case, the Secretary of Education is authorized to bypass the state agency and arrange for the provision of service to such private school children.

This situation occurred in Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991). In Pulido, the Secretary utilized a bypass to provide special educational services to several parochial schools. Local educational agencies in Missouri had failed to do so, since Missouri's constitution prohibits state involvement in distribution of funds to parochial schools. The court held not only that the bypass was legitimate but that the method chosen, use of portable and mobile classrooms, was constitutional as well.

Thus, not only is the Department under the obligation to provide services to non-secular school children, but if it fails to do so, the Secretary is authorized to bypass the Department in order to provide such services.

At issue, then, is whether the method of providing special educational services under Rule 51 (leasing classrooms in nonpublic school buildings) is permissible under the U.S. and Nebraska Constitutions.

A. The Nebraska Constitution

The Department's first question is whether the Department is prohibited by Nebraska's constitution from providing special educational services to students enrolled in private schools by providing those services in leased classrooms in sectarian buildings. The Nebraska Supreme Court addressed that very question in State ex rel. School Dist. of Hartington v. State Board of Education, 188 Neb. 1, 195 N.W.2d 161 (1972).

In Hartington, the school district proposed to lease one classroom full time and one classroom half time from Hartington Cedar Catholic High School. The classrooms would be used to provide special educational instruction to educationally deprived children pursuant to the Federal Elementary and Secondary Education Act of 1965. The school district would have complete control of the classrooms and the curricula. No religious artifacts of any kind would be allowed in the classrooms. Students enrolled in both public and nonpublic schools would be allowed to attend.

The court held that the proposal to conduct special educational instruction in leased classrooms in a parochial school was not a violation of the Constitution of Nebraska. Moreover, the court stated that to deny such instruction to parochial students solely on the basis of their enrollment in a parochial school would "violate that student's right to a free exercise of religion and to equal protection of the law." Id. at 5. The Hartington court held that if the classroom is under the control of public school authorities and the instruction is secular then there is no constitutional violation.

The Hartington court analyzed the lease program in question under Art. VII, §11 of the Constitution of Nebraska, which prohibited the appropriation of public funds "in aid of any sectarian or denominational school . . . ." Here, the Department has requested our analysis of Rule 51 under Article 1, §4 of the Constitution of Nebraska, which provides "no persons shall be compelled to . . . support any place of worship . . . and no preference shall be given by law to any religious society . . . ."

We do not believe a court would find that the lease of a nonpublic school classroom for special educational purposes would constitute support of a "place of worship." As the court held in State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb.

731, 737, 320 N.W.2d 472 (1982), "[A]ny benefit that may inure to the . . . private institution is merely incidental . . . ." Likewise, such leases do not constitute a "preference . . . to [a] religious society." As noted above, the Nebraska Supreme Court held the denial of such instruction would likely violate the Free Exercise and Equal Protection clauses of the Constitution. See Hartington, 188 Neb. at 5. Furthermore, to identify such leases as a "preference" would seem inconsistent with subsequent language in the same section of the Nebraska Constitution which provides "Religion . . . being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction." This provision refers to non-public schools. See State ex rel. Rogers v. Swanson, 192 Neb. 125, 144 (1974) (Clinton and McCown dissenting); Gaffney v. State Department of Education, 192 Neb. 358, 379 (1974) (Clinton, McCown dissenting); Attorney General Opinion No. 91066, dated September 5, 1991[9].

Hence, Nebraska's Constitution does not prohibit the Department from providing instruction in classrooms located in nonpublic schools if those classrooms are leased by the school district and under the control of the public school authorities. Therefore, Rule 51 does not violate the Constitution of the State of Nebraska.

B. The United States Constitution

The Department's second question is whether the Department is prohibited by the Establishment Clause of the United States Constitution from providing special educational services to students enrolled in private schools by providing those services in leased classrooms in sectarian buildings. Arguably, two 1985 United States Supreme Court cases would seem to say yes. Indeed, later cases have cited these decisions as holding that providing federally funded services in religiously affiliated schools violates the establishment clause. See Pulido, 934 F.2d 912; Goodall by Goodall v. Stafford County School Bd., 930 F.2d 363 (4th Cir. 1991).

The Supreme Court decisions in question, School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S.C.t 3216 (1985), and Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232 (1985), both involved special education programs taught in classrooms leased from private parochial schools. Both programs employed publicly funded instructors to teach classes composed exclusively of private school students who attended that same school. In both cases, the private schools participating in the program were substantially composed of religiously affiliated schools. The classes consisted of subjects meant to supplement the regular core curriculum.

In Ball, the Supreme Court applied the test set out in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) to determine whether the schools had violated the Establishment Clause. The Lemon test provides that a government action does not violate the Establishment Clause if: 1) it has a secular purpose, 2) the principal effect neither advances nor prohibits religion, and 3) it does not foster an excessive government entanglement with religion. The Court found the program did have a secular purpose, but that it violated the second prong of the test. Consequently, the Court did not reach the entanglement issue.

In concluding that the programs in Ball had the effect of advancing religion, the Court detailed what effects the programs might have. The Court did not conclude that such effects actually existed. Nevertheless, the court found that certain situations, if present, would result in a symbolic union of government and religion which would be an impermissible effect. In addition, the Court worried that such programs had taken over a portion of the nonpublic school's responsibility for teaching secular subjects and might in the future supplant rather than supplement core curriculum subjects.

In Felton, the Court only addressed the third part of the Lemon test regarding excessive entanglement. It is not clear whether the Felton programs complied with the first two parts of the test, thus necessitating a review of the entanglement issue, or whether they, like Ball, complied with part one but not part two.

The state, in Felton, had sought to distinguish their program from Ball in that they, unlike Ball, had devised a system of monitoring the classrooms to insure the absence of any religious content. The Court brushed aside this argument, using it as a springboard to discuss how such monitoring was in itself an entanglement of church and state. The Court also found excessive entanglement where public school administrators and teachers came into contact with private school administrators and teachers to resolve matters related to schedules, classrooms, assignments and student development.

On their face, Ball and Felton prohibit states from providing any Title I educational services in nonpublic school classrooms. William Bennet, former Secretary of the United States Department of Education, suggested to Joseph Lutjeharms, Nebraska Commissioner of Education, in a September 12, 1985, letter that "the Felton decision need not have the effect of prohibiting on-premises services to private school children in all other federal programs." (Emphasis added). Thus, it could be argued that since Rule 51 deals with services for handicapped children, Aguilar and Ball are not controlling precedent. Aguilar was decided in the context of

Title 1 programs for educationally disadvantaged children from economically depressed areas. Ball was decided in the even less comparable context of supplemental classes to private school children (i.e. mathematics and reading). It is also our understanding that some special education programs for the handicapped are currently being conducted on nonpublic school premises in other states despite Aguilar and Ball.

We do not reach the question, however, of whether Rule 51 can be distinguished on this basis. A more important consideration, we believe, is that should Ball and Felton be considered by the present Supreme Court it is not at all clear the decisions would be upheld. In fact, it is likely that both cases would be overruled. The members of the Court have changed significantly since 1985.

Ball and Felton were both decided by the narrowest of margins, a 5-4 split of the Court.[1] Voting in favor were Brennan, Powell, Marshall, Blackmun and Stevens. Opposed were Burger, Rehnquist, O'Connor and White. Brennan, Powell, Marshall and Burger have subsequently left the Court, replaced by Scalia, Kennedy, Souter and Thomas. Hence, remaining on the Court are two justices who voted with the majority and three who opposed the decision.

Furthermore, both Chief Justice Rehnquist and Justice O'Connor filed strong dissenting opinions. Justice O'Connor's dissent in Felton was an inciteful analysis of the failure of the entanglement prong of the Lemon test. Significantly, a majority of the current justices have expressed dissatisfaction with the Lemon test: Rehnquist in Wallace v. Jaffree, 472 U.S. 38 (1985); White in Roeman v. Board of Public Works, 426 U.S. 736 (1976); O'Connor in Felton, 473 U.S. 402; Scalia in Edwards v. Aquillard, 482 U.S. 578 (1987); and Kennedy in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

The Court presently has before it a case that could significantly alter the three-prong Lemon test, Lee v. Weisman, No. 90-1014. A decision in this case is expected sometime near the end of term in June or July, 1992. See School Law News, p.4, January 17, 1992. Lee concerns whether invocation and benediction prayers delivered at school graduation ceremonies violate the Establishment Clause. Regardless of the specific results in this case, it is likely the Court will set out a new test for Establishment Clause issues.

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[1]Burger and O'Connor concurred in part with the Ball case on an issue that does not affect the manner in which Nebraska's programs are operated.

IV. Conclusion

Section 004.04C of Rule 51 does not violate the Nebraska Constitution. With regard to whether this section violates the Establishment Clause of the First Amendment, we note that the Supreme Court is expecting to issue a decision in Lee v. Weisman in the near future which could effectively determine this question. It is our opinion the Department should postpone any modification of Rule 51 (with regard to section 004.04C) until the Court issues its decision. If the Lemon test is modified by the Court, we would then need to conduct a new constitutional analysis of this rule.

Respectfully submitted,

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* The assistance of Mr. Dave Lepant, law clerk for the Office of the Attorney General, in preparing this opinion is gratefully acknowledged.