

Limit on Remedial Education Is Appealed

By JOSEPH BERGER

Lawyers for the New York City Board of Education asked a Federal appeals court yesterday to declare invalid a 1985 United States Supreme Court ruling that bars public school teachers from entering religious schools to give remedial instruction in reading and mathematics.

The Board of Education has been eager to get a reversal of the ruling because it is spending \$14 million a year to deploy 114 mobile classrooms — essentially customized trailers — parked just outside Roman Catholic, Jewish and Protestant schools so that public school teachers can provide remedial instruction without actually entering the grounds of the religious schools.

In several decisions in the years since the 1985 ruling, five of the nine current Supreme Court justices have sharply questioned it or flatly declared it wrong. Because of this, the lawyers argued, the Supreme Court has essentially changed the law, and they urged the court in lower Manhattan to invoke a Federal judicial rule that allows it to nullify the decision.

The board has been joined in the suit by lawyers for Roman Catholic parents, who say that forcing students to leave their school buildings and cross the street so they can take lessons in a narrow van is a tortured and inconvenient way to receive federally required services. More than 22,000 children in roughly 250 religious and private schools receive the so-called Chapter 1 remedial services, which Congress offered to all children, whether or not they attend public schools.

Lawyers for both groups went before a three-judge bench of the United States Court of Appeals for the Second Circuit yesterday and pointed out that Chief Justice William H. Rehnquist and Associate Justices Antonin Scalia, Sandra Day O'Connor, Clarence Thomas and Anthony M. Kennedy have said flatly that the 1985 ruling, *Aguilar v. Fenton*, was wrong or should be reconsidered.

In *Aguilar*, a five-justice majority concluded that having public school teachers enter religious schools posed the threat of an "entanglement" between church and state that violated the First Amendment's pro-

hibition against establishment of religion.

But in 1994, a more conservative majority with new appointees sharply questioned *Aguilar* in throwing out a New York State law creating a special public school district for the handicapped children of the Hasidic village of Kiryas Joel in Orange County. In a concurring opinion, Justice O'Connor even suggested that the State Legislature had been forced to carve the Kiryas Joel district because *Aguilar* made it impossible to send public school teachers

An unusual fight over religious 'entanglement' in public schools.

into Hasidic schools.

Kevin T. Baine, a lawyer for the Washington firm of Williams & Connolly, representing 14 Roman Catholic parents, also pointed out that the newer Supreme Court had upheld Federal aid to religious schools as long as the program was neutral and secular and was offered to a broad group of citizens without regard to religion. Last June, he said, the Supreme Court even upheld the provision of a publicly financed sign-language interpreter for a deaf child inside a Roman Catholic school in Arizona.

"We're not simply counting noses and making predictions on what the Supreme Court justices think," Mr. Baine told the three-judge bench. "We're arguing that there has already been a change in law."

Yesterday's arguments were largely made on procedural ground, not on the constitutional merits of using mobile classrooms to provide remedial services outside religious schools. Since the Board of Education could not directly appeal the *Aguilar* decision, its lawyers seized on the favorable opinions of recent years and urged the Court of Appeals to invoke Rule 60(b) of the Federal

Rules of Civil Procedure, which is used to nullify earlier judgments when there has been a significant change in law.

The resort to Rule 60(b) was denied in May by Judge John Gleeson of Federal District Court in Brooklyn.

The three-judge appeals panel did not issue a ruling yesterday. Stephen McGrath, an appeals lawyer with the Corporation Counsel who represents the Board of Education, said that if the Court of Appeals rejected the Rule 60(b) strategy, the board would petition the Supreme Court for a rehearing of *Aguilar*.

In court yesterday, Stanley Geller, a lawyer for the National Committee for Public Education and Religious Liberty, which brought the *Aguilar* suit, disputed the Board of Education's interpretation of Rule 60(b), arguing that it could be applied only when there was an explicit reversal of a law.

But in an interview, Mr. Geller predicted that the Supreme Court would ultimately reconsider *Aguilar* since it apparently had abandoned the "entanglement" standard it once used. If the case reaches the Supreme Court, he said, he will argue that the use of public school teachers in religious schools violates the First Amendment because it frees additional money for religious education.

Mr. Geller also dislikes the vans, seeing them as an evasion of *Aguilar*. He would like to see parochial students travel into public school buildings and receive their remedial instruction there. He has filed a separate suit, which is also before Judge Gleeson, aimed at ending the van program.

At the same time, parents of religious school students say they do not want their children taking classes inside public schools because they worry about exposing their children to an atmosphere they perceive as too secular and more unruly and violent. Many Orthodox Jewish parents do not want their children in schools where boys and girls mingle.

The issue of sending parochial students into public schools may be moot right now, Mr. McGrath said, because the public schools are badly overcrowded, with a surplus of 91,000 pupils.

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LY FARM: When School Cafeterias Go Private

By LAURA MECKLER
Associated Press Writer

WASHINGTON (AP) - Hoping to entice students from the local McDonald's to the school cafeteria line, the Chicago Public Schools are turning much of their lunch program over to private firms.

It's an approach used by just 8 percent of the nation's schools, but the number is growing - and with the growth, comes concerns, according to a government report.

In 1987-88, about 4 percent of schools contracted with private companies to run their programs, according to a survey by the General Accounting Office. That doubled by the 1994-95 school year.

"Most of the food authorities using food service companies reported that they turned to the companies for financial reasons, such as their belief that using a private company would reduce budget deficits and increase revenues," the report said.

In Chicago, the plan was to make the cafeterias more attractive to students.

"We said we have to look at how we are going to improve quality in our system," said Alex Andrade, manager of food services.

The 50-year-old National School Lunch program costs about \$5.2 billion in federal funds each year, reimbursing schools and making bulk purchases of meats, vegetables and other foods by the Agriculture Department.

Poor students, who make up an increasing share of participants, get free or discounted meals. About 45 percent of students pay full price.

Schools are reimbursed for every meal they serve - more for those who get free lunches, but even students who pay full price attract some federal funds to the district.

That was part of Chicago's reasoning as it developed the privatization plan, Andrade said. The more paying customers it can attract, the more federal funds the system gets, he explained.

It seems to have worked. Participation jumped 9 percent in a 35-school pilot program last year, he said. This fall, private firms will operate in 190 schools, with 130 more scheduled to go private in January. The district has 590 schools.

The result is more fresh food and more choices, he said.

"You'll see a lot of lunch room lines looking a lot like food courts," he said. "You'll have a Mexican station, a burger station. It's more like at a free-standing restaurant."

Nationally, privatization seems to be meeting with similar success, the report said. Seventy-three percent of districts using outside companies reported participation increases. And 30 percent reported a drop in students who left school grounds for lunch.

The trouble is a lack of oversight, the government said.

Up to two-thirds of contracts with private firms do not guarantee that federal requirements will be met. Often, these contracts allow the school systems to lose control over the programs, according to the GAO.

In response, the Agriculture Department's Food and Consumer Service division agreed to remind state agencies to check contracts to be sure they comply with federal provisions. Additionally, the department plans to make its guidance to districts more readily available by putting information on the Internet and in the agency's automated information system.

Andrade said that maintaining control has been the biggest problem in Chicago. It's difficult for school personnel to keep tabs on what's going on in each school.

"I guess that's the biggest imperfection we have right now. Are we able to go out to each of these schools and check everything? No," he said. "Is it a perfect world? Absolutely not."