

Public Help for Parochial Students, at a Distance

By SOMINI SENGUPTA

If it seems that Bernadine DeCarlo, a public-school social worker who counsels children at a Roman Catholic school in the Bronx, has to act like a spy in a cold war thriller, so be it. She is following Board of Education orders to maintain the separation of church and state.

Because of a 1985 Supreme Court decision, Ms. DeCarlo cannot teach her students inside St. Luke's School in the Hunts Point section of the Bronx. Instead, she uses a neutral site — a blue and white Board of Education van that parks across the street from the school each morning.

And so, if on a blustery November morning, Ms. DeCarlo needs to consult a St. Luke's teacher about, say, a 12-year-old student's emotional health, she will set up a stakeout at the coffee shop down the street where teachers from St. Luke's buy their morning cup. Or she will pull up the blinds on the van window, waiting to signal a particular teacher when he or she appears in the schoolyard across the street.

At Holy Innocents School in Flatbush, her colleague Ymelda Joson, a teacher of English as a second language, has a few tricks of her own. Sometimes, Ms. Joson confided, she will use her one opportunity to step inside the church school: to use the bathroom at lunchtime and perhaps, near the sink, consult with a teacher about why a certain child can't read.

"But very briefly," she was careful to point out. "We avoid it, except for the call of nature. But during that call of nature, we take advantage."

Across the city each school morning, more than 100 large vans costing the Federal Government \$110,000 a year each, including driver, arrive at parochial schools as makeshift classrooms, where public-school employees counsel and provide remedial math, reading and English as a second language to impoverished students. The city provides the lessons under Federal antipoverty legislation, using Federal funds.

Until 1985, Ms. DeCarlo taught inside the school. The principal set aside a couple of classrooms and removed crosses and pictures of saints from the walls. Ms. DeCarlo could be easily found in her office by a child who was angry or anxious or acting up in class.

But in 1985, the Supreme Court found that this was "excessive entanglement of church and state." Hence, the vans and Ms. DeCarlo's surveillance missions.

Now educators and officials in New York City and Washington are wondering, Is this really what the Constitution's framers had in mind?

Nearly all the parties to the arrangement are unhappy with it — the Board of Education, the Roman Catholic Archdiocese of New York, the teachers' union and even the United States Education Department. They have asked the Supreme Court to reconsider its own decision, known as *Aguilar v. Felton*; if it did, the action would be a highly unusual exception to the principle that a Supreme Court ruling is final.

In a brief filed last month with the Supreme Court, lawyers for New York City argued that the vans and various other efforts to maintain neutral sites had been "less effective and more expensive" than sending public school teachers inside parochial schools.

The city now delivers remedial education to about 20,000 parochial school students. City school officials argue that compliance with the ruling is wasting millions of dollars. The extra cost to the Federal Government has totaled more than \$93 million from 1986 to 1994, with \$84 million of that spent on vans.

The cost to rent mobile classrooms and other neutral sites means that parochial school students receiving remedial instruction actually get a larger share of Federal dollars than their public school counterparts — about \$1,180 a child a year, compared with \$680 for public school students.

"When Title I was first passed, the idea was that the funding allocation would be same," said Norman S. Fruchter, director of the Institute for Education and Social Policy at New York University, who says public

school teachers should be permitted back inside the parochial schools. "You wouldn't have to spend more on one child than another."

But Norman Siegel, executive director of the New York Civil Liberties Union, supported the *Aguilar* decision, and said the complaint about high costs was a smokescreen.

"If they're concerned about money, you can call for a modified program that doesn't have teachers teaching in the vans," he said.

Of parochial school students getting remedial instruction, most of them — about 12,440 this school year

A costly solution to a church-state ruling pleases few.

— went to class in vans that the school board leased from New York Bus Service, a private concern that operates city buses and supplies school buses for the board. This year, the vans and drivers alone will cost more than \$12.5 million, according to the board's Bureau of Nonpublic School Reimbursable Services.

An additional 1,850 children are taught in leased buildings nearby, and 820 more in the handful of public schools not already overcrowded. Finally, about 9,500 get remedial reading and math instruction on Board of

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Education computers in their parochial schools.

On a recent day, Ms. DeCarlo saw 45 children one on one or in small groups, separated from the math teacher by a thin plastic divider. This year's class roster includes a toughened 13-year-old boy whose mother was killed recently, another who is weary from caring for his sick mother, and countless others who are confused and angry about the poverty and violence and drugs at home.

Cutout pumpkins and posters of Pilgrims decorated the van walls. In Margo Case's third-grade class, children read quietly from books in the van's mini-library, some consulting a dictionary, others eager to read aloud. In Lee Fettner's math class, fourth graders learned how to calculate the area of a square. All the students were performing below the 20th percentile for their grade level.

Sometimes, when the wind was fierce or the door slammed shut, the van swayed like a ship at sea. Inside, the steadily humming generator kept this railroad car of a classroom warm and lighted.

Up front, the bus driver perused his morning tabloid — the playing of radios is not allowed — ready to escort the next batch of children to and from the gates of St. Luke's. At the end of the day, the vans returned to their Bronx parking lot, only to pull up again for the next morning's classes.

Ms. DeCarlo and her colleagues say they have largely adjusted to the trifling inconveniences of exile: lacking a bathroom or phone, knowing that if they were inside, the precious minutes wasted on bundling up and marching over to the van could be better spent brushing up on vocabulary or learning the multiplication tables.

"There's never any attempt to proselytize or anything," said Mr. Fettner, who sees about 60 students a week from St. Luke's. "I feel, as an instructor and a citizen who also pays taxes, that the concern is a financial one."

RELIGION AND PUBLIC SCHOOLS

By the Hon. Richard W. Riley

Few legal issues stir emotions and cause as much confusion as the role of religion in public schools. Both lawyers and school administrators have had difficulty when faced with the variety of issues that arise in the public school setting in this area. In many instances in recent times, school administrators have chosen unnecessarily and inappropriately to keep religion completely out of public schools.

In a July 12, 1995 speech on religious liberty in America, President Clinton stated that "the First Amendment does not require students to leave their religion at the schoolhouse door." In the President's succinct words, the First Amendment, "does not convert our schools into religion-free zones." Nevertheless, recognizing the controversial and confusing nature of issues relating to religion in the public schools, the President instructed me as the Secretary of Education to consult with the Attorney General and issue a statement of principles concerning religious expression and activities in public schools.

At the President's behest, in August 1995, I issued and sent to every school superintendent in the country, a statement of principles entitled *Religious Expression in Public Schools*. These principles were developed with input from many diverse groups representing the entire political spectrum and reflect a developing consensus on many key issues.

Both lawyers and school administrators have had difficulty when faced with the variety of issues that arise in the public school setting in this area.

The principles are derived mainly from the First Amendment. They recognize "two basic and equally important obligations on public school officials in their dealings with religion." The first obligation is that "schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature."

Second, "[a]t the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity." The basic point is neutrality. In the context of personal student expression or activities, religion should not be singled out for special limitations—it should be treated the same as other comparable expression or activity in the school. A few examples will illustrate these points.

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STUDENT PRAYER AND RELIGIOUS DISCUSSION

One of the recurring issues regarding religion in public schools concerns student prayer and religious discussion. Although the Supreme Court specifically prohibited state-sponsored classroom prayer over 30 years ago in *Engel v. Vitale*, 370 U.S. 421 (1962), there is no prohibition against purely private religious speech by students. The Supreme Court has recognized that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original).

Students have the same rights to engage in individual prayer or engage in religious discussions during the school day as they have with respect to other comparable activities. For example, students may read the Bible, pray before a meal or test, or discuss religion with other students to the same extent that they may engage in comparable non-disruptive activities. Students also may participate in events such as flagpole gatherings for prayer or religious discussions on the same terms that other similar activities are allowed.

Although students have significant rights to engage in purely private religious prayer and discussions, schools may impose rules of order and pedagogical restrictions on student activities that are not designed or

administered to discriminate against religious activity or speech. Schools may not, however, provide students a captive audience for their religious speech or a means to compel other students to participate in any religious prayer or discussion. See, e.g., *Herdahl v. Pontotoc County School District*, No. 94CV188-B-A (N.D. Miss. June 3, 1996) (student-led daily prayers over the intercom and in classrooms before lunch are unconstitutional). School officials should take steps to ensure that students are not forced to participate in any religious activity. School officials also should not encourage or discourage participation in any of these activities.

TEACHING ABOUT RELIGION

There is no prohibition against schools teaching about religion, but public schools may not provide religious instruction or advocate religion or a particular religious viewpoint.

For example, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (per curiam); see also *Abington School District v. Schempp*, 374 U.S. 43, 225 (1963) ("study of the Bible or of religion, when presented objectively as part of a secular program of education, may . . . be effected consistently with the First Amendment"). Studying the influence of religion on art, music and literature also would be

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permissible. In a similar vein, schools may not celebrate holidays as religious events, but they may teach about religious holidays and celebrate the secular aspects of the holidays. See, e.g., *Clever v. Cherry Hill Tp. Bd. of Educ.*, 838 F. Supp. 929, 938-39 (D.N.J. 1993).

The basic question is whether a topic is being introduced for an educational purpose (e.g., so students can learn about various religions) or a religious purpose (e.g., to inculcate a particular religious viewpoint or to celebrate the religious aspects of a

holiday). Studying about Christianity (or other religions) and its influence in history is an allowable and worthwhile educational pursuit in a public school; school officials advocating or endorsing the practice of Christianity (or other religions) would violate the First Amendment.

STUDENT ASSIGNMENTS

Students may choose religious topics, as long as they are within the scope of an assignment, and the students' work should be judged on the basis of normal academic standards and other legitimate pedagogical concerns. A student's work should not be rejected or given a low grade simply because of the religious nature of its content.

STUDENT GARB

Religious messages on student clothing may not be specifically singled out and prohibited, but they are subject to the same rules as generally apply to comparable messages. With respect to the wearing of attire that is part of a student's religious practice, such as a yarmulke for a religious Jewish student, schools generally may not prohibit the wearing of these items.

Under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.*, the government (including public schools) may not substantially burden a person's exercise of religion unless it can demonstrate a compelling governmental interest and that it has employed the least restrictive means of furthering that interest.

Under this law, the U.S. Court of Appeals for the Ninth Circuit ruled that a local school district could not enforce a policy against possessing knives on school property with respect to Sikhs who wore ceremonial knives to school. *Cheema v. Thompson*, No. 94-16097 (9th Cir. Sept. 2 1994). The Ninth Circuit held under the RFRA that there are less restrictive means than the outright prohibition of ceremonial knives that would

serve the school district's interest in ensuring school safety.

EQUAL ACCESS TO SCHOOL FACILITIES

Students are also guaranteed certain rights under the Equal Access Act (EAA), 20 U.S.C. 4071 *et seq.* Under this law, which the Supreme Court found to be constitutional in *Mergens*, public secondary schools that receive federal financial assistance must provide access to school facilities to student religious groups on the same basis as other noncurriculum related student groups.

Therefore, a secondary school receiving federal aid that allows one or more noncurriculum related clubs, such as a service club or chess club, to meet on its premises during nonin-

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structional time (including lunch periods) cannot deny the same access to a student religious group such as a Bible club. See, e.g., *Ceniceros v. San Diego Unified School District*, 66 F.3d 1535 (9th Cir. 1995). This right applies even if the student group is conducting a prayer meeting or other worship service.

The EAA also ensures that student religious groups have the same access as other groups to school media, such as the public address system, the school newspaper and the school bulletin board, for publicizing meetings. See *Mergens*, 496 U.S. at 247. Any meeting qualifying under the EAA must be voluntary and student-initiated and cannot be sponsored by the school or any of the school's employees.

With respect to the use of school facilities by outside religious groups, the same basic principle of neutrality applies. A school district cannot deny a religious group access to school facilities if those facilities are open to other groups for comparable purposes. *Lamb's Chapel v. Center Moriches School District*, 113 S.Ct. 2141 (1993).

School districts are not obligated to open their facilities to outside groups at all; if they do, however, they cannot deny access to certain groups based on their religious nature or their intended religious use of the facilities. Also, a school district cannot charge a higher rental fee to religious groups than to secular organizations. *Fairfax Covenant Church v. Fairfax Cty. School Board*, 17 F.3d 703 (4th Cir.), cert. denied, 114 S. Ct. 2166 (1994).

GRADUATION PRAYERS

In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Supreme Court held that school officials may not organize or mandate prayer at public school

graduation ceremonies. Since that decision, the issue of student-initiated graduation prayers has arisen. Although the Supreme Court has not addressed this issue, a number of lower courts have done so.

The Third Circuit and a district court within the Fourth Circuit have held that student-initiated graduation prayers are unconstitutional (*ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir., 1996) (en banc); *Gearson v. Loudoun County School Board*, 844 F. Supp. 1097 (E.D. Va. 1993)). The Ninth Circuit also ruled that student-initiated graduation prayers are unconstitutional, but the Supreme Court vacated the judgment as moot. *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir., 1994), vacated as moot, 115 S.Ct. 2604 (1995).

On the other hand, the Fifth Circuit has allowed student-initiated graduation prayers (*Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S.Ct. 2950 (1993)).

Schools also may not organize or hold religious baccalaureate ceremonies. However, if a school generally allows access to its facilities to private groups, it cannot deny similar access to organizers of privately sponsored religious baccalaureate services. See *Lamb's Chapel*, 113 S.Ct. 2141. Schools should not give preferential treatment to baccalaureate ceremonies, however, and may in some instances need to disclaim any official endorsement of the ceremonies.

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CONCLUSION

The statement of principles cannot answer all the difficult questions that may arise concerning religion in public schools. However, it has been useful to school administrators throughout the country in answering basic questions and providing a framework for analyzing the more difficult problems.

The National School Boards Association has reported that because of the statement of principles it has received substantially fewer calls from school districts regarding the role of religion in public schools, and school districts, such as the St. Louis Public Schools, have issued or revised their own policies based on the principles.

In addition, the National Congress of Parents and Teachers has issued similar guidance for parents entitled *A Parent's Guide to Religion in the Public Schools* that reflects the growing consensus on many of these important issues. By emphasizing both the obligation of school officials to allow truly private religious speech in the school setting, while at the same time ensuring that schools do not endorse or coerce participation in religious activity, the statement of principles and similar efforts hopefully will help to ensure that schools do not become either vehicles for religious coercion or "religion-free zones."

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