**FORMAL OPINION**
**2002-F-05**

DATE ISSUED: March 28, 2002

REQUESTED BY: Senator Terry M. Wanzek

## QUESTION PRESENTED

Whether it violates the United States Constitution for North Dakota state institutions of higher education to place student teachers in parochial schools.

## ATTORNEY GENERAL'S OPINION

It is my opinion that it does not violate the United States Constitution for North Dakota state institutions of higher education to place student teachers in parochial schools if the placement is made pursuant to an appropriate placement policy.

## ANALYSIS

In 1986, the Eighth Circuit Court of Appeals held that a state university may not place student teachers in parochial schools to meet student teaching requirements. Stark v. St. Cloud State Univ., 802 F.2d 1046 (8th Cir. 1986). However, the principal United States Supreme Court opinions relied upon by the court in Stark have been modified or overruled by the Supreme Court in the intervening years. While the issue has not yet been decided, it is likely that a court presented with a similar issue today would decide that such a program is constitutional based on these subsequent developments.

The court in Stark principally relied on opinions in two companion cases issued by the Supreme Court in 1985. In School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997), the Court found unconstitutional two remedial and enhancement programs in which a school district provided, at public expense, classes to private school children in classrooms located in and leased from the local private schools. In reaching its decision, the Court applied the three-part test first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon test, the policy or program must have a secular legislative purpose; the primary or principal effect of the policy or program must be one that neither advances nor inhibits religion; and the policy or program cannot foster an excessive entanglement of the state with religion. Id.

at 612-13. Summarizing its decision, the Court said that the challenged programs had the effect of promoting religion in three ways:

> The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Ball, 473 U.S. at 397.

In Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997), the Court held that the Establishment Clause barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children. The defendants attempted to distinguish Ball because in Aguilar the city had adopted a system for monitoring the religious content of the publicly funded classes in a religious school. Id. at 409. The Court rejected that distinction, stating that the monitoring would inevitably result in the excessive entanglement of church and state. Id. The Court stated that the "scope and duration" of the city's program "would require a permanent and pervasive state presence in the sectarian schools receiving aid." Id. at 412-13.

A year after the Supreme Court decided Ball and Aguilar, the Eighth Circuit Court of Appeals issued its decision in Stark, 802 F.2d 1046. In reaching its holding that a state university may not place student teachers in parochial schools, the Eighth Circuit cited and heavily relied upon the Supreme Court's analysis in Ball. Id. at 1049-52. As the Supreme Court did in Ball, the Eighth Circuit utilized the Lemon test to determine whether the university's placement policy violated the Establishment Clause. Id. at 1049.

With regard to the first prong, the placement policy serving a secular purpose, the university had asserted that it adopted its placement policy to provide for its students' education by increasing the number of available student teaching sites. Id. Although the court questioned whether the university actually adopted the policy for that reason, the court accepted the university's avowed purpose and held that the stated purpose constituted a valid secular purpose. Id.

Addressing the second prong of the Lemon test, the court found the primary effect of the university's policy was to advance religion. The court found the parochial schools

were pervasively sectarian schools, and that "[t]eachers play an essential role in providing th[e] integrated secular and religious education, instructing 'in Christian values in a formal way through classroom instruction, but also by example.'" Id. at 1050. Accordingly, the court concluded that "[t]he placement of state University students in these institutions . . . can benefit religion even though the students teach secular courses. The secular education that these institutions provide 'goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution[s], the two are inextricably intertwined.'" Id. (quoting Lemon, 403 U.S. at 657).

The court further wrote:

> Given that the parochial schools serving as student teaching sites are pervasively sectarian, we are forced to conclude that the University's policy impermissibly advances religion by creating a perception that the state endorses the institutions' religious mission. The first amendment rests on the belief that "a union of government and religion tends to destroy government and to degrade religion." When a state program fosters the appearance of such a union, the state places its imprimatur on the religion and thereby "promotes religion as effectively * * * as when it attempts to inculcate specific religious doctrines."

Id. (citations omitted).

The court found that the student placements give the parochial schools the benefits of evaluating the student teachers for future employment and that the schools receive state funds "with no strings attached" due to the placements. Id. Furthermore, "the University's program creates the perception of a symbolic union between church and state in the minds of the parochial schools' students. . . . By creating the perception in the minds of the parochial school students that the state supports the religious school and its message, the state thereby promotes the religious mission of the institution." Id. at 1051.

The court concluded that "the University's policy confers the state's blessing and its funding on the pervasively sectarian institutions at which the University students teach. . . . [The] policy communicates the state's approval of the schools' religious message. Because such state endorsement has the primary effect of advancing religion, the policy violates the Establishment Clause." Id. at 1052 (citations omitted).[1]

[1] Stark is a two-one decision. Judge Bowman dissented, stating "the student teacher training program at issue in this case neither has the primary effect of advancing religion nor does it tend excessively to entangle the state with religion." Id. at 1052.

The holding of the Stark case is clear. What is unclear is whether Stark is good law based upon subsequent United States Supreme Court decisions. Since Stark, the Supreme Court has modified the Lemon test. In 1997 the Supreme Court overruled Ball and Aguilar, cases relied upon heavily in Stark. Thus, it is necessary in this opinion to address the constitutional question in light of recent Supreme Court decisions, not just the Stark opinion.

In Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), the Supreme Court addressed whether the Establishment Clause prohibited a school district from using funds under the Individuals with Disabilities Act (IDEA) to provide a sign-language interpreter to accompany a deaf student to classes at a Roman Catholic high school. The Court did not mention the Lemon test, except to explain the court of appeals' decision. Id. at 5. Rather, the Court considered whether the government program was operated neutrally without reference to religion. "[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Id. at 8.

Applying that principle to the case at hand, the Court explained that the parents selected the school of their choice, ensuring that "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." Id. at 10. Because the program did not create a "financial incentive" for parents to choose a sectarian school, the interpreter's presence at the school could not "be attributed to state decisionmaking." Id. According to the Court, "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause." Id. (citation omitted).

The Court emphasized that providing the interpreter did not relieve the school of an expense that it would have otherwise assumed in educating its students, and that any attenuated financial benefits that the parochial school did ultimately receive were attributable to "the private choices of individual parents." Id. at 12 (quoting Mueller v. Allen, 463 U.S. 388, 400 (1983)). The Court specifically rejected the argument that merely placing a public employee in a religious school creates an impermissible symbolic union between church and state. "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." Id. at 13.

The Court concluded:

> The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child

> chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.

Id. at 13-14.

The Supreme Court appeared to move even further away from the Lemon test in Agostini v. Felton, 521 U.S. 203 (1997). In Agostini, the Court specifically overruled Ball and Aguilar. Id. at 236. "Distilled to essentials," according to the Court, the Ball decision "rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking." Id. at 222. The Court explained that Aguilar also relied on a fourth assumption: "that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion." Id. The Court then stated that its "more recent cases have undermined the assumptions upon which Ball and Aguilar relied." Id.

The Court explained that Zobrest "expressly disavow[ed] the notion that 'the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school.'" Id. at 223 (quoting Zobrest, 509 U.S. at 13). Furthermore, Zobrest "expressly rejected" the notion that, "solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students." Id. at 224. According to the Court, Zobrest also "implicitly repudiated" the presumption that the presence of a public employee on parochial school grounds "creates an impermissible 'symbolic link' between government and religion." Id.

Applying Zobrest to the pending issue, the Court stated "there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee . . . will depart from her assigned duties and instructions and embark on religious indoctrination . . . ." Id. at 226. Furthermore, the presence of a public teacher in a parochial school classroom does not, without more, "create the impression of a 'symbolic union' between church and state." Id. at 227. Finally, the Court wrote that "placing full-time public employees on parochial campuses to provide Title I instruction would [not] impermissibly finance religious indoctrination." Id. at 228. Title I services are provided to students whether they choose to attend a public or a parochial school. Id. Furthermore, "Title I services are by law supplemental to the regular curricula. These services do not, therefore, 'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'" Id. (citations omitted).

The Court emphasized that the Title I program does not have "the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." Id. at 231. Programs are appropriate if "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." Id. The Court also rejected the argument that administering the Title I program would create an excessive entanglement between state and religion. Id. at 233-34.

In Mitchell v. Helms, 530 U.S. 793 (2000), a plurality of the Supreme Court further simplified the test to be applied when evaluating whether aid to parochial schools violates the First Amendment. Mitchell involves the constitutionality of a program that distributed federal funds to state and local governmental agencies, which in turn lent education materials and equipment to public and private schools. The plurality noted agreement that the program has a secular purpose, it does not define its recipients by religion, nor does it create an excessive entanglement between government and religious organizations. Id. at 808. Therefore, the plurality explained that the ultimate question before the court in Mitchell is "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." Id. at 809. "[T]he answer to the question of indoctrination will resolve the question whether a program of educational aid 'subsidizes' religion, as our religion cases use that term." Id. The plurality then emphasized the importance of neutrality:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of a government. . . . [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

Id. at 810-11 (citation omitted).

According to the plurality, to assure neutrality, the Court considers whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." Id. (quoting Agostini, 521

U.S. at 226). "[T]he private choices help[] to ensure neutrality, and neutrality and private choices together eliminate[] any possible attribution to the government . . . ." Id. at 811.

A second important factor is whether the program "'define[s] its recipients by reference to religion.'" Id. at 813 (quoting Agostini, 521 U.S. at 234). In other words, the criteria for allocating the aid cannot create a financial incentive to undertake religious indoctrination. Id.

Justice O'Connor, in her concurring opinion joined by Justice Breyer, said that the plurality opinion announces a rule of "unprecedented breadth." Id. at 837. Agreeing with the dissent, she said that the plurality opinion appears to make evenhandedness neutrality a single and sufficient test. Id. at 838. She did agree, however, "that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges." Id.

Unlike the plurality opinion, the concurring opinion recognized a distinction between per-capita-aid programs and private-choice programs. The concurring opinion explained that the proper test is whether the government acted with a purpose of advancing or inhibiting religion and whether the aid has the effect of advancing or inhibiting religion. Id. at 845. The primary criteria used to determine whether a government-aid program impermissibly advances religion are: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." Id. Those same criteria are examined, according to the concurring opinion, to determine whether a government-aid program constitutes an endorsement of religion. Id.

Applying the above test, the concurring opinion found the program constitutional because the "aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is de minimis; and the program includes adequate safeguards." Id. at 867. Although those factors may not be "constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion." Id.

It is evident that the underpinnings of Stark have been eroded by the Supreme Court's decisions in Zobrest, Agostini, and Mitchell. In fact, the Stark court relied heavily on the Supreme Court's decision in Ball, which was overruled by Agostini. The Eighth Circuit's decision in Stark rested on the assumptions (1) that student teachers who work on the premises of a religious school will inculcate religion in their work; (2) that the presence of student teachers, placed by a state institution, on private religious school premises

creates a symbolic union between church and state; (3) the placement of student teachers improperly benefits religious schools because they receive state funds with no strings attached; and (4) that state supervision of a student teacher creates an excessive entanglement between church and state. Stark, 802 F.2d at 1050-52. These assumptions were specifically or impliedly rejected in Zobrest, Agostini, and Mitchell.

Accordingly, it is my opinion that "development of constitutional law since [Stark] was decided has implicitly or explicitly left [Stark] behind as a mere survivor of obsolete constitutional thinking." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992). Because of the significant change in the Establishment Clause jurisprudence since 1985, in my opinion, it is doubtful that the Supreme Court and Eighth Circuit Court of Appeals would reach the same conclusion if the issue were decided today.

In my opinion, a policy could be drafted in a manner to permit students of state institutions to perform their student teaching at parochial schools without violating the Establishment Clause. The purpose of this opinion is not to draft such a policy. In my opinion, however, incorporation of the following provisions would help ensure that the policy complies with the United States Constitution. Although all of the following provisions may not be "constitutional requirements," they increase the likelihood a policy will be found not to have the impermissible effect of advancing religion.

> What schools are permitted to host student teachers must be based on neutral, secular criteria. Because the North Dakota Department of Public Instruction accredits public and private schools, one neutral, secular criterion could be that only schools accredited by the Department of Public Instruction can host student teachers.
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> Approval of supervising teachers in schools must be based upon secular rather than religious criteria.
>
> The decision that a student will perform student teaching in a religious school cannot be made by the state institution. For example, a policy could provide that a student will only be placed in a religious school if the student requests such a placement and a religious school placement is appropriate based upon the secular criteria for choosing the host school and supervising teacher.
>
> The policy cannot provide incentives or benefits to a student for choosing to perform student teaching at a religious school.

All services provided by student teachers at a religious school must be secular. Student teachers may not participate in any duties as a student teacher involving religious indoctrination, practice, or instruction.

Supervision and evaluation of student teachers at religious schools must be based upon the same secular standards or secular criteria as supervision and evaluation of student teachers in non-religious schools.

Any funds (honorarium) paid must be paid directly to the supervising teacher rather than to the school. [Based upon the plurality decision in Mitchell, it is not clear whether this criterion is required. Incorporating this criterion into policy, however, in my opinion, will strengthen the policy against a constitutional challenge.] [2]

Based upon the analysis currently used by the Supreme Court when evaluating whether the state's involvement with parochial schools violates the Establishment Clause, it is my opinion that a state institution could adopt a placement policy incorporating the above provisions and not violate the Establishment Clause.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[3]

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[2] A university's student teaching policy does not necessarily direct state funds to parochial schools. Unlike in Stark, where the University paid the participating school for each student teacher, 802 F.2d at 1047, many universities pay no funds to participating schools. Some universities do pay supervising teachers an honorarium.
[3] See Johnson v. Baker, 21 N.W.2d 355 (1946).