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Journal of Catholic Education

Volume 18 | Issue 2

Article 8

March 2015

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Recommended Citation

Shaughnessy, S. (2015). Introduction to the Focus Section: Law and Catholic Schools. *Journal of Catholic Education*, 18 (2). <http://dx.doi.org/10.15365/joce.1802082015>

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Introduction to the Focus Section: Law and Catholic Schools

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This edition of the Journal contains a focus section on the topic of school law. I am honored to chair this section and to have worked with four very fine authors. Those of you who have followed school law sections in the past may find the choice of topics unusual. These articles are not listings of court decisions dealing with student and or teacher rights; rather, the authors wrestle with somewhat more recent topics of growing interest to Catholic educators: (a) charter schools, (b) voucher programs, and (c) the administration of insulin to students with type 1 diabetes in Catholic schools.

Charter Schools

As Drs. Carr and Decker report, approximately 3% of the grade and high school students in the United States are in Catholic schools; this percentage is down 9% from 50 years ago when 12% of the school age population attended almost 13,000 Catholic schools. Today, there are approximately 6500 Catholic schools, a fact which supports data indicating that since the 1960s, Catholic schools have been closing at the rate of 1000 or more each decade. Virtually all readers know that the decline in the numbers of vocations to religious and clerical life has contributed to many closures as lay teachers take the places of priest, sister, and brother teachers and the cost of salaries and benefits has risen drastically.

Parents, parish administrators, and religious congregations are looking for alternative models of Catholic schools. One model that has been suggested and, in some cases, implemented, is that of the charter school. What many people fail to realize, however, is that a charter school cannot be affiliated with a religion. So, the somewhat ubiquitous myth that we can close our Catholic school at the end of this year and reopen the following in the same building with the same students, the same teachers and administrators, and the same curriculum is simply not true. Such a school, while it may be next door to the parish church, and may even share some facilities with the parish, is not a Catholic school. Religion cannot be taught in a charter school except

Journal of Catholic Education, Vol. 18, No. 2, March, 2015, 159-162. This article is licensed under a Creative Commons Attribution 3.0 International License. doi: 10.15365/joce.1802082015

from a historical or literary perspective—certainly not from a faith perspective. While character education may be a hallmark of many charter schools, character education does not equate to formation in the Catholic faith.

The authors do an excellent job of tracing the history of the U. S. Supreme Court aid to religion cases, starting with *Cochran v. State Board of Education* (1930) which introduced the “child benefit” theory, through the 1970s and the three prongs of the *Lemon* (1971) test: (1) the purpose of the government practice or aid must be secular; (2) the aid or practice cannot advance or inhibit religion; and (3) the aid or practice cannot foster an excessive entanglement with religion. The authors also discuss the later Endorsement and Coercion tests.

The legal issues that emerge when a previously Catholic school closes and a new entity, a charter school, emerges are presented succinctly and clearly. For example, religious items must be removed, but what does one do when saints and angels are carved into the building’s façade? A list of recommendations for anyone studying the issue is also included. Anyone contemplating the possibility of a charter school in a previously Catholic school building would do well to consult this article. Aside from its practical and timely utility, the article presents a summary of aid to religious school cases, which any reader may find both fascinating and useful.

School Choice Litigation

Loyola Marymount University doctoral candidate, Matthew P. Cunningham, presents an analysis of school choice programs and related litigation in five of the 12 states which currently have parental choice programs that give parents access to public money to help fund the private education of their children: Ohio, Washington, Colorado, Indiana, and Arizona. As Cunningham suggests, such programs can be very popular with parents who may wish a private education for their children but cannot afford to pay the whole tuition, as well as with parents who are seeking to avoid a problem-riddled public school system or district.

Cunningham offers a brief history of school choice litigation in recent times. Students of school law will recognize the 2002 United States Supreme Court case, *Zelman v. Simmons-Harris* and the 2004 case, *Locke v. Davey*. The author identifies decisions in each of the five state courts and discusses possible consequences of each.

I can remember when, as a high school principal in the Archdiocese of Boston, Massachusetts in the late 70s and 80s, I was inundated with petitions

and requests to put vouchers before the Massachusetts General Assembly. At that time, before I began studying law, I thought it quite clear that the First Amendment forbade such a policy. A few years later and more educated, I realized that aid that primarily benefits a child does not necessarily violate the Amendment. During that time period, students in my school could have textbooks provided by the public school district in which they resided if the texts were also used by the district; public school districts routinely provided bus transportation to Catholic schools if the schools were on an already-traveled route and, if buses were idle during the school day, would send a bus and a driver to transport students to and from field trips. In many cases, parents were reimbursed for mileage in taking their children back and forth to Catholic schools.

“Ah,” you may be thinking, “then what happened?” The law and the courts said that public school districts *could* do these things, but they were not required to do so. One by one the services and perks were taken away as budget cuts became the norm.

Some readers will remember that in 1985, the U.S. Supreme Court ruled in *Aguilar v. Felton* that Title I services could not be offered in buildings used for religious instruction, in religious schools, etc. However, the Supreme Court said that the public school districts had to provide the services somewhere else and that no services would be given to any children until all children were accommodated. That decision was overturned in the 1997 U.S. Supreme Court case of *Agostini v. Felton*.

Cunningham provides a real service in presenting and analyzing current voucher laws in five states and the litigation that the attempted and actual implementation of the litigation has brought.

He also references state constitutional provisions concerning separation of church and state and aid to sectarian entities. This article should be very helpful to those wishing a better understanding of how vouchers are intended to work and the problems that can arise when they are implemented.

Administration of Insulin to Students in Catholic Schools

Readers of *NCEA Notes* as well as those who may have heard me speak in recent years will recognize that the above topic is one that holds great meaning for me. I believe diabetes is one of the biggest legal, as well as medical, issues that Catholic schools face. Until fairly recently, Catholic schools may have enrolled a child or two with Type I diabetes. Either the child's parent(s) came to school to test blood sugar and administer insulin or staff

members volunteered for training to do those tasks. Today, however, both solid researchers and the media present data indicating that the occurrence of both type 1 and type 2 diabetes is escalating among children and adolescents. Previously, type 2 diabetes was thought to be something that didn't show up until one was at least in their 40s or so. We are now seeing seven year olds with type 2 diabetes in Catholic schools today, as well as an increase in students with type 1 diabetes. In his article, Dr. Huggins points out some of the reasons for this growth in diabetes diagnoses. Regardless of the reasons, Catholic school administrators should seek guidance on what they can and should do—from both a medical and legal standpoint.

Some states require that only a licensed nurse can give an injection in a school and insulin is generally injected. If the student can be on a pill regimen, there is no injection issue. Public schools generally have nurses in their buildings and the nurse can take care of the service. While some Catholic schools do have nurses and, in a few Catholic school friendly states, the public school district may provide a nurse or may pay part or all of the nurse's salary in a Catholic school. However, the majority of states do not. So, what is a principal to do?

The reader will no doubt be aware that Catholic schools cannot discriminate against otherwise qualified candidates for admission as students on the basis of a disability, if with reasonable accommodation provided by the school, the student can meet the program requirements. However, if state law mandates that only parents or nurses or physicians can give injections, and the parent cannot leave his or her job and there are no nurses available, what is the Catholic administrator to do? Dr. Huggins clearly discusses what diabetes is, possible treatment of the disease, and offers practical suggestions for the administrator.

Dr. Huggins has also performed a great service to all Catholic and other private schools in the United States by researching and compiling a state-by-state table of the laws governing the administration of insulin in schools.

So, welcome to this focus section. I am sure you will find the articles to be both informative and helpful.

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