

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN EULITT, <i>et al.</i>)	
)	
Plaintiffs)	
)	
v.)	Civil No. 02-162-B-W
)	
MAINE DEPARTMENT OF)	
EDUCATION, <i>et al.</i>)	
)	
Defendants)	

**RECOMMENDED DECISION ON
CROSS MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs John and Belinda Eulitt, on behalf of themselves and their daughter, Cathleen Eulitt, and Kelly MacKinnon, on behalf of herself and her daughter, Lindsey Freeman, seek, among other things, judicial nullification of 20-A M.R.S.A. § 2951(2), a statutory provision that precludes sectarian private secondary schools from being approved for receipt of public funds for tuition purposes. Currently pending are cross motions for summary judgment. I recommend that the Court **GRANT** Defendants’ motion and **DENY** Plaintiffs’ motion. I further **DENY** all pending evidentiary motions (a motion in limine, two motions to strike and a motion to supplement the summary judgment record)¹ because none would serve to exclude or introduce facts that are material to the resolution of the summary judgment motions.

¹ Plaintiffs’ Motion in Limine (Docket No. 14) seeks to exclude the testimony of J. Duke Albanese, former Commissioner of Education and Defendants’ designated expert on the status of Maine’s public education system. Contrary to Plaintiffs’ contention, nothing in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), or Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1993), would require that Albanese be prohibited from testifying if this matter went to trial. Defendants’ Motion to Strike the Affidavit of John Eulitt (Docket No. 21) is premised upon Plaintiffs’ failure to produce Mr. Eulitt for a deposition because of then existing health concerns. The State did not press the deposition and believed that only Ms. Eulitt’s testimony would be used for purposes of the summary judgment record pursuant to an informal understanding among counsel. While I can appreciate the State’s angst, I do not in these circumstances believe that the affidavit need be stricken. Plaintiffs’ Motion to Strike Pages One and

Facts

The Plaintiffs are residents of the Town of Minot and are members of the Catholic faith. They wish to obtain public funding to pay for their daughters' tuition at St. Dominic's, a "pervasively sectarian" Catholic school in the City of Lewiston which their daughters attend in order to take classes in Catholic theology and receive instruction in other educational topics from a Catholic perspective.

Maine law generally compels residents between the ages of 7 and 17 to attend school. 20-A M.R.S.A. § 5001-A. Maine law also generally compels Maine towns and cities to provide a free, public, K-12 education to children within their school administrative units and/or districts. Id., §§ 2(1), 1101, 1201. The Town of Minot is a school administrative unit that contains only grade schools (K-8). However, Maine law authorizes Minot to arrange for its resident high school age children to obtain their secondary educations elsewhere, either by contracting with other school administrative units to provide these services or by providing public funds up to the "legal tuition rate" to pay for attendance at Maine private high schools approved by the Commissioner of the Maine Department of Education. Id., §§ 2901-2905, 2501, 2951, 5204(4). Minot has complied with its legal obligations by contracting with the neighboring school administrative unit of Poland to send at least 90 percent of its high school age children to Poland Regional High School ("PRHS"), which by agreement is the "official secondary school of Poland, Mechanic Falls and Minot." Up to 10 percent of the children in Minot may be approved to attend a school other than PRHS, but only if they have "educational program requirements that

Two of Defendants' Reply Memorandum (Docket No. 31) seeks to strike Defendants' arguments that Plaintiffs do not have standing to assert claims on behalf of St. Dominic's Regional High School or that St. Dominic's claims lacked merit. Contrary to Plaintiffs' assertion, I find that the State raised the arguments in an appropriate fashion given the content of the cross-motions for summary judgment. Finally, Defendants have moved to Supplement Their Statement of Material Fact (Docket No. 28), by adding ¶ 207, a statement based upon portions of Albanese's deposition relating to the view that Maine government officials could oversee the teachings in publicly funded private secular schools, but might not be able to do so in sectarian schools. Because that day has not yet arrived, I see no reason to expand the record to incorporate the issue.

may not be offered in association with the Poland Regional High School,” as determined on a “case-by-case basis” by the Superintendent of School Union #29, which is comprised of the school administrative units of Poland, Mechanic Falls and Minot.

Plaintiffs believe they are constitutionally entitled to have Minot provide funding for their daughters’ Catholic education because less than 10 percent of Minot’s high school age children are being “tuitioned” for attendance at a school other than PRHS and because classes in Catholic doctrine amount to “educational program requirements” not offered by PRHS. However, Maine law precludes sectarian schools from being approved for the receipt of public funds for tuition purposes. *Id.*, § 2951(2). Because St. Dominic’s cannot qualify for the receipt of public tuition funds as a matter of state law, Plaintiffs could not obtain such funds for their religious purposes even if they applied. Plaintiffs have nevertheless enrolled their daughters at St. Dominic’s and are currently paying tuition with their own and other, nonpublic funds.

Discussion

This is the latest engagement in a protracted battle to force the State of Maine to fund private, sectarian education. Strout v. Comm’r, Maine Dep’t of Ed., 13 F. Supp. 2d 112 (D. Me. 1998), aff’d on other grounds, 178 F.3d 57 (1st Cir. 1999); see also Bagley v. Raymond Sch. Dep’t., 728 A.2d 127 (Me. 1999). Plaintiffs contend that they have been denied equal protection² of the law in violation of the Fourteenth Amendment of the United States Constitution because they cannot obtain public funds to pay tuition at a private sectarian school for purposes of religious education, whereas other students may obtain public funds to pay tuition at non-sectarian private schools for other educational purposes. Alternatively, Plaintiffs contend that St. Dominic’s is being denied equal protection of the law because it may not receive public funds for secondary education services, while non-sectarian private schools may.

² All other constitutional claims have been voluntarily dismissed or abandoned in the course of this litigation.

Plaintiffs contend that the only defense Maine can raise to this argument is that the provision of public funds to private sectarian schools would violate the Establishment Clause of the First Amendment to the United States Constitution. Because the Supreme Court recently held in Zelman v. Simmons-Harris that the Cleveland City School District could transfer public funds to sectarian schools for purposes of providing public education services without thereby advancing religion, 536 U.S. 639, 653 (2002), Plaintiffs contend that Maine must provide public funds to families seeking religious instruction on equal terms as it does to families seeking exceptional academic instruction and that Maine must approve private sectarian institutions for receipt of public tuition funds on equal terms with private, non-sectarian institutions.

Both the First Circuit Court of Appeals and the Maine Supreme Judicial Court have held that Maine need not do so because to do so would be in violation of the Establishment Clause, which would serve as both a rational and compelling basis for withholding public funds, whatever degree of judicial scrutiny might apply. Strout, 178 F.3d at 64; Bagley, 728 A.2d at 147. Essentially, the Court of Appeals, whose opinion would serve as binding precedent on this Court, concluded that but for the Establishment Clause concern, 20-A M.R.S.A. § 2951(2) would violate the Equal Protection Clause because the only justification provided by the State for withholding approval from private sectarian schools was that payment of public funds to sectarian schools would violate the Establishment Clause. Strout, 178 F.3d at 64 n.12. Since Strout, the Supreme Court has held that a governmental agency may provide funding to sectarian institutions in order to advance “valid secular purposes” without necessarily running afoul of the Establishment Clause, Zelman, 536 U.S. at 649, 653, which tends to erode the basis upon which the Court of Appeals decided Strout. In any event, Strout does not determine the instant litigation because the State now advances several legitimate, alternative justifications for

precluding private sectarian schools from receiving public tuition dollars that were not pressed in

Strout:

- (1) “A publicly funded education system works best when that education is one of diversity and assimilation, and not a ‘separate and sectarian’ one.”
- (2) “Public funds should pay for religiously neutral rather than a religious education.”
- (3) The State cannot reasonably oversee all aspects of a sectarian school’s curriculum because to do so would result in religious entanglements.
- (4) “Religious schools can, and reserve the right to, discriminate in favor of those of their own religion, and this state should not fund discrimination.”
- (5) There exists no exigency such as in Zelman that would reasonably require the State to depend upon sectarian schools to help provide all Maine children with a free public education.

The significance of these justifications arises not because they are my reasons, the Deputy Attorney General’s reasons, or the reasons put forth by former Commissioner Albanese. Contained within the summary judgment record (Defendants’ Statement of Material Facts, ¶¶ 189 – 204, Exs. 19, 20 & 21) are copies of the legislative record of the May 13 and 14, 2003, House and Senate debates on “An Act to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Schools” (L.D. 182) (H.P. 141), a bill that would have permitted the use of public funds to pay sectarian school tuition. The majority determined, as a matter of public policy, that “we should use our limited dollars for schools, whether public or private under our tuition programs, that are nonreligious and that are neutral on religion.” School funding issues and the public policy surrounding them are complex issues, subject to dispute and perceived “unfairness.” Those issues are best left to legislative determination, so long as they meet constitutional requirements. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

My assessment of this case is on all fours with the assessment Judge Hornby first made in

Strout:

The plaintiffs certainly are free to send their children to a sectarian school. That is a right protected by the Constitution. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). The law is clear, however, that they do not have the right to require taxpayers to subsidize that choice.

13 F. Supp. 2d at 114. I would only add now, in the post-Zelman world, that the taxpayers are apparently free to choose to subsidize others' sectarian choices regarding education in certain circumstances. As the United States Supreme Court itself said, "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general." Zelman v. Simmons-Harris, 536 U.S. at 655. Thus nothing in Zelman appears to compel the conclusion that the State must fund religious schools if it provides for any taxpayer-funded program of education alternatives that incorporates privately operated institutions or instructors.

With these broad general principles in mind, I turn to the context of the case before me. As stated by Defendants in their principal memorandum of law, Plaintiffs' own Equal Protection claim is not really based upon disparate treatment of similarly situated persons.³ With respect to the basic entitlement the State does afford (a free public, secular education), there is no evidence whatsoever that the State of Maine has denied Plaintiffs full and fair access by virtue of their religious affiliation. Rather, their universe of educational options appears to be identical to that of other Minot residents having high school age children. The State's purpose here is to

³ See, e.g., Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989) ("[T]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.").

maintain religious neutrality in its law and to insure that all its citizens receive a free public, secular education. However, this lawsuit turns not on the State's purposes in enacting this statute. Rather, the litigation centers on the Plaintiffs' perceived entitlement to public financing for their own religious purposes.⁴ The State has done nothing to impede the Plaintiffs from sending their children to a Catholic school. Indeed, these Plaintiffs stand on the same footing, in terms of public financing of their religious education choices, as do Muslim and Catholic families that live in Lewiston, a school district that maintains its own secular public high school. Finally, paraphrasing the Court of Appeals, I observe that "[requiring] direct payments of tuition by the state to sectarian schools represents a quantum leap that [this Court should be] unwilling to take. Creating such a breach in the wall separating the State from [sectarian] establishments is a task best left for the Supreme Court to undertake," not this Court. Strout, 178 F.3d at 64. Simply because the Supreme Court has said that Ohio may provide parents with a voucher system that allows them to choose to send their children to sectarian schools, it does not necessarily follow that Maine must do the same.

⁴ It is important to note that this case is about the unique Minot School Committee policy and the Plaintiffs' desire to have a publicly funded religious education pursuant to that policy. The Minot School Committee policy is not a "school choice" initiative in the sense of the Cleveland program. The policy supports tuition payments only for students attending secondary school at Poland Regional High School with a limited exception. Up to 10% of the Minot high school age students (seven students for the current school year) may be enrolled at other schools (public or nonsectarian private) based upon the availability of an educational program requirement that is not offered in association with the Poland Regional High School. The Superintendent of Schools has discretion in those cases to support alternative placements. Imagine the Equal Protection argument that might be made if seven students were "tuitioned" at St. Dominic's for purely religious purposes pursuant to this program and an eighth student came along and wanted to enroll at an equally qualified religious school of a different faith, for purely religious educational reasons. Likewise this case does not present a factual scenario where two students want to take quantum physics, Poland Regional High School does not offer quantum physics and St. Dominic's and Hebron Academy do offer it. Allowing one student to enroll in the quantum physics course at Hebron Academy, a private secular school, while denying the other student's request to enroll at St. Dominic's, a religious school, may pose an equal protection conundrum, provided that both schools met state standards and submitted to state inspections. Under either of these hypothetical factual scenarios the Court might be forced to wrestle with Equal Protection issues such as heightened judicial scrutiny. Neither hypothetical case is the case I have before me today. These parents want their children to attend religious school to receive a religious education. They can point to no similarly situated parents who have been granted that entitlement by the Town of Minot or the State of Maine.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **DENY** Plaintiffs' Motion for Summary Judgment and **GRANT** Defendants' Motion for Summary Judgment. I further **DENY** all pending evidentiary motions. For the Clerk's benefit, these motions are found in the Court's docket at numbers 14, 21, 28 and 31.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

August 8, 2003

Margaret J. Kravchuk
United States Magistrate Judge

BANGOR, STANDARD

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00162-JAW
Internal Use Only**

EULITT, et al v. ME DEPT EDUCATION, et al
Assigned to: JUDGE JOHN A. WOODCOCK JR
Referred to:
Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: None

Date Filed: 10/18/02
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights:
Other
Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

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