Constitutionality of Providing "Dual Enrollment" Support for Students Attending Private Sectarian Secondary Schools in the State

Testimony of Professor Peter Teachout,
Vermont Law School,
April 4, 2014

I. Introduction:

My name is Peter Teachout. I am a Professor of Constitutional Law at Vermont Law School. One of my areas of scholarly interest is Vermont constitutional law and history. I have published a number of articles dealing with issues in that field. I have also testified before committees of the Vermont state legislature on issues of both federal and state constitutional law. I appreciate this opportunity to testify before the Senate Education Committee today.

I have been asked to testify today on a constitutional issue presented by 16 V.S.A. 944 adopted last year establishing a structure for administering the state's "dual enrollment" program. Under the dual enrollment program, high school juniors and seniors may receive public funds to enroll in one college-level class per term and receive credit toward both high school and college graduation. The funds provided are approximately $650 per course, with that cost being shared, as I understand it, by the school in which the student is enrolled and the state.

Prior to adoption of 16 V.S.A. 944, an earlier version of the dual enrollment program existed. Under that earlier version, the dual enrollment program was open to all Vermont resident students. Last year, however, with the adoption of 16 V.S.A. 944, changes were made in the eligibility criteria for participation. The new legislation continued dual enrollment eligibility generally for students attending both public and independent schools in the state, but eliminated from eligibility those students who attend independent schools on a private-pay basis. That left two-groups of students without eligibility: those attending independent non-sectarian (or non-religious) schools on a private pay basis, and those attending any of the religious high schools in the state, schools such as Rice Memorial High School in Burlington on Mid-Vermont Christian in Quechee.

The question I have been asked to address in my testimony today is whether either the Establishment Clause of the U. S. Constitution or Article 3 of Chapter I [the so-called "Compelled Support" Clause] of the Vermont Constitution requires exclusion of students attending the religious high schools from eligibility for state-funded dual enrollment support. I conclude that neither the Establishment Clause of the U.S. Constitution nor the Compelled-Support Clause of the Vermont Constitution require the exclusion of students attending private religious high schools in the state from eligibility for publically funded dual enrollment support. The bases for my conclusion are set out more fully below.

In arriving at this conclusion, it is significant to note that, under the current program, no public dual enrollment money goes directly to any of the independent high schools. The money goes to the public college providing the course and the credit. If students attending private religious schools were made eligible for participation in the dual enrollment program, that fact alone would probably insulate the program from a successful challenge under either the Establishment Clause of the U.S., Constitution or the Compelled Support Clause of the Vermont Constitution.

Although the question is not presented here, I would go further and say that, even if the public money were to go directly to the religious high schools, that fact would not necessarily render the program unconstitutional under either the U.S. or Vermont constitution *if proper safeguards were in place to prevent the public money from being used for religious instruction.* We need not reach that issue however, since, as noted above, the public money goes, not to the religious high schools, but to the public college providing the course and credit.

Both the Establishment Clause of the U.S. Constitution and the Compelled Support Clause of the Vermont Constitution require separation of church and state. However, in the leading case interpreting Article 3 and the meaning of the Compelled Support Clause in the Vermont Constitution, *Chittenden Town School District v. Department of Education* , 169 Vt. 310 (1999), the Vermont Supreme Court indicated that the Compelled Support Clause may require a greater degree of separation of church and state than that required by the Establishment Clause. So, even if providing dual enrollment support to students in religious high schools would not violate the Establishment Clause, the question of whether providing such support would violate the Compelled Support Clause of the Vermont Constitution requires independent analysis.

Indirect Benefit: The "Divertibility" Argument

The argument that the dual enrollment program would violate the Compelled Support Clause of the Vermont Constitution if students at private religious schools were made eligible for participation in the program rests, as I understand it, on the claim of indirect benefit. Essentially, the argument is that, if dual enrollment support were provided to students attending religious high schools, it would provide an indirect benefit to such schools by supplementing the school's curriculum, lessening the school's own teaching load, thereby freeing up (allowing "diversion" of) the school's existing resources to teach religious courses. This is what is called the divertibility argument.

As I will try to show below, there is nothing in *Chittenden School District* case to suggest or support the claim that that sort of indirect benefit would violate the state constitutional provision. In fact, the Vermont Supreme Court goes out of its way in that case to make clear that many types of state assistance to religious schools in the state – including types of assistance that would allow diversion of existing resources – would not violate the Compelled Support Clause

of the state constitution. The constitutional infirmity of the funding measure struck down in that case ("sending town" tuition money) was that it provided no safeguards against using state money directly to underwrite religious education. Nonetheless, the indirect benefit argument needs to addressed since there is at least surface validity to the argument that providing dual enrollment eligibility to students at religious high schools would provide a kind of support, however indirect, to such schools.

Before turning to the question of whether the Compelled Support Clause of the Vermont Constitution prohibits making students in private religious schools eligible for dual enrollment support, it is important to address first whether doing so would violate the Establishment Clause of the U.S. Constitution.

II. If students attending religious high schools in the state were to made eligible for dual enrollment support, would that violate the Establishment Clause of the United States Constitution?

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."
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> Amendment 1, U.S. Constitution

Twenty years ago this might have been a difficult question but it is not a difficult one today. The United States Supreme Court has upheld against Establishment Clause challenge a wide variety of forms of state assistance to sectarian private schools, including forms of assistance that allow diversion of existing resources to religious instruction. Moreover, the Court has also upheld against Establishment Clause challenge a school district voucher program that allows public taxpayer money to be used directly to support both secular and religious education in religious private schools.

Here, for example, are types of governmental assistance that have been found not to violate the Establishment Clause of the U.S. Constitution: providing buses to take children to and from parochial schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); providing a sign language interpreter for hearing-impaired students in parochial schools, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); government payment for administering standardized tests in parochial schools, *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); allowing public school special education teachers to provide instruction in private religious schools, *Agostini v. Felton*, 521 U.S. 203 (1997); lending educational materials and equipment to private and public schools without distinction, *Mitchell v. Helms*, 530 U.S. 793 (2000). Notice that, in each of these cases, the public assistance to the religious school would have the effect of allowing diversion of the school's existing resources to

religious education but, notwithstanding that fact, the Court has found no Establishment Clause violation.

The most significant recent Establishment Clause case is *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In the *Zelman* case, the Court upheld, against an Establishment Clause challenge, a Cleveland program that made publically funded school vouchers of up to $2,500 per student available to parents who were allowed to use the vouchers to send their children to religious or secular private schools, *without regard to how the money would be used by recipient institutions, whether for secular or religious instruction purposes*. In other words, under the Cleveland voucher program, taxpayer money could be used to directly support religious instruction. Moreover, the Court upheld the Cleveland program in the face of evidence that showed that more than 96% of the public voucher funds would go to private religious schools.

In that case, the Court found significant that (1) the program was made broadly available (2) according to "neutral" criteria, and (3) the decision to channel the funds to private religious schools was made, not directly by the government, but rather by individual parents. As long as the decision as to where the funds would go was made by the individuals to whom the vouchers were issued, rather than government itself, according to the Court majority, it did not matter that substantial government funds eventually might be used to support not just religious schools but actual religious instruction.

These U.S. Supreme Court decisions make clear, I think, that the sort of indirect support of private religious high schools that might be involved if students attending private religious high schools were made eligible for dual enrollment support would be found not to violate the Establishment Clause. The fact that the government funds under the dual enrollment program go, not to the religious high schools, but to the public colleges providing the courses and the credit would by itself probably be determinative of a finding no violation.

Moreover, significantly, in upholding various forms of government assistance to private religious schools against Establishment Clause challenge in these cases, the U.S. Supreme Court has repeatedly declined to give constitutional weight to the so-called "divertibility" argument. It has repeatedly rejected the "argument that all aid [to religious schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Mitchell v. Helms*, 530 U.S. 793 (2000).

III. The Compelled Support Clause in Article 3 of Chapter 1 of the Vermont Constitution and the *Chittenden School District* Case

> "That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that *no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience*,

> nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."
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> Article 3, Chapter 1, Vermont Constitution
> ("Compelled Support Clause" in italics; emphasis supplied)

Since, however, the Vermont Supreme Court has ruled that the Compelled Support Clause in Article 3 of the Vermont Constitution may require greater separation of church and state than that required by the Establishment Clause of the U.S. Constitution, we need to inquire whether, in light of the Vermont Court's decision in the *Chittenden School District* case, the Compelled Support Clause in the state constitution prohibits making students in religious high schools eligible for state funded dual enrollment support.

First some background on the *Chittenden School District* case:

Under Vermont law, in order to receive state education funding, a town without a high school of its own must provide basic tuition payments to schools in surrounding communities to enable town students to attend accredited public and private schools of their choosing. In the *Chittenden* case, several parents in Chittenden had chosen to send their children to Mount Saint Joseph Academy, a Catholic school in neighboring Rutland which required students to take theology classes to graduate. When the town of Chittenden authorized the tuition payments, the state Department of Education terminated state aid to the district on grounds that the payment of taxpayer funds directly to Mount Saint Joseph violated the Establishment Clause of the First Amendment and the Compelled Support Clause of Article 3 of the Vermont Constitution. The district then sued to restore state funding.

In deciding the case, the Vermont Supreme Court first determined that there were significant differences in language and historical context between the Establishment Clause in the U.S. Constitution and the Compelled Support Clause in the Vermont Constitution. Based on these differences, the Vermont Court concluded that the Establishment Clause and the Compelled Support Clause were not necessarily coextensive in thrust and coverage. Thus, even if certain kinds of direct financial support of religious schools might be found not to violate the Establishment Clause of the U.S. Constitution, they might nonetheless violate the Compelled Support Clause of the Vermont Constitution.

The Court then determined that, whether or not it would violate the federal Establishment Clause, providing "sending town" tuition payments to a private religious school violated the

Compelled Support Clause in the state constitution *because there were no restrictions on the use of tuition payments by the recipient institution.* 169 Vt. 310, at 343. There were no safeguards to prevent state moneys from being used directly for purposes of religious indoctrination or education. Even though this might not violate the Establishment Clause, it did violate the Compelled Support Clause because it meant that taxpayer dollars could be used to directly subsidize religious education in the recipient high schools. In so ruling, the Court stressed that the problem was not providing government funding directly to the religious school itself but rather the lack of restrictions on the use of such funds. "Thus, we conclude that the Chittenden School District tuition-payment system, *with no restrictions on funding religious education,* violates Chapter I, Article 3." *Id.*

In so ruling, the Court went out of its way to make clear what it was not dealing with in this case and not ruling inconsistent with Article 3: "We are not dealing here with *the myriad ways that a public school district can subsidize education in a religious school* by paying for expenses that occur whether or not the school was sectarian. For example, this case is not governed by those that involve payments for school transportation to sectarian schools, [or provide] text books . . if books are secular, or teachers of secular subjects to sectarian school children . . ." *Id.* At 341-42 (emphasis supplied). In other words the Court specifically recognized that some forms of state assistance to private religious schools would be consistent with Article 3, provided the assistance was not, and could not be, used directly to subsidize religious indoctrination or education, as was the case with the Chittenden tuition payments. The fact that such state assistance might allow diversion of existing school resources to support religious education was not considered a constitution infirmity. "The [constitutional] deficiency in the tuition-payment system," the Court stressed, "is that there are no restrictions that prevent the use of public money to fund religious education." *Id.* at 343.

For Justice Johnson, concurring in the judgment, the crucial fact was that the tuition payments were made directly to the religious school. "The critical question under the Compelled Support Clause," according to Johnson, "is not the nature of the relationship between the state and the recipient religious organization, but *the nature of the organization receiving public funds*. . . . Thus, while the religious nature of the recipient institution may not be determinative under the federal framework, it is *the* question under the Vermont Constitution." *Id.* at 347. Thus, for Justice Johnson, the fact that duel enrollment funds go to the public colleges and not the private religious schools would in all likelihood be determinative of a finding of no Compelled Support Clause violation.

A careful reading of the Vermont Court's decision in the *Chittenden* case thus makes clear, I think, that the kind of indirect benefit that would be provided to religious high schools if students attending such schools were made eligible for dual enrollment would be found not to violate the Compelled Support Clause of Article 3 of Chapter 1 of the Vermont Constitution. That is true notwithstanding the fact that such support might allow diversion of the school's existing resources to support religious education.

Although I was not asked to address it in my testimony, I should add that, even though there is no constitutional requirement that students attending private religious schools be excluded from participation in the dual enrollment program, neither is there any constitutional requirement that they be included under either the federal or state constitution. Neither the Free Exercise Clause nor the Equal Protection Clause of the federal constitution requires that students attending private religious schools be granted all the benefits and advantages granted to public school students under state law. Similarly, under the Vermont constitution, neither the Common Benefits Clause of Article 7 of Chapter 1 nor the public education provision in Section 68 of Chapter II requires equal treatment of students in the state's private religious and public schools. So while the legislature is free to extend eligibility for participation in the dual enrollment program to students in private religious schools in the state, it is not constitutionally required to do so.

Thank you for your consideration.