ENTRY ORDER

SUPREME COURT DOCKET NO. 2021-099

JUNE TERM, 2021

Michael & Nancy Valente et al.* v. Daniel M. French, Agency of Education et al.	}	CERTIFIED FROM:
	}	United States District Court for the District of Vermont
	}	DOCKET NO. 2:20-cv-00135

In the above-entitled cause, the Clerk will enter:

On May 10, 2021, the United States District Court for the District of Vermont filed a certification order with this Court presenting us with the following proposed question: "What is the definition of 'adequate safeguards' as set forth in Chittenden Town Sch. Dist. v. Dep't of Educ., [169 Vt. 310, 312,] 738 A.2d 539, 544 (Vt. 1999)?" Pursuant to Vermont Rule of Appellate Procedure 14(a), this Court "may answer a question of Vermont law certified to it by a federal court if the answer might determine an issue in pending litigation and there is no clear and controlling Vermont precedent." The rule also permits us to decline to answer the question, or to reformulate the question. V.R.A.P. 14(b). As explained more fully below, we decline to answer the certified question in this case at this time because no adequate record exists that would allow us to answer the question such that it might determine an issue in the pending litigation.

As the federal district court explained in its certification order, this case results from the denial of plaintiffs' requests for tuition reimbursement under Vermont's Town Tuition Program (TTP) set forth in 16 V.S.A. § 822. Plaintiffs are families who reside in school districts that do not maintain a public high school and are therefore permitted to seek tuition reimbursement under the TTP to attend a school outside those districts. Plaintiffs sought reimbursement for their children's attendance at Catholic schools outside the districts. They filed suit in the federal district court after their requests were denied, alleging that denial of the requests was based solely on a statewide policy prohibiting school districts from paying tuition to any religious school deemed pervasively sectarian. They contend that the alleged policy violates various federal constitutional provisions, including the First Amendment's Free Exercise Clause on its face and as applied. They further assert, notwithstanding this Court's prior decision construing the Vermont Constitution's Compelled Support Clause, that "[i]t would be unconstitutionally intrusive for Defendants to try to tease out what aspects of a religious school are religious and what aspects of a religious school are secular in an attempt to give families a tuition benefit that went to only the secular aspects of their chosen religious school." See Chittenden Town Sch. Dist., 169 Vt. at 312, 738 A.2d at 541-42 (holding that school districts violate Vermont Constitution's Compelled Support Clause, Vt. Const. ch. I, art. 3, when they "reimburse[] tuition for a sectarian school under § 822 in the absence of adequate safeguards against the use of such funds for religious worship" (emphasis added)).

The current procedural posture in the instant federal case is that there is a pending motion to dismiss filed by defendants. There does not appear to be any allegation, evidence, or finding in the record provided to this Court that any defendant school district authorized the payment of tuition funds pursuant to § 822 for plaintiffs' children to attend religious schools subject to restrictions on the use of the public funds to support religious instruction or worship. In other words, there is no allegation that any of the defendant school districts implemented or attempted to implement restrictions designed to serve as "adequate safeguards" to ensure compliance with the Vermont Constitution's Compelled Support Clause, as interpreted by Chittenden. Nor is there any record of a Vermont statute or administrative rule establishing specific parameters on the use of tuition payments designed to serve as "adequate safeguards" against compelled support of religious worship or instruction.[*] And there is no record concerning the operation of these pervasively sectarian schools and the feasibility and effectiveness of various potential safeguards. In short, we are asked to define "adequate safeguards" in the abstract—without any actual putative safeguards to review—and without any evidentiary record to inform our analysis. Thus, in the context of a limited record indicating that no adequate safeguards were put in place, we are asked to predict what restrictions may or may not, under any set of circumstances, constitute adequate safeguards under the Compelled Support Clause.

Whether any adopted or implemented safeguards accompanying tuition reimbursement for education at a sectarian school are sufficient to satisfy the requirements of the Vermont Constitution is ultimately a question for this Court. However, we decline to attempt to answer the certified question in the abstract; the establishment of specific measures designed to serve as "adequate safeguards" under the Compelled Support Clause is a task better suited for the legislative or executive branches of government in the first instance, informed by more detailed

[*] Apparently, in mid-January of this year, the Vermont Agency of Education published nonmandatory best practices for school districts, explaining how the districts should balance their obligations under the federal Free Exercise Clause and Vermont's Compelled Support Clause. However, following the issuance of an order by the Court of Appeals for the Second Circuit in a companion case prohibiting Vermont school districts from denying tuition reimbursement based on their assessment of the religious status of the plaintiffs' chosen schools, the Agency rescinded its best practices recommendations to avoid any potential tension between those recommendations and the Second Circuit's order.

In an April 21, 2021 decision attached as Exhibit A to the federal district court's certification order, the Vermont Board of Education reviewed various federal restrictions on the use of education aid funds, as well as a use restriction cited in the plurality opinion in Mitchell v. Helms, 530 U.S. 793, 861 (2000). The Board suggested that restrictions of this type might harmonize the applicable state and federal constitutional requirements, but it noted that its decision was not issued pursuant to a rulemaking proceeding and that it could not provide binding direction to school districts. In the April 21, 2021 decision, the Board ultimately granted the plaintiffs their requested relief—ordering the defendant school districts to reimburse the plaintiffs' tuition payments for one of the two years at issue in the plaintiffs' federal case—but it noted in its decision that nothing in the limited record before it indicated that the tuition requests had been denied because the school districts would use the funds for religious worship or instruction or that the school districts were asked whether they would certify that public tuition dollars would not be used to fund religious worship or instruction.

knowledge of school operations and other factors bearing on the nature and feasibility of specific proposed safeguards. See Mortg. Lenders Network, USA v. Sensenich, 2004 VT 107, ¶ 10, 177 Vt. 592, 873 A.2d 892 (Dooley, J., concurring) (stating that state certification procedure "works well . . . where the record is adequate to address the questions framed by the certifying federal court").

The certified question from the federal district court is declined.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice