NATIONAL CATHOLIC REPORTER
Published on *National Catholic Reporter* (http://ncronline.org)

Religious colleges win legal round with court ruling on HHS suit

Mark Pattison Catholic News Service | Dec. 19, 2012
Washington

Four days after the first federal appellate-level hearing on two religious colleges' legal challenge to the contraceptive mandate, the appeals court said Tuesday the lawsuit will remain pending and it "will hold" the government to its word that it plans to modify enforcement of the mandate for some religious employers.

Oral arguments were heard in the case Dec. 14 by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in Washington.

In their ruling, the judges said that the government said in its argument that "there will be a different rule for entities like the appellants ... and we take that as a binding commitment."

The government said it will publish notice of proposed rulemaking in the first quarter of 2013 and issue a final rule before August 2013.

"We take the government at its word and will hold it to it," the ruling said, adding that the government also has to report to the court every 60 days about its progress on this modification.

Last year, the Obama administration put in place a yearlong period, called "safe harbor," that protects employers from immediate government action against them if they fail to comply with the mandate. The circuit court said the government must continue to protect the two colleges from enforcement of the mandate.

William Thierfelder, president of Belmont Abbey College, called the ruling "a major victory" and "the answers to our prayers."

Belmont Abbey College's case was the first to be filed challenging the Department of Health and Human Services mandate last November. The North Carolina liberal arts college has been run by the Benedictine monks of Belmont Abbey since 1876.

A lower court dismissed the suit in July. The school appealed and its case was combined with a lawsuit filed by Wheaton College, an evangelical school in Illinois.

The mandate -- already the subject of more than 40 court challenges -- requires employers, including most religious employers, to provide free coverage of contraceptives, sterilization and some abortion-inducing drugs free in employee health insurance. A narrow exemption applies only to those religious institutions that seek to inculcate their religious values and primarily employ and serve people of their own faith.

It does not include a conscience clause for employers who object to providing such coverage on moral grounds.

The government also proposed an accommodation allowing those employers who object to providing contraceptives to pass on the costs of the mandated coverage to their insurance carriers or a third party, rather than pay for them directly. But many dioceses are self-insured, and Catholic officials say the policy would offer

no fundamental change.

During the oral arguments Dec. 14, spirited sparring between judges and attorneys marked proceedings that went twice their scheduled length. Lawyers could barely complete their sentences before judges asked questions challenging their assertions.

On one hand, the lawyer for Belmont and Wheaton colleges was asked if his appeal was premature since the federal has said it has planned to finalize by next August a rule to accommodate religious employers that do not fit the mandate's narrow exemption for churches.

On the other hand, the Justice Department attorney representing HHS was asked if he would support injunctive relief for the colleges until the new rule is put in place.

In the Dec. 14 hearing, lawyers, scheduled to present oral arguments for 15 minutes each before the three-judge appellate panel, instead went for 30 minutes, and a scheduled four-minute rebuttal period went for 10.

Kyle Stuart Duncan of the Washington-based Becket Fund for Religious Liberty, representing the two colleges, said he was arguing on the "rightness" of the issue, not its timeliness. He also expressed his doubts about HHS modifying its rule by August, saying, "We've never seen a notice of proposed rulemaking" regarding any modification.

The final rule on the mandate takes effect in August 2013.

As a Catholic institution, Benedictine-run Belmont Abbey College opposes all forms of artificial contraceptives, according to Duncan, while Wheaton opposes only those such as "Plan B" and the "morning-after pill" because those drugs could prevent implantation of a fertilized egg in the womb. Their cases, rejected separately by different judges, were combined for the appeal.

Even so, there are employees at both schools who are ready to sue their respective school if they are not offered free contraception as part of their health plan come Jan. 1, Duncan said.

"The government has not said what it is going to do" regarding any modification, Duncan told the judges.

Adam Jed, arguing the government's case, said he could not say how HHS might modify the rule as the comment-seeking period for modification has already begun. He added Belmont and Wheaton qualify for HHS' "safe harbor" period and could qualify for exemption under a modification.

Jed said injunctive relief would not be the proper remedy even in the interim as the two colleges had not sought an injunction in their appeal.

While Jed sought outright dismissal of the cases, Circuit Judge Merrick B. Garland raised the idea of sending them back to the federal district court, with instructions to put the cases on hold. This would prevent the need for the cases to be refiled anew should the colleges object to a rewritten rule.

Circuit Judge Thomas B. Griffith advocated for "judicial restraint" in the matter, defining it as "not having to decide an issue until we have to," suggesting that it was premature to come to a decision on a rule all know will be changed. Garland, citing an earlier energy rule rewriting case said, "We do not need to decide the issue now. We may never need to decide the issue" if it becomes moot.

But Senior Circuit Judge A. Raymond Randolph called that "the lazy judge's rule," saying that the "guidance documents" issued to religious employers on the HHS mandate are "like a press release" and "not binding," with employers having no clear idea of what is expected from them. "The government is sending mixed message

about what's coming down the pike," he added.

Contributing to this story was Patricia L. Guilfoyle, editor of the Catholic News Herald*, newspaper of the Charlotte Diocese.*

Source URL (retrieved on *02/07/2016 - 09:26*): http://ncronline.org/news/politics/religious-colleges-win-legal-round-court-ruling-hhs-suit