B. PRIVATE SCHOOL UPDATE AND IMPACT OF ALLEN V. WRIGHT

1. Introduction

In the private school area, 1984 was dominated by a single U.S. Supreme Court case. The Court's decision in the case, Allen v. Wright, 104 S. Ct. 3315 (1984), may have effectively ended a period of intensive emphasis on the Internal Revenue Service's policy on private schools and racial discrimination. As the following discussion will demonstrate, however, the technical questions concerning determination of a private school's racially nondiscriminatory policy and other issues, such as the distinction between day care organizations and private schools, persist. Prior CPE texts contain extensive analyses of private school developments leading up to 1984's events. Consequently, this topic will not attempt a comprehensive review but rather will focus on 1984 matters.

2. Review of 1984 Litigation Developments

On July 3, 1984, the Supreme Court issued its long awaited opinion in Allen v. Wright. This case began in 1976 when parents of black children attending public schools in school districts undergoing desegregation brought suit challenging the Service's guidelines and procedures concerning private schools and racial discrimination. The plaintiffs resided in seven states other than Mississippi. They alleged that many racially discriminatory private schools were created or expanded in their communities at the time the public schools were undergoing desegregation and they asked for relief in the form of a nationwide injunction similar to that issued in 1980 in Green v. Regan mandating affirmative action guidelines for certain Mississippi private schools. In fact, the Wright case and the Green case were consolidated at the District Court level in 1977. The cases were separated on November 26, 1979, when the District Court dismissed the Wright action on several grounds including lack of standing to sue.

Prior to the dismissal, W. Wayne Allen, the Chairman of the Board of Trustees of the private Briarcrest Baptist School System of Memphis, Tennessee, was granted leave to intervene in the case. Briarcrest was one of the schools specifically named in the complaint as being a racially discriminatory tax exempt school.

The District Court's dismissal on procedural grounds was taken to the Court of Appeals for the District of Columbia which, on June 18, 1981, overturned the

District Court decision on all grounds including standing. Both the government and the intervenor then asked the Supreme Court to hear the case. The issue before the Court was thus the procedural question of whether the plaintiffs had standing to sue the government over its application of the federal tax laws to third parties rather than the substantive question of the adequacy of Service guidelines on private schools and racial discrimination.

The Supreme Court heard oral arguments on February 29, 1984. The attorney for Wright argued that the Service had not adopted sufficient standards and procedures to fulfill its obligation, as described in Bob Jones University v. U.S., 461 U.S., 103 S. Ct. 2017 (1983), to deny tax exempt status to racially discriminatory private schools and had thereby harmed the plaintiffs directly and interfered with their children's opportunity to receive an education in desegregated public schools. The alleged direct harm consisted of government support in the form of tax exemption for such racially discriminatory private schools. It was not alleged that the plaintiffs' children had ever applied or would ever apply for admission to any private school. The Solicitor General and the attorney for Briarcrest Baptist argued that the plaintiffs did not have standing as they had not shown an injury arising from the Service actions.

The Supreme Court decided that the plaintiffs did not have standing on the basis that their claim of direct harm by the mere fact of federal tax exemption for allegedly discriminatory private schools does not constitute a judicially cognizable injury. The Court also concluded that the claim of stigmatizing injury caused by racial discrimination accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct. The Court noted that the claim of injury based on the diminished ability to receive an education in a racially integrated school, though a judicially cognizable injury, failed to support standing because the alleged injury was not fairly traceable to the challenged government conduct, the recognition of tax exemption. The Court also viewed it as entirely speculative whether revocation of tax exemption would lead a school to change its policies.

The Court distinguished its 1971 summary affirmance of Green v. Connally (affirmed as Coit v. Green, 404 U.S. 997) on the facts that Green was limited to the schools in one state, the history of school desegregation in Mississippi at the time of the Green case was different, the Service policy on private schools and racial discrimination at the outset of Green was different, and the District Court's findings on the link between private school formation in the state and avoidance of integration were never challenged as clearly erroneous.

The Court was divided five to three in making its decision in Wright. Justice Marshall did not take part in the deliberations.

In addition to Wright, the Supreme Court was involved in a second action concerning private schools in 1984. On October 1, 1984, the Court refused to hear the appeal of Clarksdale Baptist Church, a Mississippi church operating a private school, on the issue of whether the 1980 Green orders infringe the First Amendment rights of the church. The refusal of the Court to hear the appeal lets stand the Court of Appeals decision in the case to the effect that the 1983 Supreme Court decision in Bob Jones University v. U.S. applies to church-operated as well as unaffiliated religiously-oriented private schools. The Clarksdale decision removes the final impediment to the Service's implementation of the 1980 Green orders.

3. Review of 1984 Legislative Developments

One of the many exempt organizations areas affected by the Deficit Reduction Act of 1984 (DEFRA) is that of private schools. The impact on schools occurs in two ways. The first impact is in DEFRA section 1032 which amends IRC 501 by adding a new IRC 501(k) stating that, for purposes of IRC 501(c)(3), the term "educational purposes" includes the provision of child care away from the home if substantially all of the care provided is for purpose of enabling parents to be employed and the services provided by the organization are available to the general public. The Conference Committee Report on the provision notes that it is not intended to affect the meaning of the terms "educational" or "charitable" for any purpose other than considering the child care organizations described in the provision as having educational purposes. In prior CPE texts, the issue of child care and education has been discussed and it was noted that such organizations could be recognized as exempt under IRC 501(c)(3) in one of only two circumstances, that they qualified as schools with a regularly enrolled student body, faculty, curriculum, and place where the school activity was carried on or that the organization provided custodial day care only to children from low income families. Congress has now concluded that such custodial care no longer must be limited to children from low income families to meet IRC 501(c)(3)'s requirements.

The second impact on schools occurs in DEFRA section 2603 concerning social security treatment of certain church employees. A detailed discussion of this provision is included in the separate topic on DEFRA but, briefly stated, the

section provides, in part, that elementary or secondary schools controlled, operated, or principally supported by churches can make a one-time election to have their employees covered by SECA rather than FICA.

4. Impact of Allen v. Wright

The main impact of the Supreme Court's decision in Allen v. Wright is in terms of what was avoided, namely, the possibility of court-supervised administration of the Service's private school policy through a nationwide injunction similar to Green. The Court left open the possibility that standing might be found in some future case where an actual injury, such as denial of admission to a school based on race, occurs. The decision does, however, make it more difficult for third parties to challenge the Service's treatment of particular taxpayers. In this regard, the Wright decision forms part of the Service position in the pending case of Abortion Rights Mobilization, Inc. v. Regan, 80 Civ. 5590 (S.D.N.Y.)

Abortion Rights Mobilization, Inc. (ARM), along with several other organizations and individuals, is suing the Secretary of the Treasury and the Commissioner. It is the plaintiffs' position that the Service has knowingly permitted the Roman Catholic Church and some of its affiliates to engage in political activity on the issue of abortion; i.e., they allege that the Church has endorsed candidates for public office, passed out campaign literature and otherwise supported "pro-life" candidates in direct contravention of its exempt status under IRC 501(c)(3), and without incurring censure from the Service. The plaintiffs state that by permitting such activities, the Service has allowed a privilege to the Church not accorded to other IRC 501(c)(3) organizations and, thus, has violated the Constitutional mandate for separation of church and state. The case is before the U.S. District Court for the Southern District of New York.

In a preliminary motion the Service challenged the plaintiffs' standing to sue. The Court, in Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982), ruled against the Service. A motion to dismiss the action for lack of standing based on Wright is currently pending.

A second third-party suit is pending, Khalaf v. Regan, in which the mayors of four "West Bank" towns and several other individuals have sued the U.S. Government claiming that the United Jewish Appeal, United Israel Appeal, Jewish National Fund, American Section of the World Zionist Organization, Jewish Agency--American Section, and Americans for a Safe Israel are aiding the State of

Israel to discriminate against the Palestinian people and therefore are not operating for IRC 501(c)(3) purposes.

The suit was brought in the U.S. District Court for the District of Columbia and is being heard by Judge Jackson. Plaintiffs are asking for (1) a declaratory judgment that the six named organizations have violated both IRC 501(c)(3) and IRC 170 and that the government has failed to perform its duty to revoke these organizations' recognitions of exemption, and (2) an order enjoining the government to revoke.

The complaint was filed on October 6, 1983. The government has moved to dismiss the case on the basis of lack of standing to sue. Briefs have been filed and a hearing was held on the motion on June 8, 1984. Subsequent to the hearing, the Supreme Court handed down its decision in Wright. Material supplementing the government's brief, including a copy of the Wright decision, has been submitted. To date, Judge Jackson has not acted on the government's motion.

5. Conclusion

The preceding discussion is a review of 1984 developments in the private school area. It is important for a full understanding of the 1984 events to review the discussions in preceding CPE texts as the court decisions discussed in this topic appear to have settled controversies which began in the 1960's.