NATIONAL CATHOLIC REPO
THE INDEPENDENT NEWS SOURCE

Published on *National Catholic Reporter* (https://www.ncronline.org)
December 18, 2012 at 8:17am

Spirited sparring between federal judges, lawyers marks HHS appeal

by Mark Pattison by Catholic News Service

Washington — In the first federal appellate-level hearing on a lawsuit challenging the HHS contraceptive mandate Dec. 14, spirited sparring between judges and attorneys marked proceedings that went twice their scheduled length.

In the hearing, conducted in Washington at the U.S. Court of Appeals for the District of Columbia Circuit, lawyers could barely complete their sentences before judges asked questions challenging their assertions.

On one hand, the lawyer for Belmont Abbey College, a Catholic school in North Carolina, and Wheaton College, an evangelical school in Illinois, was asked if his appeal was premature since the federal Department of Health and Human Services 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.

The HHS 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.

To date, only one federal judge, in New York, has ruled against the government. In the ruling, issued Dec. 5, the judge, Brian Cogan, said, "There is no 'trust us, changes are coming' clause in the Constitution." Many of the lawsuits are still working their way through the court system.

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. 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.

It also proposed what it called 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.

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.

Following questioning by Randolph, Duncan said he invited HHS to enter into a consent decree with the colleges, "but they refused."

Afterward, Duncan said Randolph seemed "most sympathetic" of the three jurists, although "all three were sympathetic at some point during the hearing." He added he was hopeful for a decision in early 2013.
