

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILADELPHIA CITY COUNCIL, <i>et al.</i> ,	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 02-998
v.	:	
	:	
HON. MARK SCHWEIKER, <i>et al.</i> ,	:	
Defendants.	:	

**MEMORANDUM AND ORDER**

BUCKWALTER, J.

March 27, 2002

The defendants have asked the court to abstain from hearing this case. It is, of course, very rare for a federal court to grant such a request. Such language as “federal courts have an unflagging obligation to adjudicate claims that are presented to it”; federal courts “have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution” and abstention is “the exception and not the rule” is commonplace in cases in which to abstain or not abstain is the question.<sup>1</sup>

These are not mere high sounding phrases but reflect clearly the duty of a federal court to undertake to resolve the dispute properly before it. Indeed, to do

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1. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 358 (1989); Marks v. Stinson, 19 F.3d 873, 882 (3d Cir. 1994).

otherwise is counterintuitive. As our Court of Appeals stated recently in Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 149-150 (3d Cir. 1999), “abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it and one which should be invoked only in exceptional circumstances.” Yet, a considerable body of law has developed outlining just what exceptional circumstances may justify abstention. The familiar concepts regarding abstention have primarily as their source these four Supreme Court cases:

1. Railroad Comm’n of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941);
2. Burford v. Sun Oil Co., 315 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943);
3. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971); and
4. Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

With regard to these doctrines commonly known as Pullman, Burford, Younger or Colorado River abstention, the Supreme Court has stated: “The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of consideration designed to soften the tensions inherent in a system that contemplates parallel judicial processes.” Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n. 9, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).

As stated in Chiropractic America v. Lavecchia, 180 F.3d 99, 103 (3d Cir. 1999), “at the risk of oversimplification, we can say that these reasons (for abstention) come within the rubric of comity, or the idea ‘that certain matters are of state concern to the point where federal courts should hesitate to intrude; and they may also concern judicial economy, the notion that courts should avoid making duplicate efforts of unnecessarily deciding difficult questions.’ Bath Memorial Hosp. v. Maine Health Care Fin. Comm’n, 853 F.2d 1007, 1012 (1<sup>st</sup> Cir. 1988).”

Pullman and Burford have somewhat similar requirements that when combined, stand for the following proposition with regard to abstention; namely, as a first step, there must be substantial uncertainty as to the meaning of state law and the state law issue must raise complex questions involving or arising from a complex state statutory scheme.

In the case now before this court, there is substantial uncertainty as to the meaning of state law which raises complex questions involving a complex state statutory scheme. By way of example, Counts I and III claim denial of substantive and procedural due process. Plaintiffs claim, in part, that substantive due process has been denied them because their right to vote on amendment and repeal of Home Rule Charter and Home Rule School District and to participate in the political process has been abrogated by Acts 46 and 83 and the implementation thereof.

Plaintiffs' claims of denial of procedural due process include the following.

First, plaintiffs claim that state laws have vested the right to have a voice in administration, management, and operations of their school system, to hold school officials accountable, to vote and to engage in protected free speech in plaintiffs, who have been deprived of these rights by the passage of Acts 46 and 83, the declaration of distress and the creation of the School Reform Commission (SRC). The state laws are according to plaintiffs:

1. Article IX, § 2 of the Pennsylvania Constitution: Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum.
2. Pennsylvania Home Rule Act, 53 P.S. § 13131 provides plaintiffs the general right of local self-governance and the power to legislate and administrate local, municipal functions.
3. Pennsylvania Education Home Rule Act, 53 P.S. §§ 13202-13222 provides plaintiffs, through the ballot, the power to frame, adopt, amend, and repeal character provisions governing the administration of a separate and independent home rule district.
4. 53 P.S. § 13218(a)(2)(3) provides for a board of education of such home rule school district, which shall be charged with the administration, management and operation of such home rule school district.

5. 53 P.S. § 13212: Once established by Philadelphia voters, these procedures supersede conflicting laws and become the “organic law” for Philadelphia residents.

Instantly the complex, undecided issue of state law arises. Are Acts 46 and 83 in conflict with the Pennsylvania Constitution and the Pennsylvania Home Rule Act and the Pennsylvania Education Home Rule Act, and if so, should these acts supersede what plaintiffs call the “organic law” for Philadelphia residents?

Plaintiffs have additional claims regarding denial of procedural due process. They are:

1. Acts 46 and 83 violate the Pennsylvania Constitutional provision that confers a right to be free from special legislation directed only at regulating the affairs of Philadelphia.

2. Act 83's provision allowing to contract out the operation of the Philadelphia schools to private, “for-profit” entities conflicts with the Pennsylvania Constitutional provision conferring a right to public education.

3. Act 83 gives the SRC the power to suspend the following Pennsylvania statutory rights without notice or opportunity to be heard

(a) prior to the permanent closing of a school (24 P.S. § 7-780);

(b) about keeping schools open for 180 instructional days (24 P.S. § 15-1501);

(c) about instruction in basic subjects, *e.g.* English, Arithmetic (24 P.S. § 15-1511);

(d) concerning a sufficient number of professional employees in the schools (24 P.S. § 11-1106);

(e) regarding criminal background information on prospective employees who will have direct contact with children (24 P.S. § 1-111);

(f) regarding discharge of certain employees convicted of certain crimes (24 P.S. § 5-527); and

(g) about being included in the establishment of Charter School and to have safeguards regarding their operation (24 P.S. § 17-1701).

4. Acts 46 and 83 violate plaintiffs' procedural due process rights because the criteria for a declaration of distress is vague and overbroad with no procedures by which to challenge that designation; that is, pursuant to Act 46, the Secretary may declare the Philadelphia School District distressed if he alone believes that the School District "has failed or will fail to provide for an educational program in compliance with the provisions of this act, regulations of the State Board of Education, or standards of the Secretary of Education" (24 P.S. § 6-691(c)(4)) without

(a) due process notice;

(b) opportunity to be heard;

(c) opportunity to confront witnesses;

- (d) opportunity to cross-examine;
- (e) opportunity to challenge the evidence relied upon by the

defendants to declare distress;

- (f) opportunity to review all evidence;
- (g) right to have an attorney during potential hearing;
- (h) right to a decision based solely on the evidence presented; and
- (i) right that the decision maker be impartial.

To resolve the above procedural due process concerns, this court would have to delve into complex and uncertain issues of state law. To name a few:

1. What power does the General Assembly of Pennsylvania have to override or preempt statutory provisions which deal with matters of local concern?
2. Do Acts 46 and 83 which pertain only to cities of the first class (Philadelphia) violate the Pennsylvania constitutional provision to be free from special legislation?
3. Does contracting out the operation of the Philadelphia public schools to for-profit agencies undermine the right and nature of “public” education as that term is defined by Pennsylvania law?
4. Does Act 83 give the SRC the power to suspend existing Pennsylvania statutory rights?

5. What is the criteria under Act 46 for determining distress under the provision “has failed or will fail to provide for an educational program in compliance with the provisions of this act, regulations of the State Board of Education or standards of the Secretary of Education?”

6. To what extent do Acts 46 and 83 appropriate taxing authority to the school district and does this undermine the taxing authority vested in City Council as set forth in the Home Rule Charter?

The abstention question does not end with the finding that there is substantial uncertainty as to the meaning of state law which involve complex questions about a complex statutory scheme.

It is a reasonable possibility (a Pullman requirement) that if the Pennsylvania Supreme Court, given exclusive jurisdiction under Act 46 to hear any challenge to or render a declaratory judgment concerning the constitutionality of the acts in question, would clarify the state law questions that a need for a federal constitutional ruling might be obviated. Certainly, it would be of extreme importance in preventing this court from making an erroneous construction of state law which could seriously disrupt the important and paramount state interest of providing the best education possible (a Pullman requirement).

Pullman cautions that even if the court finds that

1. there is a substantial uncertainty as to the meaning of state law (there is);

2. there is a possibility that the state court's clarification of the state law might obviate the need for a federal constitutional ruling (there is); and

3. an erroneous federal court construction of state law would disrupt important state policy (it would);

the court must nevertheless consider

1. the effect on the litigant;

2. sensitivity of state interest;

3. importance of federal interest; and

4. availability of an adequate state remedy.

Items (1) and (4) above are somewhat intertwined. A decision to abstain could involve delay, but there is an available remedy under state law which can be undertaken by these plaintiffs. It is, of course, correct that the Pennsylvania General Assembly cannot deprive this court of jurisdiction to adjudicate federal claims. But that is not the issue here. As stated in Chiropractic America, *supra*, "Our focus should not be on whether a federal claim has been presented, but rather on the nature of that claim." (at p. 108).

Plaintiffs' attacks on the state law and regulations involved here require at the very outset a complex analysis of a variety of state law questions as set forth in part in this opinion – an analysis which would inextricably overlap with the one that would be made by the Pennsylvania Supreme Court. Plaintiffs seem to be suggesting that the failure of that court to act except by summary denials with regard to others who have petitioned it makes a remedy “unavailable.” But, there has been no showing that the Pennsylvania Supreme Court has refused to rule on the precise issues raised in their complaint. There is little question that the foundation of plaintiffs' claim is rights they contend exist under Pennsylvania law and they have a state remedy to address those contentions, both by way of the statutory action before the Pennsylvania Supreme Court or whatever other state action counsel for plaintiffs may deem appropriate.

Educational policy is a very sensitive state interest. It is “a matter of particularly local concern.” Pustell v. Lynn Public Schools, 18 F.3d 50 (1<sup>st</sup> Cir. 1994). It is doubtful if there is any issue that galvanizes local interest and opinion any more than education. It is certainly true on the other hand that federal interests alleged in plaintiffs' complaint are important. But ultimately, this very sensitive state interest must be resolved by the state where it can best be adjudicated.

Based upon the foregoing, the following Order is entered:

**AND NOW**, this 27<sup>th</sup> day of March, 2002, it is hereby **ORDERED** that the Motion to Abstain is **GRANTED**, and this case is **STAYED**, pending proceedings in the state courts.

BY THE COURT:

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RONALD L. BUCKWALTER, J.