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In re Parochiaid: Church-State Wall of Separation Scrutinized-Again

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In re Parochiaid: Church-State Wall of Separation Scrutinized—Again

by Neal Devins

Aguilar, Secretary of the U.S. Dept. of Education and Chancellor of the Board of Education of New York City
v.
Felton
(Docket Nos. 84-237, 84-238 & 84-239)

Argued December 5, 1984

ISSUE

Federal aid to parochial schools is the subject of *Aguilar v. Felton*. At issue is a provision in the Elementary and Secondary Education Act which authorizes comparable federal funding of remedial education for educationally deprived children in low income areas who attend private schools. Specifically, the *Felton* case involves a constitutional challenge to New York City's practice of sending public school teachers to private schools to provide such remedial education services.

It is unlikely that the decision ultimately rendered in *Felton* will clarify the present widespread confusion in church-state jurisprudence. Yet, *Felton* might close a chapter on one particularly vexing issue—namely, government involvement with religious schools. In recent years, the Court has intimated that government, under proper circumstances, may play some role in the secular educational function of children attending private schools. Yet, Supreme Court "parochiaid" decisions are so intricate as to speak only to the particular facts of a case. *Felton* may end this confusion and establish broad parameters for permissible government involvement with religious schools.

FACTS

Under Title I of the Elementary and Secondary Education Act, school systems may receive federal aid for those programs: 1) designed to meet the special educational needs of economically and educationally deprived children, 2) which supplement rather than supplant nonfederally-funded programs and 3) extend program services on an equal and equitable basis to eligible children who attend private schools. In New York City, starting in August of 1966, city-employed Title I teachers were sent into the private schools during regular school hours. Under this arrangement, contacts between Title I administrators and private school officials involve the city's processing private school requests for Title I assistance and private schools providing information to the city concerning its planned scheduling of classes. Private school officials also suggest which of their students should participate in the Title I program, although Title I officials need not accept these recommendations.

In an attempt to ensure that Title I teachers do not involve themselves with or become influenced by sectarian components of parochial school instruction, these teachers were prohibited from: 1) introducing religious matter into their teaching; 2) permitting parochial school teachers a role in either selecting students or teaching courses, and 3) permitting private school teachers access to Title I materials or equipment. Additionally, public school field supervisors were supposed to make periodic unannounced visits to ensure compliance with program guidelines. Finally, participating parochial schools were required to "sanitize" or strip all religious symbols from the walls of classrooms and other facilities before those rooms could be used for Title I purposes.

A group of taxpayers from the Eastern District of New York brought suit challenging New York's practice of onsite instruction by Title I teachers at parochial schools. These taxpayers claimed that such onsite instruction did not pass muster under the three-part test frequently used by the Supreme Court to determine whether the government action violates the Establishment Clause. As stated in *Lemon v. Kurtzman*: (403 U.S. 602 (1971)) "First, the statute [or program] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally [it] must not foster an excessive government entanglement with religion" (403 U.S. 602, 612-13). Taxpayers alleged that New York's Title I program has the primary effect of both advancing and inhibiting religion. Taxpayers further contended that the program has the potential for excessive entanglement.

Taxpayers claim that religion is inhibited because the Title I program seeks to "desanctify" otherwise religious elements of church school education. Taxpayers claim that religion is advanced in several ways: 1) Title I teachers lend the prestige of government to the church

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school; 2) Title I teachers aid the sectarian function of parochial schools by improving the basic skills of remedial students, and 3) unascertainable content of Title I teachers' instruction necessarily advances religion.

Taxpayers also claim that: "The potential for excessive entanglement [in New York City's program] is sufficient to condemn the program." For example, noting the difficulty of monitoring possibly religious-advancing contact between Title I teachers and parochial school officials, taxpayers argue that: "any such system of surveillance would have to be so oppressive as to create ... entanglement."

The Secretary of Education, the Chancellor of New York City's Board of Education and affected private school parents (hereafter "education officials") join together in this case and disagree with taxpayers' assertions. Central to their argument is the contention that "time and experience" demonstrate that the New York City program "does not in fact constitute 'a step towards establishment' or create any of the substantive evils against which the clause is designed to protect." In regard to taxpayers' claim that the Title I program has the impermissible effect of both advancing and inhibiting religion, the education officials assert that this claim is inaccurate because Title I aid is provided directly to eligible students, not to the schools they attend; Title I is a neutral program, primarily extending aid to students attending public schools; and Title I aid is only used for secular activities.

The education officials also contend that the taxpayers' excessive entanglement claim is erroneous. Instead, they argue that, unlike earlier cases, here "there is no need for continuing and intensive surveillance ... to prevent impermissible fostering of religion." To support his contention, they assert that the parochial schools involved are not pervasively sectarian; that Title I services are provided directly to the students by Title I teachers, and that New York City has structured its program so as "to insulate it from private school influence and assure it complete autonomy."

At the district court level, the New York City program was upheld as constitutional. Key to this holding was an identical 1980 Southern District of New York decision, *National Coalition for Public Education and Religious Liberty v. Harris* (489 F. Supp. 1248 (S.D.N.Y. 1980)). *Harris* was dismissed by the Supreme Court for want of jurisdiction since plaintiffs failed to file their appeal in a timely fashion (449 U.S. 808 (1980)). On appeal, the United States Court of Appeals for the Second Circuit reversed.

Although recognizing "that the City had made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion," the appellate court claimed that it was bound by the Supreme Court's decision in *Meek v. Pittinger* (421 U.S. 349 (1975). *Meek* invalidated a Pennsylvania statute which, among other things, provided "[onsite] services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language)." Although recognizing that, unlike *Lemon v. Kurtzman*, decided four years earlier "the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work," the court in *Meek* concluded that this "does not substantially eliminate the need for continuing surveillance."

The education officials' introduction of evidence suggesting that the New York City program had a secular effect was viewed as irrelevant by the appellate court in this case; the Second Circuit held that *Meek* still controls.

It is now argued before the Supreme Court that this conclusion is erroneous because: 1) private schools are not pervasively sectarian, and 2) New York City's Title I program ensures a secular content to its remedial programs without obtrusive church-state contracts. Taxpayers disagree with both of these assertions.

BACKGROUND AND SIGNIFICANCE

Felton, for several reasons, will prove to be a significant church-state decision. First and foremost, if the Court upholds New York City's Title I program, Supreme Court decisions such as *Lemon* and *Meek* will be of questionable validity. Those decisions of a decade ago created a Catch-22 situation for state aid to parochial schools. On one hand, the Court assumed that aid to pervasively religious church schools would necessarily have the impermissible primary effect of advancing religion *unless* substantial supervisory safeguards were utilized by the state to monitor the aid program. On the other hand, the Court assumed that the sort of safeguards needed to effectively monitor the church school would impermissibly entangle the state with religion. As can be seen by the Second Circuit's application of *Meek*, *Felton* challenges this so-called *per se* rule.

Second, if the Court upholds New York City's program, *Felton* may create a new *per se* rule. This new rule would find *per se* constitutional all financially neutral government aid to education programs. In other words, since comparable Title I benefits extend to both public and private school students, the Court may hold that there is no need to undertake a searching inquiry about New York City's implementation of its Title I program. Alternatively, and more likely, the Court will pay some attention both to the adequacy and scope of administrative safeguards designed to prevent illegal church-state involvements. (This possibility is heightened by a December, 1984 federal district court decision, *Wamble v. Bell*, which held that Missouri's Title I program—*as implemented*—is illegal under the Establishment Clause.

Third, should the Court uphold the appellate court ruling, *Felton* would highlight the "educational costs" of church-state separation. All parties and the appellate court agree that New York City's Title I program has been a success. To invalidate the program, underprivileged children will be denied important benefits of remedial education. Yet, that is a cost that the First Amendment might countenance. At the same time, that might be a cost that the Supreme Court views as higher than the wall purportedly separating church from state.

ARGUMENTS

For Private School Parents *(Counsel of Record, Charles H. Wilson, 839 17th Street, NW, Washington, DC 20006; telephone (202) 331-5000;* ***For the Secretary of Education*** *(Counsel, Rex E. Lee, Department of Justice, Washington, DC 20530; telephone (202) 633-2217);* ***For the Chancellor of the Board of Education of the City of New York*** *(Counsel of Record, Frederick A.O. Schwarz, 100 Church Street, New York, NY 10007; telephone (212) 566-4338)*

1. The court of appeals' application of the *per se* test (and concomitant failure to consider the proferred evidentiary record) was in error, for government neutrality towards, and accommodation of, religion are central Establishment Clause concerns.
2. New York City's Title I program does not violate the Establishment Clause for it has: a) a secular purpose; b) a secular effect, and c) does not involve (nor does it have the potential to involve) the state in religious affairs.

For the Taxpayer *(Counsel of Record, Stanley Geller, 400 Madison Avenue, New York, NY 10017; telephone (212) 755-2040)*

1. By requiring that religious objects be removed from Title I classrooms, the New York City program has the impermissible effect of inhibiting religious observance.
2. The New York City program has the impermissible affect of advancing religion.
3. The court of appeals' application of *per se* test was valid, for the New York City program has the potential for excessive entanglement.

AMICUS BRIEFS

In Support of the Education Officials

Briefs were filed by the Catholic League for Religious and Civil Rights; United States Catholic Conference; Citizens for Educational Freedom; Council for American Private Education and the National Jewish Commission on Law and Public Affairs.

In Support of the Taxpayers

An amicus brief was filed by Americans United for Separation of Church and State.