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# BEYOND TEXTBOOKS AND TRANSPORTATION: VIABLE ALTERNATIVES FOR AID TO NEW JERSEY'S NONPUBLIC SCHOOLS

The constitutional line between church and state is clear. What remains unclear after a quarter century of judicial interpretation is on which side of the line certain forms of aid to nonpublic schools should fall.

The Supreme Court, in striking down numerous state statutes which provided such aid, has articulated an exacting standard which leaves the states little room in which to maneuver.[1] Despite these constraints, New Jersey has shown a willingness to develop and implement a viable program of aid to nonpublic schools. Indeed, this state has rebounded from a recent setback[2] and adopted a textbook distribution plan which on its face appears capable of withstanding a constitutional challenge.[3]

Aid to nonpublic schools need not stop at textbook distribution. Although narrowly circumscribed, other forms of assistance are not entirely precluded. The avenues which remain open are worthy of the consideration of a legislature working to foster education, irrespective of where that education is obtained.

## *The Evolution of the Current Constitutional Tests*

The viability of any program furnishing state aid to religiously affiliated schools is dictated by judicial interpretation of the First Amendment to the United States Constitution, which provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[4]

1 Haskell, *"The Prospects for Public Aid to Parochial Schools,"* 56 MINN. L. REV. 159 (1971) (Hereafter cited as Haskell).

2 The Federal District Court for N.J. declared the State's auxiliary services statute unconstitutional and granted an injunction against its implementation. Public Funds for Public Schools of N.J. v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd 417 U.S. 961 (1974).

3 N.J. STAT. ANN. § 18A:58-37.1 (1974).

4 The purpose of the Establishment Clause is to insure government neutrality in matters of religion. "When government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." (Gillette v. U.S., 401 U.S. 437, 450 (1971)).

Nonpublic school aid met its first Supreme Court challenge in 1947. By a 5-4 majority, the Court, in *Everson v. Board of Education*[5] upheld a New Jersey statute[6] authorizing local school boards to reimburse parents for expenses incurred in busing their children to and from nonpublic schools other than those operated for a profit. The legislation, in the words of Justice Black,

> ... does no more than provide a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools.[7]

The court reasoned that excluding persons because of their faith or lack of it from public welfare legislation would be unconstitutional.[8] The fact that nonpublic schools were the indirect beneficiaries of such public welfare legislation was not enough to make the statute constitutionally infirm.

Sixteen years later, in *Abington School Dist. v. Schempp*,[9] the court fashioned a two-pronged test to determine the validity of a statute challenged on Free Exercise and Establishment Clause grounds. A Pennsylvania enactment required that student-selected bible passages and the Lord's Prayer be read at the commencement of each school day.[10] Invalidating that statute as an advancement of religion, the Justices pronounced:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution.[11]

Notwithstanding this interpretation, advocates of parochaid were heartened when the Court, in *Board of Education v. Allen*,[12] tested a New York statute which furnished secular textbooks to all students in grades seven through twelve of any accredited school,

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The Free Exercise Clause is designed to protect against government compulsion against the *individual* in regard to religious matters. Under this clause it is necessary for the complainant to show the coercive effect of some government act as it operates against him individually in the practice of religion. (Abington v. Schempp, 374 U.S. 203 (1962)).

5 330 U.S. 1 (1947).

6 N.J. STAT. ANN. § 18A:39-1 (Supp. 1968).

7 Everson v. Board of Education, 330 U.S. 1, 18 (1947).

8 *Id.* at 16.

9 374 U.S. 203 (1962).

10 PA. STAT. title 24, § 15-1516 (Purdon Supp. 1960); Also considered by the Court was a rule adopted in 1905 by the Baltimore Board of Education pursuant to MD. CODE ANN. Art. 77, § 202, which contained similar provisions.

11 Abington School District v. Schempp, 374 U.S. 203, 222 (1962).

12 392 U.S. 236 (1967).

public or private.[13] Using the guidelines set forth in *Schempp*, the Court upheld the scheme. The majority found the purpose of the program to be secular in nature with a primary effect that neither advanced nor inhibited religion.[14] The Court pointed out that the primary financial benefit accrued to the parents and their school-age children. As in *Everson*, the indirect benefit enjoyed by the parochial schools was viewed as insufficient to breach the wall separating church and state.[15]

In response to the *Allen* decision, many states adopted aid programs specifically confined to areas of secular education. The post-*Allen* legislation,[16] seemingly adhering to the *Schempp* test as applied in *Allen* as well as substantially benefiting parochial schools, was first tested by the Supreme Court in *Lemon v. Kurtzman*.[17] At issue was a statute[18] providing reimbursement for teacher salaries to parochial schools. Finding the statute in conformity with constitutional guidelines, a three-judge panel in the United States District Court dismissed a taxpayers' challenge.[19]

Before *Lemon* reached the Supreme Court, however, the Court heard *Walz v. Tax Commissioner*.[20] This case held that a property tax exemption granted to a religious organization was not violative of the Establishment Clause. Because the question presented was the viability of an indirect subsidization of religion, the Court's reasoning signaled the result of future challenges to parochaid. As Chief Justice Burger, writing for the majority, observed:

> Determining that the legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.[21]

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13 N.Y. ED. LAW, § 701 (McKinney Supp. 1974) as amended by Ch. 320, § 1 (McKinney 1965) N.Y. Laws 436.

14 Board of Education v. Allen, 392 U.S. 236, 243 (1967).

15 *Id.* at 248.

16 *See e.g.*, CONN. GEN. STAT. ANN. § 10-281a *et seq.* (Supp. 1974), which provided for state purchase of "secular educational services" and would in effect pay salaries and textbook expenses for teachers of secular subjects. The statute required that the money be spent on secular subjects and that certain admissions standards be followed. This statute is no longer viable. See note 37, *infra*.

17 397 U.S. 664 (1969).

18 PA. STAT. title 24, § 5601 *et seq.* (Supp. 1969). This law passed in 1969, was similar to the Connecticut statute, *supra* note 16, with additional accounting and reporting requirements.

19 Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).

20 397 U.S. 664 (1969).

21 *Id.* at 674.

The Chief Justice felt that, while the exemption created some minimal church-state involvement, it nonetheless tended to insulate each from the other.[22] Despite the result in this case, the excessive entanglement standard was devised and impeded future attempts to aid nonpublic schools.

Following the *Walz* decision, *Lemon v. Kurtzman* reached the Supreme Court on appeal.[23] Reversing the District Court's decision, the majority set forth the current three-pronged test for determining validity under the Establishment Clause:

> First, the statute must have a secular legislative purpose;[24] second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster "an excessive entanglement with religion". (citations omitted)[25]

The Court maintained that a lay teacher would have difficulty confining instruction to purely secular areas.[26]

Analyzing the prohibition in the statute against sectarian usage of the public funds, the court warned:

> [A] comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between church and state.[27]

Similar reasoning was utilized to strike down that portion of the Pennsylvania statute which allowed direct payments to the non-

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22 *Id.*

23 403 U S. 602 (1971). Joined with *Lemon* on appeal was a case arising under Rhode Island's 1969 Salary Supplement Act, Ch. 246 (1969) R.I. Laws. Robinson, Commissioner of Education of Rhode Island, et. al. v. DeCenso et. al., 316 F. Supp. 112 (D.R.I. 1970) construed this statute which provided direct payments of state funds to secular teachers in nonpublic schools as violative of the excessive entanglement prohibition. The Supreme Court affirmed this decision for the same reasons as it reversed *Lemon*.

24 *Lemon's* "secular purpose" test was later expanded in Abington School District v. Schempp, 374 U.S. 203 (1962). The Court held there that a statute will not violate the secular purpose standard if it is reasonably related to some valid health, safety or educational interest of the state.

25 Lemon v. Kurtzman, 403 U.S. 602,612-613 (1970), citing Walz v. Tax Commissioner, 397 U.S. 667, 668 (1969). The *Lemon* decision and later cases have emphasized that the amount of political devisiveness along religious lines that will be generated by the program is a factor to be considered under the test. The typical example of devisiveness is debate in the state legislature over funding programs such as the ones in *Lemon*.

26 *Id.* at 618-619.

27 *Id.* at 619.

public schools for books and instructional materials, for the procedure alone violated the excessive entanglement rationale.[28]

In essence, the Supreme Court has formulated a constitutional "Catch-22." Direct aid without controls would have no guarantee of strictly secular use and would therefore be unconstitutional. Aid with controls would require close state supervision and inevitably lead to excessive entanglement.

*Programs Invalid Under the Current Test*

In the aftermath of *Lemon,* the three-pronged test proved fatal to two broad areas of aid: cash payments made directly to the school, and tax credits or tuition rebates.

The Supreme Court, in *Committee for Public Education and Religious Liberty v. Nyquist,*[29] emphatically sounded the death knell for the tax credit program as well as some other methods of nonpublic aid.[30] The New York law under consideration provided tax credits to those who had paid nonpublic school tuition but who qualified for benefits under a companion tuition reimbursement plan.[31] The Court looked at the legislative findings and the state's interest in enacting the statute and concluded that there was a valid secular purpose.[32] However, the Court went on to say that

> . . . the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between church and state.[33]

The tax relief scheme failed the "primary effect" test. The Court felt that tax benefits would induce parents to send their children to parochial schools, thus having the "inevitable effect" of aiding and advancing the nonpublic institutions.[34] Tax credit plans are no longer a viable means of parochial aid.[35]

*Levitt v. Committee for Public Education and Religious Liberty*[36] and *Nyquist* taken together have effectively barred any direct pay-

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28 *Id.* at 621.

29 413 U.S. 765 (1973).

30 The *Nyquist* case also dealt with a "maintenance and repair" payment to the nonpublic school and a reimbursement of tuition costs to low income parents.

31 Ch.414 (1972) N.Y. Laws, amending N.Y. TAX LAW § 612 (c),612 (j) (McKinney Supp. 1972).

32 Committee for Public Education v. Nyquist, 413U.S. 765,773 (1973).

33 *Id.* at 774.

34 *Id.* at 793.

35 Among the statutes which may be considered unconstitutional in light of *Nyquist* is WEST CAL. ANN. REV. and T. CODE § 17065–17067 (Supp. 1974), and similar legislation in Connecticut, Hawaii, Illinois, Louisiana and Minnesota. See generally, Jacobson, *Aid to Church Related Schools,* COMPACT (Sept./Oct. 1973).

36 413 U.S.472 (1973). (Hereinafter cited as Levitt).

ments to the parochial schools. In *Levitt*, the Court examined a statutory provision which reimbursed private schools for the cost of performing testing and record-keeping services required by the state.[37] This payment went to secular nonpublic schools as well as to church-sponsored institutions. In the absence of a guarantee that the monies received by the parochial schools would not be used for religious purposes, the statute was held invalid. The statute considered in *Nyquist* provided for direct payments to nonpublic schools for the "maintenance and repair" of their physical plants.[38] Again, there was no guarantee in the law that the funds would only be used for secular purposes; again, the Court struck down the scheme as one having the primary effect of advancing religion.

The *Nyquist* Court went one step further. It refused to uphold that portion of the statute which would reimburse parents of children attending nonpublic schools for tuition.[39] Looking beyond the direct payment to the parents, the court noted that, in the absence of restrictions on the use of the funds, the school would be the ultimate beneficiary.[40]

The bases upon which the court grounded its decision in both of these cases rendered a consideration of excessive entanglement unnecessary. Had the legislation been drafted to overcome the Court's initial objection, it nevertheless would have been constitutionally unacceptable, as the controls mandated by the courts would have necessitated the continuing involvement of the state.[41]

In *Hunt v. McNair*[42] the Court appeared to retreat from its firm stand against direct aid. State appropriation of funds for the construction of private college facilities was held to be compatible with the Establishment Clause. It should be noted, however, that the Court's major concern has been the intermingling of religious studies and secular education at the elementary and secondary levels. This concern has not been displaced by the result in *Hunt*.

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37 Ch.138 (McKinney 1970) N.Y. Laws180.

38 Ch.414 (McKinney 1972) N.Y. Laws 881 amending N.Y. Ed. Law art. 12, § 549-53 (McKinney Supp.1972).

39 Ch.414 (McKinney 1972) N.Y. Laws 881 amending N.Y. Ed. Law art. 12a, § 559-63 (McKinney Supp.1972). The tuition reimbursement ($50.00 per grade school pupil, $100.00 per high school pupil) was to be paid only to those families whose taxable income was less than $5,000.00.

40 This was essentially the same reasoning used to invalidate the N.Y. tax credit plan under consideration in the same case. See note 32, *supra*. See also, Sloan v. Lemon,413 U.S.825 (1973), in which the Court reaffirmed its position that tuition reimbursement plans which have no restrictions as to the ultimate use of funds by the parochial schools failed to meet the "primary effect test" especially when the class of recipients was limited.

41 Lemon v. Kurtzman, 403 U.S. 602 (1971).

42 413 U.S. 734 (1973).

Effective assurance of the secular purpose to which a given facility will be put is still necessary below the college level.[43] Concommitantly, surveillance by the state is required, thus placing any such program squarely within the excessive entanglement prohibition.

The clear import of judicial interpretation of the Establishment Clause then, is that while there is some room for aid to parochial schools,[44] the following programs are unacceptable: tuition reimbursements;[45] tax credits to parents of nonpublic school children;[46] subsidization of teacher salaries;[47] and direct payments to parochial elementary and secondary schools for secular or state-mandated activities.[48]

*The Uncertain Status of Auxiliary Services*

The provision of auxiliary services[49] is one alternative method of assisting nonpublic schools which should withstand challenge if the statute providing these services is properly drafted. The position of the Supreme Court on this issue remains unclear as that tribunal has not yet completed its review of current cases challenging such aid.

*Public Funds for Public Schools of New Jersey v. Marburger*[50] and *Meek v. Pittenger*[51] represent the conflicting views. In *Public*

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[43] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[44] Sloan v. Lemon, 413 U.S. 825,835 (1973).

[45] *Id.*

[46] Committee for Public Education and Religious Liberty v. Nyquist,413 U.S. 756 (1973); United Americans v. Franchise Tax Board,—U.S.,—,95 S.Ct.166,42 L.Ed.2d 135 (1974).

[47] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[48] Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973). This case arguably closes the door on any direct payment to sectarian institutions, including vouchers, because there is no guarantee that the monies will be used only for secular purposes.

[49] "Auxiliary services" has been defined as "nonadministrative" services provided by personnel other than regular classroom teachers, school librarians, principals or other supervisory personnel to students whose special needs are not met in a standard or regular school program. Auxiliary services are limited to services, usually described as, or similar to, the following:

1. Remedial and corrective instructions and diagnostic services in reading and mathematics;
2. Corrective instruction in speech;
3. Adaptive or corrective instruction in physical education;
4. Guidance counseling and testing services;
5. Psychological testing and diagnostic services;
6. School nursing and health services.

N.J. ADMIN. CODE 6:8–1.3.

[50] 358 F. Supp. 29 (D.N.J.1973), aff'd. 417 U.S. 961 (1974). While the Court's determination that New Jersey's auxiliary services program was invalid must now be considered as

*Funds*, the court reviewed a New Jersey statute[52] which, in part, provided for the furnishing of secular supplies, equipment and auxiliary services to the nonpublic schools in the State.[53] Finding this plan, insofar as it provided supplies and equipment, tantamount to a direct grant to the schools, the court reasoned that monitoring the use of the materials and services would require excessive entanglement.

The court struck down the auxiliary service provision of the statute on two grounds. The first justification was the New Jersey Administrative Code provision for negotiation between the local board of education and the nonpublic school to determine the type, cost and use of the services to be provided.[54] The court found this provision replete with danger, observing that:

> The possibilities of disagreement arising from such an inquiry suggested the production of future state-church areas of disagreement which is exactly what the holding in *Lemon* seeks to avoid.[55]

Secondly, the court decided that the use of an instructor to provide auxiliary services would require a constant watch on the lessons to guarantee the absence of religious overtones.

Although the district court refused to uphold New Jersey's scheme, it did not voice total opposition to nonpublic school aid. Reviewing previous Establishment Clause decisions, the court noted:

> [E]ven though the Establishment Clause was intended to protect against "sponsorship, financial support and

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final, the lack of a decision in the pending Meek v. Pittinger, *infra*, n. 51, and accompanying text, leaves open the possibility that Pennsylvania's auxiliary services program will be upheld.

51 374 F. Supp 639 (E.D.Pa.1974); prob. juris noted—U.S.—, S.Ct. 38,42 L.Ed.2d 45 (1974).

52 N.J. STAT. ANN. § 18A:58–59 *et seq.* (Supp. 1973). The statute also provided for cash reimbursements under certain circumstances to parents of nonpublic school pupils. That part of the law was declared unconstitutional under the rationale of Lemon v. Kurtzman, 403 U.S. 602 (1971).

53 The auxiliary services section of the statute, N.J. STAT. ANN. § 18A:58–64 (Supp. 1973), provides:

> In addition to the provisions of section 5 above (18A:58–63) the commissioner shall provide, within the limits of the funds made available by the Legislature, such supplies instructional materials, equipment and auxiliary services as are requested by the nonpublic school. The board (State Board of Education) shall adopt guidelines and procedures under which such supplies, instructional materials, equipment, and auxiliary services shall be provided. Ownership of the nonconsumable supplies, instructional materials, and equipment provided pursuant to this act shall remain in the State Department of Education.

54 N.J. ADMIN. CODE 6:8–2 (F).

55 Public Funds for Public Schools of N.J. v. Marburger, 358 F. Supp. 29, 40 (D.N.J.1973), aff'd. 417 U.S. 961 (1974).

> active involvement of the sovereign in religious activity" . . . it is clear that not all legislative programs which may indirectly or incidentally provide some benefit to a religious institution are proscribed by the Establishment Clause. (citations omitted)[56]

*Meek v. Pittenger*,[57] on the other hand, upheld portions of a Pennsylvania statute[58] which sought to provide auxiliary services and to loan secular instructional material to nonpublic schools. An important distinction was made between the loan of *inherently secular* materials, such as gymnasium or lab equipment, and the loan of other materials, such as projectors and recorders. The latter type, said the court, could easily be diverted to religious use. In its analysis of the statute, the court set forth acceptable methods of state aid in view of the primary effect test:

> [S]tate expenditures for education will be held not to have the primary effect of advancing religion
> 1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or non-religious, or
> 2. if, although a property or service is furnished directly to the student, it is clearly identifiable as a secular or non-religious property or service, or
> 3. if, although a payment or service is furnished directly to a sectarian institution, its use is effectively restricted to the secular non-religious activities of the institution.[59]

On the question of excessive entanglement, the *Meek* court described what it considered sufficiently minimal involvement to avoid the constitutional prohibition:

> [T]he expenditure is limited to secular purposes and . . . [because of] the character of the institution, the purpose of the payment and the nature of the materials or facilities . . . it will not be necessary, in order to assure only secular use, for government to be involved in the

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[56] *Id.* at 34.

[57] 374 F.Supp. 639 (E.D.Pa.1974); prob. juris. noted —U.S.—, 95 S.Ct. 38, 42 L.Ed.2d 45 (1974).

[58] PA. STAT. title 24, § 9-972 (Supp. 1974).
This act defines "auxiliary services" as:
> guidance counseling and testing services; psychological service; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantagd (such as but not limited to teaching English as a second language), and other secular, neutral, non-idealogical services as are of benefit to nonpublic school children and are presently or hereinafter provided for public school children of the Commonwealth.

[59] Meek v. Pittenger, 374 F. Supp. 639,650 (E.D.Pa.1974), prob. juris. noted —U.S.—, 95S.Ct.38,42 L.Ed.2d 45 (1974).

internal operations of the institution . . . on a continuing basis.[60]

This reasoning led the court to find that the primary effect of the Pennsylvania program was the accomplishment of the State's "primary objective of assuring that individual students received those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning".[61] The benefit to the nonpublic school was held to be incidental, and far outweighed by benefits accruing to the children through achievement of the State's educational objectives.

Moreover, although the law provided that certain teachers (remedial reading instructors and therapists) would periodically teach at a sectarian school, the *Meek* court felt that the evidence failed to show how a professional therapist or counselor would succumb to "sectarianization" of his or her professional work. The public health program of the State, in effect for many years, was seen as an example of a successful state program being operated in a sectarian institution. Thus, the contacts between church and state being minimal, the danger of sectarian permeation of the programs was not significant.[62]

The major difference between *Public Funds* and *Meek* is their treatment of the question of secular teachers in sectarian schools. Although the remedial subjects to be taught were clearly secular in nature, the court in *Public Funds* said:

> [I]t would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected —even unintentionally—in the instruction provided. . . .[63]

The *Meek* court, on the other hand, stated that:

> The logistical problems of providing the services at public centers were at least formidable, if not insurmountable. The legislature chose to meet the problem by sending the therapists to the pupils.[64]

Conceding that children in this program might be more susceptible to religious influence, the court found that the benefits to the child in the educational and therapeutic area far outweighed any danger of religious taint. Implicit in the district court's analysis of the

60 *Id.* at 652.

61 *Id.* at 656.

62 The decision has been appealed and the Supreme Court has noted probable jurisdiction. —U.S.—,95 S.Ct.38, 42 L. Ed.2d 45 (1974).

63 Public Funds for Public Schools of N.J. v. Marburger, 358 F. Supp. 29,40 (D.N.J. 1973), aff'd. 417 U.S. 961 (1974).

64 Meek v. Pittenger, 374 F. Supp. 639,656 (E.D.Pa.1974).

statute is the realization that secular teachers do not operate in a vacuum. The nature of the subject matter and the limited contact between the institution and the professional were sufficient guards against sectarian influences.

*Meek* presents the more reasoned view. That court was able to obtain empirical information about the necessity, cause and effect of the Pennsylvania program. The State was able to plead and prove its overriding interest in the educational and therapeutic welfare of its school children. Its analysis shows a full understanding of the current Supreme Court guidelines and their implications. Unless the Court significantly expands its view of excessive entanglement, the Pennsylvania auxiliary services statute should survive.[65]

*Viable Alternatives for New Jersey*

In conjunction with past decisions, it is possible to outline several areas in which the state can act to alleviate the financial burden borne by the nonpublic schools. Based on the current Supreme Court philosophy, those services and materials which are inherently secular may be furnished to the nonpublic schools because their secular nature erases any need for state supervision. Permissible services include health and psychological programs which further the state's interest in the well-being of its school-age children. Permissible materials would include such

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[65] On May 20, 1975, the Supreme Court decided the *Meek* case, 43 U.S.L.W. 4596. It upheld the textbook loan programs established under the Pennsylvania law, but struck down the auxiliary services portion of the statute, primarily on grounds of excessive entanglement. Chief Justice Burger, the author of the excessive entanglement test, dissented from the majority opinion stating that the *Meek* decision goes ". . . beyond any prior holdings of this court and, indeed, conflicts with our holdings in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." The Chief Justice stated further:

> There is absolutely no support in this record or, for that matter, in ordinary human experience to support the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the education process—especially remedial tools—to students in private schools.

The *Meek* decision, Chief Justice Burger felt, "literally turn[ed] the Religion Clause on its head." 43 U.S.L.W. 4603.

The auxiliary services program was struck down by a 6-3 majority, and the broad language used in the opinion would seem to preclude any auxiliary services program. However, the Court will have a chance to clarify its position when it decides *Wolman v. Essex* 43 U.S.L.W. 3299 (U.S.D.C. So. Ohio, 1974), which involves an Ohio auxiliary services plan somewhat less ambitious than the Pennsylvania attempt. As it stands now, however, even a showing of a strong state interest would be enough to offset that level of entanglement the Court deems "excessive."

things as gymnasium equipment and laboratory supplies which cannot be effectively used for sectarian purposes.[66] By expanding the current textbook statute,[67] New Jersey could make all manner of learning materials available to each student in the State. The theory of "commonality",[68] which is the philosophical basis of the textbook scheme, would allow the state to make school supplies, such as pencils, paper, workbooks, and art materials available to all students notwithstanding the fact that these supplies might be used for sectarian purposes.

The teaching of remedial courses in the nonpublic schools by publicly paid personnel is an uncertain course of action. Should *Meek* be upheld, the State would be able to move into this area with little or no difficulty. As long as the teacher, course content and subject materials are under control of the state or local board of education, there would be little danger of religious taint. There is some support for this proposition in federal law.[69]

Statewide teacher education programs, designed to raise the level of competence of both public and nonpublic school personnel, is another valid area of action for New Jersey. Although this type of program does not provide financial aid to the nonpublic schools, it does permit their personnel to develop professionally without cost to the school. Mississippi, Missouri, New York, Kentucky and Maryland have projects of this type which cover topics from drug education to data processing instruction.[70] New Jersey has also implemented a teacher training program for personnel of public and nonpublic schools.[71]

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66 PA. STAT. title 24, § 9-972 (Supp. 1974); IOWA CODE ANN. § 257.26 (Supp. 1974).

67 N.J. STAT. ANN. § 18A:58-59 (1974).

68 "Commonality" is the theory by which a statute is written to benefit all school children, regardless of their status as public or nonpublic school students. The concept is a practical response to the "child benefit" and "public welfare legislation" language of most of the major Establishment Clause cases.

69 Title I of the Elementary and Secondary Education Act (ESEA) of 1965 (P.L. 89-10, April 11, 1965) requires participating state authorities to design special programs for educationally deprived children in both public and nonpublic schools. In a case involving unequal application of monies between public and nonpublic schools, Justice Blackman, writing for the majority, noted that the ESEA clearly contemplates sending public employees into nonpublic schools to provide specialized services not normally provided by a nonpublic school. The opinion also cited a survey which indicated that Missouri was the only state receiving Title I funds which did not use either dual enrollment or private school instruction to accomplish the purposes of the Act. Wheeler v. Barrea, —U.S.—, 94 S.Ct. 2274 (1974).

70 Research Brief, "Curriculum Instruction and Special Programs," EDUCATION COMMISSION OF THE STATES, Vol. 2, No. 4 (1974).

Constitutional uncertainty or outright proscription plague many of the alternatives. However, one proposal—the "dual enrollment" or "shared time" concept—includes, by its very nature many of the programs previously struck down in other contexts, and is compatible with current aid restrictions.

The concept resembles the "released time" program approved by the Supreme Court in *Zorach v. Clausen.*[72] In *Zorach*, a New York law was scrutinized which permitted the State's public schools to release students during school hours on written request of their parents to attend religious instruction or devotional exercises at sectarian centers. The religious centers kept attendance records and reported those students released from the public schools who failed to report for religious activities. No expenditure of public funds was involved.

Justice Douglas, writing for the *Zorach* majority, declared:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.[73]

The Court further stated that, to hold otherwise,

> would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[74]

Dual enrollment is based on the released time plan but permits a substantial increase in the religious instruction received by the student with a corresponding decrease in expenditures by nonpublic schools for many secular activities and courses. The plan's impetus is the fact that since all families support public schools through taxation, all children should have access to public school facilities and instruction regardless of their enrollment in a nonpublic school. Under a dual enrollment plan, nonpublic school children attend a public school for certain secular courses and activities, and while there, they are treated as students of the public school. The plan thus blends compatible aspects of *Pierce v. Society of Sisters,*[75] which recognized the rights of parents to choose

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71 The New Jersey "Right to Read" program, under the auspices of the State Department of Education, is designed to implement a statewide plan leading to the improvement of reading skills in all schools in the state. *Id.* at 36.

72 343 U.S.306 (1952).

73 *Id.* at 313,314.

74 *Id.* at 314.

between secular and public education for their children, and the American ideal of a free education for all children.

Several states have adopted shared time or dual enrollment programs,[76] and the New Jersey Attorney General has issued an opinion which validates their constitutionality.[77] Specifically addressing the secular purpose and primary effect tests, the Attorney General's opinion stated that provision of programs by a public school, which a privately enrolled student might otherwise forego, has a valid secular legislative purpose.[78] The opinion continues:

> [T]he primary effect of dual enrollment is colored by its overriding purpose, that is, to raise the overall level of educational achievement for all pupils within a given jurisdiction without regard to the character of the school attended. The primary effect is, simply, the accomplishment of this end.[79]

The administrative relationship between secular and sectarian activities created by this type of program threatens none of the entanglements considered excessive in *Lemon*. It is confined to course selection and the release of private school students for enrollment. No greater administrative contact is required than that approved in *Everson* and *Allen*.[80] Opponents of the dual enrollment plan argue that it aids religion by releasing funds for religious use. However, the Supreme Court has explicitly rejected such a rationale.[81]

Clearly then, the dual enrollment concept is constitutionally viable. By implementing such a program, New Jersey would be able to provide nonpublic school students with the health, psychological, and remedial programs currently available to public school students. In addition, the program would allow parents to have complete freedom of choice in the education of their children without any risk of sacrifice of worthwhile state-supported programs.

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[75] 268 U.S.510 (1925).

[76] New York, Minnesota, Maryland, South Dakota, Washington, Illinois, Iowa, Arizona, Utah and Pennsylvania have implemented the shared time concept. MINN. STAT. ANN. § 124.17 (Supp. 1974); and N.Y. ED. LAW § 3601 *et seq.* (McKinney Supp. 1974) are representative statutes.

[77] OP. ATTY. GEN. 1 (1965).

[78] *Id.* at 4.

[79] *Id* at 7.

[80] *The Sacred Wall Revisited—The Constitutionality of State Aid to Nonpublic Education Following Lemon v. Kurtzman and Tilton v. Richardson,* 67 NW. U. L. REV. 118, 127 (1972).

*Recommendations for Action for New Jersey*

In order to maximize the educational opportunities available to all of its school-age children, New Jersey should adopt a broad-range dual enrollment program. Implementation of such a concept will enable parents who prefer nonpublic education to avail themselves of the best of both systems. Children participating in the program will reap immediate educational benefits, and the State will enjoy long range improvement of both educational systems.[82]

To assure optimum constitutional palatability, dual enrollment children must be under the exclusive control of the public school authorities while on public school premises. They should intermingle freely with the student population of the public school. The nonpublic school should be given no opportunity to influence decisions made by public school personnel regarding curriculum, homework, or study matter. In short the private school pupil should be a public school pupil in all respects while attending the public school.[83]

In the wake of recent New Jersey Supreme Court decisions invalidating the local property tax as a means of financing education,[84] an alternative method of state financing for this program should be devised. The most logical method of accomplishing this goal would be to amend the existing state aid statute known as the Bateman Act.[85] By changing the definition of "resident enrollment" set forth in section 2 of the Act to include part-time students, the weighted pupil formula could be changed to reflect the status of private school students in part-time attendance at public schools.[86] Aid for a dual enrollment program would then be furnished by the state with little appreciable discomfort to the local taxpayer.[87]

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81 "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Tilton v. Richardson, 403 U. S. 672, 679 (1971).

82 This concept would also eliminate costly duplication of expertise in the public and private sectors. For example, if a public school has an excellent advanced biology program, nonpublic school students could take full advantage of it. Conversely, if a nonpublic school has an outstanding language arts program, the public school student could reap its benefits. Payments in the latter case would be made by the pupil's parent directly to the nonpublic school.

83 *See generally,* Robinove, *Does Dual Enrollment Violate The First Amendment?,* 3 JOUR. LAW & ED. 129 (1974).

84 Robinson v. Cahill, 62 N. J. 473, 303 A. 2d 165 (1973), aff'd. 63 N. J. 196, 306 A. 2d 65 (1973).

85 N.J. STAT. ANN. § 18A:58-1 *et seq.*

86 Minnesota, which uses a weighted pupil formula to determine amounts of state aid, obtains a figure which is the ratio of total minutes a shared time pupil spends in public school (which can vary with each student) and the minimum minutes required for a full

Certainly, the dual enrollment concept is radical for New Jersey. One variation of the concept, which should find a broader base of legislative and constituent support, is the concept of commonality.[88] Should the State embrace such a plan, New Jersey's school-age children would all benefit through more widespread application of health, psychological and remedial services. Since these services would be furnished away from the sectarian institution there would be little room for constitutional objection. However, this type of program fails to address the financial problems of New Jersey's nonpublic schools and, as the Legislature has expressed a receptive attitude toward nonpublic school aid, the dual enrollment concept should be fully examined.[89]

*Conclusion*

In recent years, the Supreme Court has struck down a number of ingenious state plans for aid to nonpublic schools. The Court's three-pronged test has severely limited the types of aid which will pass constitutional muster and provide significant relief to financially strained private schools. Dual enrollment, the only feasible program which can adequately fill both functions, should be thoroughly investigated by the State Legislature, with a view toward adopting a program as expeditiously as possible.

*Steven Picco*

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time pupil. The fraction is then added to other attendance figures to get an average daily attendance amount, which is the basis for determining the level of state aid to be granted. MINN. STAT. ANN. § 124.18 (Supp. 1973).

87 Fittapaldi, *Dual Enrollment*, New Jersey Catholic Conference Research Paper, (1973).

88 *See* note 67, *supra*, and accompanying text.

89 On Dec. 12, 1974, Senator Joseph Maressa introduced S. 1522, N. J. Legislature, 1974 Sess. The bill provides for a limited dual enrollment program consistent with the concepts set forth in this article. The proposal is now under consideration by the Senate Education Committee.