

EDITORIAL NOTE

As this Comment goes to print, Governor Cahill has signed into law a new Nonpublic Elementary and Secondary Education Act, No. A-2544, (Dec. 7, 1971); ch. 336, [1971] N.J. Laws —, which specifically repeals N.J. STAT. ANN. §§ 18A:58-38 *et seq.* (Supp. 1971-72). *See* notes 137-42 and text at 84-85 *supra*.

The new law contains two provisions which grant aid to nonpublic schools in two different manners:

- (1) Providing of supplies, instructional materials, equipment and auxiliary services by the State to nonpublic schools with guidelines to be established by the State Board of Education and ownership of these items remaining in the Board;
- (2) Reimbursement of parents for money spent during the school year on secular, non-ideological textbooks, instructional materials and supplies in the amount of \$10 per year for each child in kindergarten through the eighth grade and \$20 for each child in high school.

The first provision attempts to employ the *Tilton* rationale for the benefit of elementary and high schools. This factor creates one difficulty with the provision since the Court in *Tilton* was of the opinion that the fact that aid was going to colleges rather than secondary schools was significant. The Act is also careful to retain ownership of the supplies in the State, but the relationship set up seems to be one of a more continuing nature rather than the "one-time single purpose grant" in *Tilton*. Finally, and most importantly, the character of the items granted to the schools is significantly different. The geographical separation possible with nonsecular buildings such as auditoriums and gymnasiums is not attainable with the unsupervised purchase of supplies and instructional materials to be employed in the teaching of substantive courses.

The second provision raises even more interesting questions. A direct grant to parents seems to avoid the entanglement question since that issue applies to direct state-institution relationships. The Court in *Lemon*, however, pointed out that scrutiny of the entanglement question precluded consideration of the primary effect test. The converse would be the result if the New Jersey Act was challenged. A reviewing court would not be distracted by the entanglement question and would probably evaluate this provision directly on the basis of the older cases

of *Schempp* and *Allen*. A heavy burden would be placed upon the State to illustrate that the provision's primary effect is not the advancement of religion. The secular goal of the provisions is also somewhat suspect. Final determination as to the Act's constitutionality, however, awaits further Supreme Court action in the area.