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Supreme Court of the United States

Washington, D. C.
March 19, 1973

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR LEVITT and EWALD B. NYQUIST,	:	
of the State of New York	:	
APPELLANTS	:	
v.	:	No. 72-269
	:	
COMMITTEE FOR PUBLIC EDUCATION	:	
and RELIGIOUS LIBERTY	:	
APPELLEES;	:	
	:	
EARL W. BRYDGES of the	:	
NEW YORK STATE SENATE	:	
APPELLANT	:	
	:	
v.	:	No. 72-270
	:	
COMMITTEE FOR PUBLIC EDUCATION	:	
and RELIGIOUS LIBERTY	:	
APPELLEES;	:	
	:	
CATHEDRAL ACADEMY ET AL,	:	
APPELLANTS	:	
	:	
v.	:	No. 72-271
	:	
COMMITTEE FOR PUBLIC EDUCATION	:	
and RELIGIOUS LIBERTY	:	
APPELLEES	:	
-----	:	
	:	

Washington, D. C.,

Monday, March 19, 1973

The above-entitled matter came on for argument
at 11:24 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice

continued

continued

WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Case Number 72-269, 72-270 and 72-271.

Mrs. Coon, you may proceed.

ORAL ARGUMENT OF MRS. JEAN M. COON,
ON BEHALF OF THE APPELLANTS

MRS. COON: Mr. Chief Justice, and may it please the Court:

The statute at issue on this appeal, Chapter 138 of the New York laws of 1970, provides for payment by the state to nonpublic schools within the state specific sums of money as partial reimbursement of the expenses of recordkeeping, testing and reporting incurred by the nonpublic schools in complying with requirements of state law and regulation. The laws and regulations referred to have been enacted for the purposes of the examination and inspection of the nonpublic schools by the state. The examination of this statute to determine its validity must, we feel, be made in the perspective of the total historical educational picture in the state of New York.

From the creation of the University of the state of New York in 1787, the Regents of that University and subsequently the Commissioner of Education, as its administrative arm, have had general supervision over all educational institutions in the state of New York, both

public and private. All private educational institutions, from elementary grades through colleges, receive their charters from the Board of Regents.

The state education law gives the Commissioner of Education the power to examine and inspect private as well as public institutions of learning to determine whether or not they comply with the compulsory attendance and instructional requirements of the state law.

The state education law not only requires children to regularly attend some school--either public or private--but sets minimum standards of education, including course content, which must be met by the schools which these children attend, in order that their attendance does comply with the compulsory attendance laws.

The importance of this supervisory function to the state's concern relative to its children's education was recognized by the framers of the state constitution in 1894, when in adding a provision prohibiting aid to sectarian schools, they specifically excepted expenditures of money for ^{the} purposes of examination and inspection. In the carrying out of this function of examination and inspection, and general supervision over the education provided by nonpublic schools, ^{in the state,} the state requires the schools to perform certain testing, recordkeeping and reporting to the state. Among these are the administration of tests--including Regents Examinations--which are state-wide

tests of specific subject matter achievement, pupil evaluation program tests in grades 6 and 9 and other general state-wide evaluation tests also used in public schools. And in addition, the regulations of the Commissioner of Education require the nonpublic schools to conduct a continuing program of individual pupil testing in all grades to provide an adequate basis for evaluating pupil achievement.

In addition to the testing program, the nonpublic schools are required to maintain health records, records of marks, attendance records, provide information under the basic educational data system which includes statistical information as to students, teachers, curricula offered, physical plant, and so forth, and in the secondary schools, additional data on a more detailed basis than in the basic educational data system.

These requirements, imposed upon the nonpublic schools by law or regulation, involve considerable additional expense to the schools for which, immediately prior to the enactment of Chapter 138, the schools were not compensated.

While immediately prior to the enactment of the statute the schools were not compensated, the state has had a long history of providing some compensation to some nonpublic schools in recognition of the cost burden imposed by the state, in assuring that the requirements of the compulsory attendance laws are being met. Beginning in 1892,

appropriations were made annually to so-called academies for services in connection with the compulsory attendance laws. Those academies included sectarian and nonsectarian, secondary nonpublic schools.

The provision for such compensation was retained in the state's education law until 1930. But even after repeal in that year, appropriations continued to be made in the state's local assistance appropriation bills in connection with the attendance requirements of academic pupils. Only in the years between 1968 and the enactment of legislation at issue here were no payments made to any nonpublic schools for these purposes.

The legislation adopted in 1970, therefore, merely reinstated a past practice of compensating nonpublic schools for recordkeeping and examination services required by the state, updated the amount paid to reflect current economic conditions, and made the base of payment more equitable by including all nonpublic schools and all state-imposed examination and recordkeeping requirements.

The cost analysis studies made for the State Education Department, ^{which} and/are exhibits in this case--exhibits D and G in the separate folder of exhibits submitted to the court--and which were made by three individuals acting independently of each other, demonstrate that the payments made to the nonpublic schools are justified in amount and

are still substantially less than the actual cost of the performance of the services.

Appellees do not dispute these conclusions except by alleging that the administration of tests is a part of the teaching function of the nonpublic schools, and that consequently New York is paying the schools for the cost of education. This is a matter of perspective.

From the state's point of view, we are not paying the schools to administer tests apart of the educational programs of the schools, but rather as a method of evaluating the achievement of the schools in meeting minimum standards of education. This assumes that the teaching function, per se, has been completed prior to the administration of the test as a measuring device and we submit that this is a more reasonable viewpoint on the aspect of the state's payment in this regard.

The past decisions of this Court have not prohibited all payments or benefits to nonpublic schools, just as they have not permitted all payments or benefits.

In Everson, the activities which were described as prohibited were those directed to the aid of religion as such. In McGowan, this Court observed that the establishment clause does not ban state or federal regulation of conduct whose effect merely happens to coincide with the tenets of some religions.

Again, in Everson, the Court expressed the concept of neutrality, stating that the Constitution does not require the state to be the adversary of religion. In both Schempp and McGowan, this Court discussed the intent and effect test, by which a statute is measured as to whether it has a secular legislative intent and a primary effect which neither aids nor inhibits religion.

In Walz, the test by which legislation was being measured was expanded to include an evaluation as to whether the statute at issue created an excessive entanglement between church and state. In discussing whether or not the New York statute here at issue meets objections under each of these tests, we must bear in mind the observation of this Court's opinion in Lemon--that the line between permissible and impermissible legislation is not a wall but rather a blurred, indistinct and variable barrier, depending upon all the circumstances of a particular relationship.

Q. Mrs. Coon, in this connection is the record clear as to the fact of the state aid embracing or not embracing teachers examinations as such, other than the generalized tests that come out of the state offices?

MRS. COON: Yes, your honor, because the State Commissioner's regulations require the nonpublic schools to have a continual in-school program of testing of pupils to measure educational achievement. And that the testing

involved here includes not only the general tests imposed by the state--which are state-wide in application--but also the state's examination of the tests administered in the schools to determine whether or not the pupils in all grades are meeting levels of educational achievement.

Q So that if a teacher gives a weekly quiz, her time and the preparation of that quiz is a part of the cost that's considered?

MRS. COON: That was included in the cost analysis study, yes, your honor.

Q How does the state audit that? How does the state know whether the tests are executed?

MRS. COON: They require reports to be made to the Commissioner of Education.

Q Reports on each individual pupil?

MRS. COON: On the results of testing, yes, your Honor. Not by name, necessarily, but by a program of evaluating the tests given the results of the test and how the pupils are measuring up in terms of whether or not their measurement complies with the general standards of education of children in similar grades in the public schools.

Q Is it possible for the New York statute to have been construed more narrowly so as to, as not to include what you have just told me is included?

MRS. COON: It would be possible to so construe it.

That might raise a question as to the relationship to the amount paid. There was a cost analysis study which is exhibit G, which referred only to the state-wide tests and comes to less than the amount paid to the schools. However, it should also be noted that that particular cost analysis study, while it related only to the state-wide tests, did not include the other recordkeeping functions such as health records and attendance records and so forth, which were included in the other studies which included the teacher testing.

Q Has this statute ever been construed by the state courts?

MRS. COON: No, your Honor, it has not.

Q It's conceivable that they might have construed the statute more narrowly, had it gone to them, if --

MRS. COON: It is conceivable, your Honor.

Q Mrs. Coon, it seems to me that one of the subsidiary questions in this case might very well be whether the process of testing can, in fact, be separated from the basic, overall process of teaching. Bearing that in mind, am I correct in my understanding that all these tests are standard tests prescribed by the state--prepared either by the state or by some national testing agency?

MRS. COON: No, your Honor, they are not. They are --

Q Are any prepared by the local schools?

MRS. COON: Yes, your Honor. They are required by

the Commissioner's regulations.

Q Right. Are they all multiple choice tests? Or may any of the tests be answered by narrative questions that require discretion on the part of the teacher in grading?

MRS. COON: I would assume any type of test the teacher would use is measuring whether or not her pupils have understood and learned the material provided.

Now, of course, from the state's standpoint, it should be remembered that the state is only concerned in how these particular tests measure achievement as to the subjects which are taught also in public schools. It is not a concern of the state nor would any cost analysis process here be used tests which are directed solely to the, to sectarian subjects or sectarian information.

Q Mrs. Coon, do I understand that there's a difference between the kinds of tests that are given in the public schools from the kinds of tests that are given in the nonpublic schools?

MRS. COON: No, except in this regard, that there is no specific regulation of the Commissioner which directs the public schools to conduct a continuing testing program, an in-school testing program. The Education Department relies more on its more direct and continuing supervision of the public schools, in terms of the evaluation.

Q That is, by members of the staff of the Commission of Education?

MRS. COON: Well, right. The staff and their continuing relationship and much more direction supervision, of course, over the public schools than they have over the nonpublic.

Q But they do have--the state-wide tests are given in the public schools, aren't they?

MRS. COON: Yes. Both in the public and nonpublic schools.

Q But the regulation doesn't require the public schools to prepare their own tests, like it does the private schools?

MRS. COON: It does not require them to conduct this continuing program of testing--

Q Yes.

MRS. COON: --under this regulation. It would require them, certainly, to prepare any test which the school itself intends to administer. All tests administered in public schools are not state-wide tests. There are teacher-prepared tests there as well.

Q What do you think the issue here is, Mrs. Coons? Do you think its--or is it both--that the schools were paid for this or that it entangles the state too much in the school program?

MRS. COON: I think that the issue is probably as raised by the plaintiffs in this action, was more that the schools were paid. We submit that this problem of payment produces considerably less entanglement than would a direct administrative supervision.

Q How much audit is done of the --

MRS. COON: The only audit that has been done of this has been the cost analysis studies which were done on a selected schools basis, comparing the cost in public and nonpublic schools.

Q There's no continuing auditing?

MRS. COON: No, there is not.

Q The entanglement is actually in requiring the tests.

MRS. COON: Right.

Q And the supervision of performance?

MRS. COON: Right, and we submit, your Honor, that there would be much more entanglement involved here were the state to have to send inspectors into the schools, or send test administrators into the schools to perform this function there--that the payment of the cost of administration and recordkeeping produces substantially less entanglement than would a direct supervision.

Q I didn't understand, Mrs. Coon, what supervision is there of performance?

MRS. COON: Well, we submit, your Honor, that if the state were not able to pay --

Q Yeah, but what--I'm sorry--but what's the nature of the supervision of performance? What form does that take?

MRS. COON: Well, the state has an interest, and I think that this Court in Allen certainly said that the states do have the interest in supervising.

Q I guess I haven't made my question clear yet. I'm just trying to find out what's done--how do you supervise performance?

MRS. COON: By auditing the tests, by getting reports from the schools. The schools are required to submit extensive reports, recordkeeping analyses, and so forth. And to this extent --

Q I see.

Q That's what these tests are for, isn't it--to audit the performance of the school?

MRS. COON: That's what the tests are for.

Q In terms of educational achievement?

MRS. COON: Yes, precisely.

Q Whatever entanglement there is, is really without regard to payment, then.

MRS. COON: That's quite true, your Honor. The payment, we feel, merely compensates them equitably for supplying this particular service to the state. We submit

that there is no entanglement.

Q Teaching is mandated by the state, too, isn't it?

MRS. COON: Yes, it is, your Honor.

Q So under your theory, they could pay the whole budget money?

MRS. COON: Oh no, no, your Honor. I don't think so because I think there's a difference. The teaching function of the schools was undertaken voluntarily by the schools as education. The fact that the state's requirement which has been superimposed upon the schools of keeping all these records and reporting, and so forth, for the state has been an involuntary function of the schools and we submit that having imposed this requirement upon them, involuntarily, that we should be able to compensate them for at least part of the cost of it.

Q Don't they impose teaching upon them, too?

MRS. COON: Only since they have voluntarily undertaken to establish themselves as a school. And to that extent, the teaching function has been voluntarily, we submit, undertaken by the schools.

Q Isn't this really a part of, sort of a condition, isn't it of satisfying the compulsory attendance law? Does the school have to do this? It can just --

MRS. COON: Oh yes, they would have to do this.

Q They would have to do it or the students

wouldn't be satisfying the compulsory school attendance laws?

MRS. COON: That's quite true, your Honor. But we think that there's more to this than this. I think there's certainly a state interest and function here in seeing that these pupils are not only in school, but that they are receiving certain qualities of education and so forth. And I think that the state has the interest in compensating the schools for all the recordkeeping and detailed functions that we have imposed upon them.

Q Do the teachers--just following up my brother Douglas' question--do the teachers in private and parochial schools have to meet certain standards imposed by the states, or do they have to be--in the state of New York--or do they have to be certificated in any way?

MRS. COON: Not in this program, your Honor. However, there are extending certificating requirements under other programs and that certainly the basic educational data system which they have to file with the state, does request information concerning the education of the teachers.

Q But there's no requirement as to the educational or professional qualifications of the teachers in these schools?

MRS. COON: Not in the, not as far as --

Q The teachers, as far as the state goes, could be wholly illiterate, for instance?

MRS. COON: I don't think that they're--well, if they were wholly illiterate and could teach the students in a manner in which --

Q They'd be quite extraordinary teachers, I agree with you.

(Laughter)

MRS. COON: I would think so. I think that the thing the state is interested in here is the result --

Q But there are no standards for the teachers, are there? As there are in the public schools, of course.

MRS. COON: Not in this regard, your Honor.

Q There are standards for courses, are there not?

MRS. COON: There are standards of courses, yes. There are certain courses that must be taught in the schools. And there are certain levels of achievement they have to reach --

Q Then the state could finance the teaching of those courses?

MRS. COON: Yes, your Honor. No, no, no. No, because as I said, again, this relates to the fact that the schools have voluntarily established themselves as schools. To that extent, we would agree certainly with the decision of this Court in Lemon--that the state cannot pay for the teaching function. What we're saying here is we're paying for a neutral, a non-ideological function of the schools,

simply a recordkeeping program and an achievement measurement program.

Q But the District Court couldn't even figure out whether the amount paid equalled the cost to the schools or exceeded it.

MRS. COON: Well, in this particular instance, we have the stipulated cost analysis studies, that are in the record, which indicates that the amount paid to the schools is substantially less than the actual cost of the program itself.

Q Was that stipulated?

MRS. COON: Yes, your Honor, it was.

Q That was on a, not a school by school, that was a sample basis.

MRS. COON: That was a selected measurement between public and non-public schools.

Q From your response to one of the earlier questions, it would seem to me at least, that New York state is unique in not having any standards or qualifications for the teachers. Some of the states at least have the same requirements applied to private and parochial church schools as for public schools. Are you sure that New York doesn't require those same standards for the teachers in a church school? If a college degree is required to teach eighth grade or junior high school and public schools, are you

telling us that that is not required?

MRS. COON: That has not been required in the past in New York, no. There is, I believe, some--certainly going to be some--as more and more lay teachers/reach the schools, I believe there'll be more and more qualifications imposed.

MR. CHIEF JUSTICE BURGER: Very well. I understand, Mr. Chandler, that you will reserve your time for rebuttal?

MR. CHANDLER: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Pfeffer.

ORAL ARGUMENT OF LEO PFEFFER, ESQUIRE

ON BEHALF OF THE APPELLEES

Q Mr. Pfeffer, before you start, on this last question, did you understand that situation in New York?

MR. PFEFFER: I understand it, yes. That is the situation in New York.

Q That is unusual, isn't it?

MR. PFEFFER: It is rather unusual, and it's the reality of the influence and political power which groups have in New York which has been able to resist this.

Q Well, I don't think that's too unusual. Through our people and our family, I know quite a good many of them who are college graduates who have had jobs in private schools, but who couldn't get jobs in public schools because they hadn't had the necessary courses in education. That's not too unusual. Some of the best private schools in

the country have teachers who could not get jobs in public schools.

MR. PFEFFER: Well, that's entirely true, yes, your Honor.

Q Because they haven't had the necessary courses in education.

MR. PFEFFER: The question was whether they are on the general level. There are exceptional persons who have innate genius, but on a general level -- a general level, it is assumed, a general assumption that they have the training that is necessary for effective teaching.

Q The state does accredit or withhold credit from private schools, as I understand it. Is that correct?

MR. PFEFFER: On the elementary school level? I don't know that the state accredits in that sense. There is overall right of the power of visitation which is as I understand it.

Q In my state, the State Board of Education publishes a list of accredited private schools and that list is available to colleges and universities and the state has standards for accrediting and those standards include the number of days children must attend school. It requires certain courses. It requires certain minimum requirements with respect to teachers. I don't know whether this record contains that information or not. I don't recall it at the

moment.

MR. PFFETTER: I don't think the record contains -- my own understanding is that it doesn't have it, at least on the elementary school level. It may have it on the secondary school level.

The position of the Appellees in this case is that this Act, Chapter 138, is not what it purports to be, but whether it is considered what it really is or whether it is considered what it purports to be, it is equally unconstitutional under the Establishment Clause.

The Act purports to be a law to compensate private schools for certain services which are mandated by law and regulation. But aside from a sort of talismanic reference to it, perhaps to satisfy the purpose-effect requirement which had been expressed before this law was enacted, the declaratory -- the declaration of purpose refers to these non-graded services of testing and recordkeeping and that is the last thing that is in the law.

The rest, the operational act, the policy act, has no reference to it. Each school gets a specific amount per child, \$28 for each pupil, grades one through six, \$45 for each pupil, grades six through twelve. It matters not whether the -- this is the way the rule is interpreted and applied by the state -- it matters not what is the actual cost of these mandated services in a particular year if it is \$1 or \$5

or \$10, the school gets \$28 per student or \$45 per student without regard to what is the expense.

The school is not required to account for the money. It gets the money personally and does with it what it will.

Q Could it avoid giving the tests entirely?

MR. PFEFFER: Very strictly, it could. Now, let me --

Q Would it still get the \$28 and the \$45 if they didn't --?

MR. PFEFFER: According to the application and construction of the statute by the state, yes. And this is what is expressed in the Exhibit G. Exhibit G, which was a second of these illegal cost analyses, made months before the law was enacted, but after the law suit was started for the purpose of defending the law suit.

selected

They took a few/schools and they found out what?

They found out in these few selected schools in the first test -- or in both tests -- that about two-thirds of the amount -- and this is two-thirds of the amount, which is, was found to be the cost -- is used for inschool, which means teachers examinations. Only one-third, which was found in both tests, only one-third can be ascribed to examinations such as those which come from the state, the recordkeeping, everything else and the defendants brief -- the defendants brief admits -- it's on page 16 of defendant's brief. It says the State of New York admits that -- at the bottom of the

page -- that the overwhelming majority of tests --

Q Where are you now, on page --

MR. PFEFFER: On page --

Q -- 16 of the brief?

MR. PFEFFER: -- 16 of the main brief of Defendants Levitt and Nyquist, your Honor, the brief of the State of New York, near the end of the bottom of the page.

"The overwhelming majority of tests given in public and nonpublic schools alike are formulated, administered and graded by teachers."

These are the tests which take care of two-thirds of the whole course. We eliminate that and you have an amount which is conceded to be substantially less than the amount which is given per student.

But even that is not relevant because the state takes the position that it is irrelevant how much money is spent for these nongraded services. The amount is given per pupil and not on the basis of what the cost is. These costs and amounts were never required by law. They were made merely for the purpose of preparing for this -- for this case, apropos of the suit and the state states in its interrogatories which is in paragraph three -- it does not ask what the money is for. It doesn't require any reporting and it takes the position that the amount is fixed by law and this is the amount which is unchangeable, whether the

costs go up or go down.

Now, there's another point I'd like to call to the Court's attention. I think Mrs. Coon, you're correct in stating that this money is used to reimburse full expenditures already made.

The law was passed in 1970 to take effect the following year and each year the school gets, per pupil, according to the amount of students during that current year.

The first year, the school is allowed to choose the month of September, October, November, which month it will take to measure the number of students it has and for that year, that is the number taken for the \$28 or \$45.

Thereafter, the year before the current year is used as a base year but the payment is not made for the base year. They've already been paid for the base year. The payment is made for the current year and that provides that in the event that there is a difference between the student involvement through the current year or the base year, an adjustment is made accordingly.

Moreover, the Act provides that the payment is to be made in two portions, one is payable January 15th. The other is paid April 15th, for the current year.

Now, April 15th is two and a half months before the end of the school year. There is nothing in the Act or its administration which prevents a school teacher or school

principal or superintendant of schools or religious school saying to the teachers, "We are short of money for our religious teaching. We are short of money for our religious worship. We've got to cut out inclass tests. No more class testing. Use all that money for the two and a half months we are going to get now -- use all that money to pay for catechism, to pay for religious worship."

According to the State of New York, that is perfectly permissible. There are no strings attached to this money, no reporting, no auditing, the only auditing required is to establish how many students there are during the year.

Q Of course, if New York set up a system of strings attached in auditing, then you would be here saying there was too much entanglement, wouldn't you?

MR. PFEFFER: Your Honor, you are entirely correct.

Q So, you see --

MR. PFEFFER: This is exactly what the point is. This is what the Court said in Lemon. It is insight of the dilemma. Either you give them money which can be used for religious purposes which the Court has said is unconstitutional, in which case you have the Scylla of financing religious instruction, or you audit and you supervise, as it tried to do in Lemon, which is the Charybdis of the problem. The answer is, of course, it was often unconstitutional. But that is not unusual. That is what the Court said in Lemon

against Kurtzman. That's what the Court said in Tilton v. Richardson.

In Tilton against Richardson, the Court said, an unrestricted grant of money which is partly used to build a building which after 20 years may be used to hold religious classes, that is unconstitutional.

You cannot have a no strings attached grant of money to a religious school.

Q Mr. Pfeffer, don't you think that New York would be in bad faith -- I mean, the schools would be in bad faith if they did what you suggest?

Let's take the money but don't use it for what it is supposed to pay for?

MR. PFEFFER: The question here is not that case, your Honor.

Q Well, I didn't -- that is, I just asked you a question, would it be in bad faith or not?

MR. PFEFFER: Bad face?

Q Bad faith.

MR. PFEFFER: Oh, bad face, not the point, no. I'm sorry. Not a point of interpretation which the state has given of its law.

Q You mean that New York would say, "Here is \$28. Do with it what you want to"?

MR. PFEFFER: This is what the state has said. This

is what the state is doing. The state gave this money.

Your Honor, the state gives money -- made this selective cost analysis for a whole year it gave it to it. It's not asking any questions, what are you doing with the money? The money was given. It gave the money for them to deal with.

Q Independent of the First Amendment religion clauses, Mr. Pfeffer, doesn't the state, if they fail to carry out the contract in relation to the grant for statutory purposes, couldn't the state recover it?

MR. PFEFFER: Not according to -- now, look, the only statutory requirement according to the State of New York, the only statutory requirement -- this is in response to the interrogatories -- Mr. Justice Blackmun asked whether the New York courts have interpreted this. The New York courts haven't because they can't. New York is the one state in the Union which does not allow taxpayers' suits.

We've tried taxpayers' suits and been thrown out of court. It's the one state in the Union we can't get into court so the only court we can get into -- again reading Flast against Cohen -- is the federal court. But New York has not, according to the Defendants who were suing the State of New York -- have not interpreted this law as requiring anything.

Q Could the Attorney General bring a suit in the

state courts?

MR. PFEFFER: The Attorney General is defending this law.

Q Well, could he bring a suit in the state court asserting that the school, a particular school or a whole group of them, failed to comply with the purposes of the grant and therefore seek reimbursement?

MR. PFEFFER: No --

Q I'm not talking about individually, just, could he do it legally?

MR. PFEFFER: I don't think he could, because according to the state's interpretation, he is not required to.

MR. CHIEF JUSTICE BURGER: Well, we will resume there right after lunch. Thank you, Mr. Pfeffer.

MR. PFEFFER: Thank you, your Honor.

(Thereupon, a recess was taken for luncheon from 12:00 o'clock p.m. to 1:00 o'clock p.m.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Pfeffer, you may continue.

MR. PFEFFER: If your Honors please, the complaint in this action challenges the law on its face as construed and applied.

I've devoted myself up till now to the law as applied and I have pointed out that the law as applied does not require the schools to in any way account for the money received. This is substantiated and established by the interrogatories submitted to the state and the response to it on Appendix pages 87a and 88a in which the state says "the qualifying schools are not required to submit reports accounting for the moneys received and how they are expended."

Also -- that means it is a free -- they have a free hand on it, no strings attached.

Also, I want to call to the Court's attention the fact that, as applied -- and this comes from the second of the in litem cost analysis made by the state after the suit was started, that in two typical schools that they selected, the Catholic Central High School and the North Shore Hebrew Academy -- and I point this out, I give this reference on page 20 of my brief -- the school, the first school received \$77,878. Let's say, \$77,000 under the law.

Taking in account everything other than teacher's

examinations, that means these Regent's Examinations and pupil evaluation tests, recordkeeping, healthkeeping, everything conceivable under the Act, which is mandated -- which is not mandated and this includes indirect costs and so-called "kind and benefit costs" which these teachers give as inkind; taking all, according to the state's own cost analysis, the sum total of all these, the most liberally interpreted mandated service is \$24,674 which is less than one-third of the amount received in the Statute.

The only way you can justify this Statute is the other two-thirds of it is if teachers' examinations, the kind of examination which the teachers give in every school, oral or written, daily quizzes, weekly quizzes, are included; you get two-thirds of the sum total is that.

The same is true of the second, also on page 20, the second typical school, North Shore Hebrew Academy. They had received \$5,400.

Q Where are you? Page 20 of what?

MR. PFEFFER: Page 20 of my brief, that gives the page references to --

Q Page 20 of your brief?

MR. PFEFFER: Yes.

Q Thank you.

MR. PFEFFER: Page 20.

Q Thank you.

MR. PFEFFER: It's all in Exhibit V and Exhibit T. \$5,400 this North Shore Academy received under the statute. Its total cost for other than inschool teachers testing is \$1,776, again less than one-third.

So that in answer to the question which Mr. Justice Blackmun put, if this statute were interpreted narrowly to limit it only to these -- to exclude teachers tests and quizzes, the guts of the statute would be out.

Two-thirds of the amount would be destroyed. Now, there is no question that is not what is intended.

Now, assume the statute is what it says it is. I will now, at this point, accept the statute at face value and accept that teachers examinations, the kind of examination which is done every day in school, it's taken two-thirds of the time -- that that is properly within the state.

It is our opinion that this statute is unconstitutional on its face for a variety of reasons. It is indistinguishable from Lemon against Kurtzman.

Mrs. Coon has responded to a question put by one member of the Court as to whether teaching itself is not mandated, which was involved in Lemon against Kurtzman, teaching, teaching of secular subjects. Her answer I was unable to quite understand. She said, it is not mandated because the school voluntarily establishes itself to teach. If it didn't voluntarily establish itself to teach, it

wouldn't be required to teach. But that could be true about this reporting. If the schools, the private schools, didn't have voluntarily undertaken to teach, they wouldn't have to submit a report of any kind.

The statute of New York -- as in Pennsylvania, as in Oklahoma, requires a number of things. It requires that you teach certain -- either eight or nine basic courses, which was involved in Lemon against Kurtzman and DiCenso against Robinson -- and it also requires that you keep records and you report them. I can see no distinction between them. If one is unconstitutional, I can't see how the other is constitutional.

Moreover, keeping records and testing is ^{not} the only thing that is required of these schools by law. They are required to be safe. They are required to be sanitary. They are required to be well-lit. They are required to be in every respect acceptable. Otherwise, they are violating the law.

If Mrs. Coon suggests that because the state requires that schools be safe and sanitary and lit and heated, that the state can't constitutionally, under the establishment clause, pay for the fuel bills, pay for the lighting bills, repair the buildings, the church buildings, that this mandate --

Q Mr. Pfeffer, to discuss this further, suppose the state required an annual or semi-annual examination, X-rays,

chest X-rays and annual inoculations for polio, and gave private schools the choice of either having the state supply the service on mobile medical units or to let the private schools engage the services themselves with their own physicians and pay them \$5 a hear or \$10 a head. What would you say about that?

MR. PFEFFER: I think that was constitutional provided, Mr. Chief Justice, provided the schools were required to account that they did that particular thing, that they used the money for that purpose for the inoculations. But that's not required here.

Q But that would be entanglement.

MR. PFEFFER: No, that would not be entanglement. This is the difference between this case and Everson and Allen. There is no religious aspect to the inoculation. A doctor does not need religion to inoculate. But as the Court pointed out in Lemon against Kurtzman, there is a world of difference in the teaching. A teacher can -- and this is from the Lemon case -- a teacher can -- some may and some may not -- may use the teaching for the purpose of indoctrinating religion and this is exactly equal with respect to testing.

If you include inclass testing, and I have put forth in my brief examples of testing in respect to the most value-free subject, mathematics and I have given examples of

the texts which were actually used and proposed and which are fully impregnated with religious values.

Now, I don't say that the school -- any of the schools in New York use those texts. I don't know whether they do or they don't, but it is not important. The point that is important is that -- is that the point is that to make sure, as they must do, in order to avoid financing religion, to make sure that it doesn't do it, this state has an obligation to maintain a continuing surveillance.

Q Well, that would be true in the inoculation case because the school might take the money and use it for religious teaching, and therefore, the state would have to be assured that the school had not done that and that would entangle the state with the school, would it not?

MR. PFEFFER: The entanglement would be limited, not to examining what is taught, but limited to a doctor's certificate, yes, we inoculated 50 students here and we got paid \$250. There is no entanglement there. That's not the surveillance of going over their heads.

Q Did I understand you to say that they could give the money to the school?

MR. PFEFFER: In this case?

Q For the inoculations.

MR. PFEFFER: Well, I would say that even if they did, I don't believe that would be unconstitutional. In fact,

provided that there was auditing to show that the money was used for that purpose, expressly, you don't reach the entanglement surveillance. When you get the fact --

Q Why not? You are giving money to a parochial school. Why not entanglement?

MR. PFEFFER: Well, I think it would be such a limited entanglement. I don't think it would be accepted entanglement. It doesn't get into the guts of what the school is for. The school is an establishment --

Q Well, suppose they gave \$46 per student --

MR. PFEFFER: Yes?

Q -- for health examinations.

MR. PFEFFER: I don't think that would be unconstitutional, provided -- I think that amount would be entanglement in the case of health, it would not be excessive entanglement. But you don't want to deal with that. We are dealing with tests which are done in the classroom.

Q Would that be true if it were given to a Christian Science school?

MR. PFEFFER: Oh, that would be a different thing. A Christian Science school couldn't accept it. It wouldn't be in its concepts.

Q Well, let's say this, they did accept it.

MR. PFEFFER: Then I think it would be unconstitutional.

Q Why?

MR. PFEFFER: Because giving the money there, it would be used for an unlawful or for an unconstitutional purpose.

Q The only law that would be violated would be the Christian Science tenets.

MR. PFEFFER: Well, if they -- if the Christian Science school accepted it and used it for inoculations, that is all right. That would be all right. I think so.

Now, the point is, I think it is completely unrealistic, I think it just is a fact of the world to seek to divorce testing, day-by-day testing, examinations written or oral in the future from the days of Plato when testing has been the basic way of teaching, the major way of teaching religion, as the Catechism, the traditional Catechism, it's a form of teaching by testing. Their teacher asks questions and the student answers. If the student answers correctly, he has learned his lesson. If he answers incorrectly, he studies some more.

Every student knows that in order to pass his course, he has to pass examinations. How do you pass examinations? You give the teacher what the teacher wants.

Now, you take the two schools here, the Catholic Academy or the Hebrew Academy and the Catholic School. I am certain that a student in the Catholic Central High School

would not answer a question on History of the Reformation the way the same question would be answered by a student in a Lutheran high school. Or, take a question on the origins of Christianity. I am sure that a student in the North Shore Hebrew Academy would not -- if he wants to pass the course -- answer that question the same way that a student in the Catholic Central School would do it.

?

Teaching is with tirades. One way, the least effective way, is for the teacher to stand up in front and lecture and lecture and then send the students home.

A most effective way is for the teacher to get it from the students. That is the way it is done and the state says that applies to everyday teaching, written and oral.

Q Mr. Pfeffer, do you know, has the ROTC Program ever been tested in any of the federal courts or state courts.

MR. PFEFFER: There is no such case that I know of. I don't think that applies here because these are elementary schools, grades one to six.

Q Yes, but it is --

MR. PFEFFER: But I don't know of any such case.

Q That still has some entanglement and gives some aid to church-operated institutions, does it not?

MR. PFEFFER: Well, the -- my answer to that would be that ROTC is generally, as far as I know, up till now, at

the college level and in Tilton versus Richardson, this Court held that there were more liberal rules in respect to -- at the college level than with respect to elementary and high school levels so that I don't think it would necessarily be the same answer. I would have reservations on the elementary and secondary schools. I would certainly have reservations on them.

Now, in Lemon, this Court said that -- in Lemon and DiCenso -- that the state of Rhode Island and the State of Pennsylvania were obligated under the Constitution's statute to see to it that the money given to the teachers was used only for secular teaching, that it could not give them the money and say, use it for secular teaching, but make no examination, no verification of whether it is being used for the purpose and then the Court went on and said, but that very verification -- in answer to Mr. Justice Rehnquist's question -- that very auditing, that very surveillance, that very required, constitutionally and statutorily required assurance that it was not used for sectarian instruction or religious worship, that involved that surveillance which from Walz through Lemon the Court said is forbidden by the establishment clause.

Yes, it is true that if there were no audits here, as there isn't, we claim it is unconstitutional because it is financing, subsidising religious education and if there is

audits and there is surveillance and there is policing, we say it is unconstitutional because involved in entanglement but that is not our dilemma, that is the dilemma of the establishment clause. That is the dilemma of the history of over 150, 175 years where state after state, court after court, constitution after constitution said you cannot do what you are trying to do here. You cannot take tax-raised funds and use it to pay part of the operating costs, whether it is required by law or not required by law, of church schools.

This is what it is all about as to what the establishment clause says and this is what the Court said no to, that long before there was a public school system, there was a religion clause and that the policy, the constitutional interests which were set forth in the religion clause, antedated our educational system.

Our educational system had to shape itself to the establishment and free exercise clauses, not the establishment and free exercise clauses to shape themselves against the educational interests.

This is what this case is about. This case says as the court below said, you cannot take an important element of the budget of a church school and offer it -- you cannot take it off the voluntary contributions of those who adhere to it, and make it an obligation of every taxpayer. This is a violation of what the establishment clause of the Constitution

requires.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pfeffer.
Mr. Chandler.

REBUTTAL ARGUMENT OF PORTER R. CHANDLER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. CHANDLER: May it please the Court, I appear on behalf of a group of Catholic schools, admitted as intervenors below.

jury

There is a group of Jewry schools also who intervened and who appealed, who have filed a brief here and they are not represented on oral argument, but our positions are similar.

Q Mr. Chandler?

MR. CHANDLER: Excuse me.

Q That is Mr. Lewin's brief?

MR. CHANDLER: What?

Q Is that Mr. Lewin's brief?

MR. CHANDLER: Is that it? Yes. Yes, I believe so.
It names the two academies at the bottom, I think.

Or is that another one?

Q Well, Mr Chandler --

MR. CHANDLER: Yes?

Q When you say Catholic schools, do you mean

that they are schools that restrict entrants to Catholics?

MR. CHANDLER: These do not, no, but they are affiliated with the Catholic Church and we make no bones about it.

Q All right, how about --

MR. CHANDLER: There is one high school and two elementary schools.

Q But you say they do admit other faiths?

MR. CHANDLER: Cathedral Academy in Albany has an enrollment of approximately 500 students. Approximately 230 of them are black. Approximately 225 of them are non-Catholic.

Q And so there must not be, then, a requirement to --

MR. CHANDLER: (Overriding) There is no such requirement as I've said. There is no such requirement.

Q But there is also no requirement, I take it, then, of attending a religious class in school, teaching the Catholic religion?

MR. CHANDLER: I believe in one or two of them, courses in religion are required.

Q Well, that is different, I --

MR. CHANDLER: Attendance at worship is not.

Q Yes, all right.

MR. CHANDLER: The answers to our interrogatories spell that out.

Q Yes. All right.

MR. CHANDLER: Spell that out completely.

We are here -- in this case, this statute has been enacted, a unique statute, in reliance on the language of this Court in the Allen case. This Court there said, "If the state must satisfy its interest in secular education through the instrument of the private schools, it has a proper interest in the manner in which those schools perform their secular education function."

That is what we say this act was designed to do.

It has already been brought out but should be emphasized again that public and private schools in the State of New York are part of one system and subject to one set of controls. They have been under the University of the State of New York since 1784. They have been required to be compulsorily examined, tested and inspected since, I think, 1852. Take the case of a child who goes to a Catholic high school. He has to take courses prescribed by the Regents of the State of New York. His attendance records are kept. He takes examinations and when he takes them, they are the same as the so-called "Regents Examinations." They are the same examinations that are given down the street in George Washington High School and if he passes them, he gets a diploma. And who does he get the diploma from?

He gets the same diploma as his friend down the

street. He gets the diploma signed, not by the Bishop, not by the Pastor, but by the Commissioner of Education of the State of New York.

The degree of control is illustrated by one regulation which is that if a school, public or private, wants to give a course where there is not already an approved syllabus, permission from the State Education Department must be had before that course is to be taught.

Mr. Pfeffer's arguments and his bookkeeping depend upon one fundamental fallacy. He overlooks the fact that this is a reimbursement statute. This talk about the money goes out, they can use it for whatever they like overlooks the fact that chronologically what has happened is this: The school sends in a form asking a large number of questions on testing, do you comply with this and this section of the law? What courses do you give in fire protection? What courses do you give, so on and so on -- before you are eligible. You have to fill that out in order to get the money and you have to certify that you have conducted the testing requirements, that you have kept attendance requirements and done all the other things required by the mandated services.

The school will have done all that out of its own pocket. It will be out that much money and then later on, its gets a reimbursement.

Now, that reimbursement --

Q You don't mean reimbursement, do you? You mean partial reimbursement? All --

MR. CHANDLER: Your Honor, you are quite correct. I omitted that word. It is a partial reimbursement.

Q Well, you didn't let me finish. Or over-reimbursement.

MR. CHANDLER: Or what?

Q Over.

MR. CHANDLER: There is no indication --

Q That is, when you send in this information, does it say how much it cost for these services?

MR. CHANDLER: There are studies in the book --

Q No, no, I am talking about this shoot that they file. You said they answer a whole lot of questions.

MR. CHANDLER: Yes, sir.

Q Is one of those questions how much money you have spent for this?

MR. CHANDLER: No. No, it is not.

Q So how can it be reimbursement?

MR. CHANDLER: Well, it -- it's a partial reimbursement because it is less than the cost that the school undertook.

Q Well, could it be a contribution?

MR. CHANDLER: A contribution toward that, but the point that I am make is, the school -- whatever it is, the

school is out the money. It has performed the services. It gets back a partial -- not larger -- a partial reimbursement and that partial reimbursement of course becomes its own money.

Let me go back to an analogy. What about the parent in the Everson bus case. He paid out of his own pockets for bus fare. He later got it back. Was that money segregated or marked or tainted by sectarian influence? No. When he got it back, he could use it to put in the plate, he could use it to go to the races. It was a reimbursement for a legitimate expense.

So, with all respect, I say that this talk about audits is completely beside the point. The point is that the school is required to perform a large number, an appalling number of administrative services for the state.

One side illustration, I just happened to notice that the records of attendance and other basic data in connection with these applications are required by the state to be maintained open to inspection in the school's files for at least 50 years.

Did the parent in the textbook case who was relieved of the cost of buying textbooks, did he get sectarian money? Was it sectarian reimbursement? No.

The point I am making is that as this is a reimbursement for funds already expended, it is completely

immaterial where the money goes.

The partial reimbursement was deliberately fixed by law in the judgment of the legislature, which should be conclusive and it was fixed in such a way that there would be no overage. The cost studies made after the suit was brought all bear that out.

Let me give you just one little illustration from one of the Exhibits. In mode two they studied how much it cost the schools to perform the mandated services. They took a public high school and a Catholic high school and a public elementary school and a Catholic elementary school and applied the same bookkeeping tests to both of them to see how much it cost.

Holy Trinity High School in Hicksville, for doing the state's bookkeeping for it, it cost thst school \$232.90 per pupil and they got back \$45.

Hicksville High School in the same time, same town, it cost them \$361.72, one-third more.

Corpus Christi Elementary School in Minneola, Catholic, it cost them \$77.56 to do the state's work for it. They got back \$27.

Willis Avenue Elementary Public School across the street, it cost them \$474.12 to do the same services and so, as for all the other --

Q Mr. Chandler, why do you think there was such

a variation in these cost figures?

MR. CHANDLER: Well --

Q Among the schools?

MR. CHANDLER: Variation? Well, apparently, because the Catholic schools pinch their pennies a bit tighter.

The Minneola High School --

Q Well, there is quite a variation from \$400-plus in the one instance and \$77 in another.

MR. CHANDLER: The Minneola High School may have -- I believe that was a new school with not too large an enrollment and it may have come to more. That -- uh -- but let me take ours from the same study.

Holy Family Elementary in Hicksville, it cost them \$86, got back \$27. The Dutch Lane Elementary School, it cost them \$198, still much larger but not quite as large as the Minneola figure.

You see, it simply shows that there is no padding and no excess and that applying the same bookkeeping methods fairly to both public and private schools shows, or demonstrates, the fact that there can be no overage and no excess.

As a matter of fact, all three judges in the trial court agreed that there was no excess. Judge Palmieri pointed it out very forcefully in his dissent. The other judges said that if you take out of account teacher exams, then the costs are -- then the reimbursement might in some instances exceed

the cost. But the point is, we maintain that the teacher exams should not be taken out. They are in the statute. They are specifically provided for in a regulation which my opponent has not even cited in his brief.

I see time is running very short and I will close, your Honor, with one further thought. We've heard something about dilemmas today. Consider this dilemma: The state has a right to have parochial schools perform effectively. It has a right to have testing and examination done, not for the purpose of educating them, but for the purpose of seeing how well they are being educated.

If it admittedly costs the schools a lot of money to do it, if relief of this sort is not allowed, there is another alternative that once comes up -- may I just finish my sentence? -- a corps of state inspectors.

If it is all wrong to reimburse a school for doing this kind of work, it is obviously all right to send a patrol of inspectors in every Monday, Wednesday and Friday to keep attendance records, to give examinations, fire the teacher from the room for the moment and give an examination and do all the bookkeeping work.

That would require quite a few more people in Albany and would, I think, result in entanglement of a sort that has been conceived.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Chandler.

Thank you, Mr. Pfeffer.

The case is submitted.

(Whereupon, at 1:39 o'clock p.m., the case was submitted.)