In the

Supreme Court of the United States

HUBERT WHEELER, et al.,
Petitioners,
v.
ANNA BARRERA, et al.,
Respondents.

No. 73-62

Washington, D.C.
January 16, 1974

Pages 1 thru 70

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Wednesday, January 16, 1974.

The above-entitled matter came on for argument at 10:48 o'clock, a.m.

BEFORE:

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

LEO PFEFFER, ESQ., 15 East 84th Street, New York, New York 10028; for the Petitioners.

THOMAS M. SULLIVAN, ESQ., Downey, Sullivan and Fitzgerald, 700 Title Building, 112 East Tenth Street, Kansas City, Missouri 64106; for the Respondents.

APPEARANCES [Cont'd]:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for the United States as amicus curiae, supporting Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-62, Wheeler against Barrera.

Mr. Pfeffer, you may proceed whenever you're ready. Let me remind you again that the electronics system is malfunctioning and that you'll have 45 minutes; do you want a five-minute warning?

MR. PFEFFER: Yes, I'd like to have a five-minute warning; and I'm reserving ten minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: I'll indicate to you when you've used forty minutes.

MR. PFEFFER: Thirty minutes, because I'd like to reserve ten minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: All right.

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. PFEFFER: Mr. Chief Justice, and may it please the Court:

This is a suit brought by a group of parents in private church schools in Kansas City against the Commissioner, the State Commissioner of Education of Missouri and the members of the State Board of Education, charging that the plaintiffs were deprived of their rights under the Elementary and Secondary Education Act of 1965.

The complaint is a rather broad-ranging document, but

as the case progressed, the issue became quite narrow. The crux of the controversy revolves around a policy adopted by the State of Missouri that to assign publicly employed teachers to perform their educational services in private and particularly religious schools would be contrary to the law of the State of Missouri; and that this law was applicable to Title I teachers as well.

The defense was that the Act does not mandate, does not require assignment of Title I teachers to teach in church schools, and,if it did, that to that extent the Act is contrary to the First Amendment of the United States Constitution.

The District Court ruled in favor of the defendants on the ground that the statute did not mandate such assignment, and stated further that if it did it would raise grave constitutional issues under the Establishment Clause.

The Court of Appeals reversed, two to one, with Judge Stephenson dissenting, and remanded the case to the District Court.

On the basis of that remand, the District Court entered a final judgment, the critical sentence of which is found on page A46 of the Petition for Certiorari, which says: "Defendants are enjoined from disapproving any application of a Local Educational AGency for the grant of Federal Title I ESEA Funds on the basis that such application includes the use

of Title I personnel on private school premises during regular school hours."

That's an unlimited injunction that forbids the refusal to approve any plan which requires assignment --

QUESTION: What part of the District Court's order is that?

MR. PFEFFER: This is the District Court's order on remand. It's called, Injunction and Judgment Issued in Compliance with Mandate of the Court of Appeals.

It's found on the Petition for Certiorari, page A45, but this sentence is found on page A46. The first paragraph.

This is the critical issue before this Court.

Now, the Court of Appeals opinion is somewhat unclear, and Judge Stephenson interpreted it to mean, as the District Court interpreted it to mean, and as the plaintiff interprets it to mean, a final conclusive determination that the State of Missouri may not refuse, all things being equal, may not refuse to assign publicly employed teachers to teach in religious schools.

Now --

QUESTION: The trouble is that your Petition for Certiorari doesn't have 846 pages.

QUESTION: A -- A46.

MR. PFEFFER: A46.

QUESTION: A?

MR. PFEFFER: A.

No, I didn't burden this Court with an 846-page petition for certiorari.

QUESTION: Not yet!

MR. PFEFFER: Particularly with the complaints of this Court of overbearing --

QUESTION: Is that in paragraph 2?

MR. PFEFFER: It's the first paragraph on the page. It's the last sentence of the first paragraph, before No. 2. The part, the paragraph which begins on the preceding page.

QUESTION: Mr. Pfeffer, don't we have something of a problem, in that we don't know what the District Court's order is going to be ultimately? The plan.

MR. PFEFFER: Well, this is the final District Court order, this injunction --

QUESTION: Well, but the plan has not been developed, has it?

MR. PFEFFER: The plan hasn't, but no plan can -- well, the plans have been, yes. As of now, because of this injunction -- because of this injunction -- and we sought to get a stay from the District Court, and the District Court refused a stay, and we applied to the Court of Appeals for a stay. The Court of Appeals didn't act on it until it was ready for argument here.

But, as of now, as of now, the situation is subject to action by this Court, that public school teachers, Title I teachers, are assigned in to parochial schools to do exactly the same type of teaching the record shows --

QUESTION: You're telling us facts now subsequent to the entry of the order that's under review here?

MR. PFEFFER: In pursuance to the mandate of that order. Pursuant to the mandate of the order. We interpret the order as an injunction forbidding us, and this is the issue before the Court, forbidding us to refuse to assign teachers to teach in parochial schools.

This is the injunction which we're operating on, and in order to -- to make sure that this is before the Court, when we filed our Petition for Certiorari, we filed it with a two-pronged petition. We filed a Petition for Certiorari to review the judgment of the Court of Appeals, but we also have the alternative to review the earlier judgment of the District Court ordering us not to refuse a program for sending public school teachers into parochial schools.

The fact situation in this case, as revealed on the trial and as it developed, is just one narrow thing: we have here in Missouri, as in most States, the Title I program is limited to teaching reading and arithmetic, and occasionally some other similar subjects, like, in summer schools, shop or something like that. But basically reading and arithmetic.

And the record shows what Title I is, if we look at page 43 of my brief we find a typical application, a typical application for Title I funds by a local agency, which is pretty much the same; and it gives the whole facts of this.

"A reading specialist" -- that's in paragraph 3 -- "A reading specialist will assist classroom teachers in daily developmental reading instruction and provide corrective or remedial reading instruction in groups of four to ten on a regularly scheduled basis. Programmed reading texts plus a variety of supplementary materials combined with pupils' creative writing and teacher-made materials will be utilized to extend and strengthen reading skills."

This is a typical thing which is done in all the schools, private and public. And this is the crux, this is what we're contending, we're not now required to do under the statute, and if we are, the statute to that extent violates the Establishment Clause.

That is the dual question before this Court.

Now, addressing myself first to the statutory instruction, I think -- statutory interpretation -- I think the first thing to do, of course, is to look at the text of the statute. That is found on page 16 of my brief.

It says that a State agency shall not approve any of these local agency's projects unless it is determined "that, to the extent consistent with the number of educationally

deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate."

Now, I should like to call the Court's attention to the examples given in the statute, the first one of which is critical: Dual enrollment. What does dual enrollment mean?

It's stated in the regulations, it explains what it is: dual enrollment, sometimes called shared time, is when pupils in their private schools, registered in a private school, go into the public schools for some but not all of their courses.

This Act provides it is permissible, to meet the requirements of the statute, to take pupils from the school, private school, and bring them into the public school.

Clearly this is just the opposite of sending the school teacher into the private school. So that the Act, on its face, as giving an example, this is not the only thing permitted, it's just "such as", as one example of what is permissible which will meet the requirements of the Act, is to send the children into the public schools rather than sending the public school teacher into the private schools.

So that it is clear without further -- that the statute does not mandate what apparently the Court of Appeals mandated and the District Court mandated, you must send them into the parochial schools if you send them into the public schools.

Secondly, the situation in Missouri, where the law is interpreted by the State Board of Education, is not to permit this, was called to the attention of the HEW very early in a letter specifically addressed, specifically addressed to this problem, sent to the Assistant Commissioner of Education, and we have the response of the Commissioner of Education, on pages 19 and 20, which, in the light -- this is 1967 -- in the light of the specific missouri situation, said: No, it's not required. The statute does not mandate any particular form so long as you provide services for the students.

Then we have another -- there are many more, but another in here -- in the Handbook of HEW, the Commissioner of Education, which again recognizes, and I call the Court's attention to that paragraph which I've quoted on page 22 of our brief, in which it refers again to the situation. It's called Logistics, on page 22.

It says: "Not the least of the difficulties in including private school children in Title I activities are the problems of scheduling, transportation, hiring and

assignment of personnel, purchanse and inventory of equipment, and arrangements for space. In those States in which public school personnel may not perform services on private premises, the difficulties are compounded."

Then, if there is no easy solution to the logistical problem, to do the best, with good faith, you can get it.

But, this again is a recognition that there is a problem, a logistical problem.

If the Court of Appeals was correct, that you must send them in, then there's no problem. The answer is there's no problem because you have to send them in.

Finally, and there's more in my brief and I don't want to spend too much on it, but finally I want to call the Court's attention to something which appears in the government's brief. On page 19 of the government's brief, in which a House Committee -- this is after the Act was in operation for a year.

On page 19, the paragraph beginning on page 18, but the critical part of this is that the State Boards are given wide discretion to the form of program they will approve, and towards the end: "in order to assure that such programs and projects could operate as a part of the public school system in conformance with local and State legal and constitutional requirements."

QUESTION: Mr. Pfeffer, the Eighth Circuit, as I

read their opinion, said that there was some conflict in Missouri laws, that the Attorney General had disagreed with the Superintendent, and they ended up saying that the kind of injunction Judge Collinson entered was in conformity with Missouri law.

Certainly we're not going to second-guess the Eighth Circuit on what Missouri law is.

MR. PFEFFER: No. The answer to that, Mr. Justice Rehnquist, is that -- I don't believe the Court of Appeals found it -- the Court of Appeals found, as the Court of Appeals had previously found in an earlier proceeding, where the District Court had sought to dismiss the complaint on the ground that there was an unresolved question of State law. The Court of Appeals reversed, saying it's not -- it's irrelevant what the State law is, the question is what the federal law is.

The thrust, as I understand it, of the Court of Appeals opinion is that State law is irrelevant. This is a federal law, and therefore it is to be interpreted and applied according to federal standards.

QUESTION: But if you turn to A20 and A21 of your Petition for a Writ of Certiorari, if you look at the paragraph beginning at the bottom of A20, "Plaintiffs discount the applicability of State law", and this is the majority opinion, then Judge Lay goes on to say, on page A21, this approach,

discounting the applicability of State law, "substantially ignores the legislative history of Title I which establishes that State policy and law shall govern the administration of these programs."

So I don't agree with your reading of the Eighth Circuit opinion at all.

MR. PFEFFER: My only response to that is that that apparently is what the District Court interpreted, the District Court so interpreted it, and I think Judge Stephenson so interpreted it, and it is the only -- and, independent of that, independent -- I addressed that before.

Independent of that, the legislative history and the constructive interpretation by HEW over the years is that it is not the State Attorney General who gives an advisory opinion, who determines State law, but that under the ESEA the responsibility for interpreting and applying the Act -- and I cite it in the brief -- rests with the State Education Agency. And it is not, indeed as I indicated from the fact that while the Congress was in session it had this situation in Missouri in mind.

And the -- the -- the Commissioner of Education responding to Senator Long then, said: We know that Missouri law doesn't permit it.

All the HEW writings, including its program guide, and all the things that I've read, recognized that.

QUESTION: The Supreme Court of Missouri is the ultimate arbiter of Missouri law, I take it, and certainly the Eighth Circuit here addressed itself to a holding of the Supreme Court of Missouri and said: on balance, we conclude the Missouri law does permit it.

MR. PFEFFER: I don't think so, Your Honor. I think if that were the case, if that were the case, I think -- I don't think we'd be under the case, because we believe that's not all the discretion which the State Board of Education has. That it has other discretions as well.

But, it seems to me, and it seems to everybody, that the decision did not go on the fact that the State Board of Education was unable to interpret its own law.

The Supreme Court decision, of the State of Missouri, was interpreted one way by the State Board of Education, and another way by the State Attorney General. We initially had the same -- took the same position that you took, Justice Rehnquist, we asked that the court, the District Court, abstain until the State of Missouri, Supreme Court of the State of Missouri resolved that question.

The District Court said no, because that's irrelevant. What the State does is irrelevant, this is a federal law, giving you federal funds, and therefore it's to be applied by federal law.

That's why we're here. We want it, we wanted it.

If we had been directed, and indeed the plaintiffs still have the option of a mandamus in the State court.

Now, so much for the --

QUESTION: Before you leave that, let me get back to your brief, page 22, where you had discussed the matter of the regulations on logistics, or the handbook. Do you have that part?

MR. PFEFFER: Yes, I have it.

QUESTION: I take it, that last paragraph on the page is your brief now, your statement: "If the Court of Appeals was correct, there was a very easy solution to the logistical problems: assign the public school personnel to perform the Title I service on private premises."

MR.PFEFFER: Yes, sir.

QUESTION: Now, that's a little cryptic, I'm not sure I follow it. Do you mean that you'd have no objection to it?

MR. PFEFFER: No --

QUESTION: The problem, if it were done on private premises?

MR. PFEFFER: No, Mr. Chief Justice. What I am trying to point out in this, this is a -- a administrative interpretation of the statute. And the administrative interpretation says there are logistic problems in various things. One of the logistic problems arises when State law

forbids assigning public personnel to private schools.

Now, if the Court of Appeals is correct, that State law is irrelevant, then the HEW would have said: there's no logistic problem, simply this law requires that -- whatever the State law is -- the federal statute -- that you must assign them to serve in private schools. Then there's no logistics at all.

The fact that they said, in the second paragraph, that there are no easy solutions; however, when the legal solution allows several options, then good faith, we'll work something out.

But this, as I interpret it, is a recognition by HEW that you are not mandated to send public school teachers into the private schools, even to avoid logistic problems.

Now, I should like to devote the rest of my time here, up to the amount I'm reserving, except for that I'm reserving for rebuttal, to the constitutional issue.

In the event we are incorrect, in the event that this Court decides that where certain services are provided for in the public schools, educational services by Title I teachers, the Title I teachers must go into the church schools to perform those services.

We suggest that to that extent the statute violates the Establishment Clause of the First Amendment.

Now, in saying that, it is important to note that

the issue before this Court in this case is quite narrow. We are not challenging other Title I services, which are permitted under the statute, including those specifically stated in the statute as mobile equipment, nor those which HEW has in its interpretation and application of the law held to be permissible, such as breakfasts or medical care. We do not challenge sending a doctor in, or a hot breakfast in, with cooks to prepare it.

We are challenging only what are basically, and the record shows it, basically the same type of teaching of regular subjects, both commonly used, reading and arithmetic, which goes into the public schools except -- what? Except smaller classes, and specially trained, or the teachers are given special, additional training in the crash course, how to handle students who are below the norm.

And that, too, appears in the typical application. Again I ask the Court to turn to page 43 of my brief, which is a typical application.

Item 4: Degree of educational deprivation necessary for participation.

"Below norm on standardized tests by: 3 months for Primary School; 6 months for Intermediate; 9 months for grade 7."

If a student is below those norms, he is put into a smaller class, that's in the case, and he's given a teacher,

and the teacher, say, will be given a crash course under HEW sponsorship of how to handle that case.

Nw, these students who are below norm are not students who are psychologically problems, they are ordinary students who are lax in reading, slow.

The best example is the one which the Court of Appeals gave in its opinion, on page -- which I cited, page A45, footnote 13 of the Petition for Certiorari -- A45 -- no, that's not it -- no.

A15, I'm sorry. A15. A15, on footnote 13. Yes.

It says: "The record discloses that Our Lady of the Americas school, a parochial school in Kansas City, has a student body that is 98 percent Mexican with approximately 175 students eligible for Title I. These children are confronted with a language and cultural problem."

Now, that's all I want to read from that.

What do we have here? We have students who, because they're foreign-born, are slower than the average. But the instruction given them is basically the same thing as the instruction given to other students.

Now, it's our contention that in that context this case is indistinguishable from Lemon v. Kurtzman, Earley v. DiCenso, and Sanders v. Johnson, where this Court said, You cannot finance secular instruction in church schools.

What is the difference? The education is basically

the same. Secular, ordinary secular education. And even in Lemon v. Kurtzman they chose these secular courses.

What is the only difference? The only difference between this situation and the Lemon-DiCenso-Johnson cases is that in this situation the teachers are paid directly, and hired directly, by the public agency; in the other cases the teachers are hired originally by the parochial schools, but paid, in whole or in part, out of public funds.

QUESTION: And you don't think that's an important difference?

MR. PFEFFER: No. We don't think it's a critical difference. We say this because -- a number of reasons. We say that in some, that the potential for conflict -- and I'm reading now from the Levitt decision, which this Court decided last year, and quoting from the Lemon decision: "The potential for conflict 'inheres in the situation'" -- just as it did in the Levitt and in the DiCenso-Lemon cases.

We show, we argue, and we show in the Writ that the efforts to operate, it is perfectly permissible, for example, perfectly permissible for the parochial school to take one of its teachers, or more, divorce them, sever them from the payroll and assign them as a Title I teacher. They get special training, and they come back to doing the same thing, but they have now gone from one payroll to another. They do the same thing, except they are now under the public

payroll.

Moreover, and this is where -- and this is interesting, that they may even be employed simultaneously by both.

If you -- in the regulations, which I quote on page 5 of my brief. Page 5 of the brief says as follows:

"Provisions for special" -- this is from the regulations, C.F.R. Section 116.19.

"Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools," -- now the next is critical -- "except for services performed outside their regular hours of duty and under public supervision and control."

In other words, what this allows is for a parochial school teacher to teach under the payroll of the parochial school for part of the time, and under the payroll of the Title I the other part of the time; so long as it is beyond the regular hours of the parochial school teacher. And a parochial school teacher can be hired from nine to three, or hired from nine to one or nine to twelve.

Moreover, the -- whatever you look at, you have the severe problem of the fact that a church school is a church school and doesn't become something else, when a public school, a publicly employed teacher enters. That is why the

courts which have been faced with this issue in respect to State laws, and the District Court in the case which I cite, Americans United v. Oakey, the District Courtin the First Circuit said -- which involved a State statute, a State statute -- which said that publicly school -- publicly appointed teachers out of State funds may teach in parochial schools, it declares that unconstitutional.

And I commend to this Court the Court's opinion there, which is the sole discussion of it, indicating that the potential for conflict, the law of the Constitution, as interpreted by this Court, in Nyquist, in Levitt, in Lemon, and is central in each one of the cases, said that in a situation such as this, it is an obligation to make certain -- to make certain -- that the publicly employed teacher does not use his position for the advancement of religion.

The -- the -- this Court said, in Nyquist, and I quote it on page 30, referring to the DiCenso case, on the bottom of page 30:

"The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State" -- and this is emphasized; the emphasis is not mine, the emphasis is by this Court in the Nyquist case, referring to the DiCenso case -- "The State must be certain, given the Religion Clauses, that subsidized

teachers do not inculcate religion."

And the Court found there, in both Nyquist, Levitt, DiCenso, Lemon, that there was no such certainty. There is no such certainty in this case.

All there is is a statement in the rules, in the regulations, that the Title I teachers may not teach religion.

But that alone doesn't -- that was also the case in each one of these cases, all the State statutes struck down, in DiCenso, Levitt, in Lemon, in Johnson, all those did have the same forbidden --

QUESTION: In Lemon and DiCenso, no public authority could dismiss the teacher for violating that, such an instruction. Isn't that true? Because the teachers were not under the supervision and control of the public board of education.

MR. PFEFFER: The sanction was there, that the funds could be and would be turned off. And those funds went to the teacher himself if there was a clear sanction, because, for example, in DiCenso, the record shows that a teacher who wanted to get public funds had to take, write a written promise of the conflict, that he or she would not teach any religion. And that violation of that meant, as far as the law was concerned, dismissal to the extent of being paid by public funds.

Now, finally, --

MR. CHIEF JUSTICE BURGER: Mr. Pfeffer, you're down to within three minutes of your reservation of ten.

MR. PFEFFER: All right. Thank you.

Now, finally, the -- this Court, in Walz, the tax exemption case, and then subsequent cases, added a new dimension to the test for impermissibility under the Establishment Clause.

Previously, under the Shemp ? case, it was a forbidding of any law which either has as its purpose the advancement of religion or whose primary effect was the advancement of religion. And we do not assert here that the purpose of this lawsuit is to advance religion. We say its effect is.

But, in Walz and then in Lemon, the following cases, this Court added a new dimension, that even if those two qualifications were satisfied, if the result of the law is entanglement of church and State, that, too, is unconstitutional.

It was a new dimension, but it goes back, way back, at least as far as the cases in which the Court said it could not intervene in intrachurch disputes, going back to the Civil War period.

But this entanglement, which is one of the foundations of the Establishment Clause is inevitable in this situation; you must, in order to assure that teachers who are working in a church school, under at least partially the

supervision, and the regulations show that, under partially the supervision of the school authorities, do not, because of their religious commitment, use their office to advance religion.

It must be put under continual surveillance. It must be subject to continual policing. This surveillance is exactly what the Court held, as forbidden by this.

MR. CHIEF JUSTICE BURGER: Your time is up now in chief, Mr. Pfeffer.

MR. PFEFFER: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Sullivan.

ORAL ARGUMENT OF THOMAS M. SULLIVAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SULLIVAN: Mr. Chief Justice, and may it please the Court:

Let me try to outline our position in this case, as it has been from the time we filed the complaint.

We say that the Title I of the Elementary and Secondary Education Act of 1965 provided that comparable educational services for educationally deprived children, and relating to special educational benefits, must be provided on a basis consistent with their number and the extent of their educational deprivation.

We say that this had to be done on a comparable basis, across the board, for public and non-public children

alike.

We say that in carrying this out certain regulations were promulgated by the Office of Education We say that this is a federal law funded entirely by federal funds; it's a federal law, there's no matching funds, no State funds of any kind.

We say that in Missouri the State Board of Education, very early in the game, took steps to preclude either dual enrollment or the mobile educational service of sending the teacher in, the public school teacher into the private school.

We say that in almost every situation, when the State Board precluded those two methods of participation by the private schools, the private school children could not, did not, have not received their fair equitable comparable participation in Title I benefits.

We say that in Missouri we recognize that there is a compulsory attendance statute that the Court of Appeals referred to, that the Supreme Court of Missouri has interpreted as to preclude dual enrollment or shared time.

We say that if we're going to accommodate that decision and that State law, as the Court of Appeals suggests, the only thing, and the only other way that we can receive comparable educational benefits for the private school children is by sending the public school Title I teacher into the private school, to teach the educationally deprived,

qualified, eligible non-public school children, and to give them the Title I benefits in that fashion.

We say generally that this is constitutional for a number of reasons.

We say that the regulations in the Act have made provision that would make it beyond any question, it seems to me, affected by the Establishment Clause.

And we say that the relief directed by the Court of Appeals and implemented by the injunction and the order of the District Court is a proper, lawful, and clearly warranted holding of the Court of Appeals.

The --

QUESTION: Well, dual enrollment would never be sufficient, then.

MR. SULLIVAN: Sir?

QUESTION: Dual enrollment, where the class is held on the public school property, would never be sufficient.

MR. SULLIVAN: Not in Missouri, Mr. Justice, because --

QUESTION: No, under the Act; forget Missouri.

MR. SULLIVAN: Oh, I think it could -- I think it could be, certainly.

QUESTION: Well, by definition, the class is carried on on public school property, and I thought the Court of Appeals said that if these services are furnished by teachers

on public school property during the school hours, it must be furnished on -- be made available on private scholl property during school hours.

MR. SULLIVAN: That's right, Mr. Justice --

QUESTION: Then the dual enrollment program would never be sufficient.

MR. SULLIVAN: It would be in Missouri. At least that --

QUESTION: Forget Missouri. They said the Act required it.

MR. SULLIVAN: No, Mr. Justice, they did not say that.

They said that the Act -- they said that the Act did not --

QUESTION: All right. Well, I'll put it to you this way: if they did say it, they were wrong. Is that it?

MR. SULLIVAN: Well, if they did say it, they were wrong.

QUESTION: Okay. That's all I needed. Thank you.

MR. SULLIVAN: They said the Act did not provide any particular method, and I can -- I think I can quote that. They said the Act did not provide any particular -- the Court of Appeals said: We further observe that no particular program or service is mandatory under the Act.

They took that, in that part of their opinion, they

analyzed the holding of the statute and the holding of the Missouri Supreme Court, and they said that in Missouri there will not be shared time, there will not be dual enrollment. We're going to accommodate State law in that respect.

They found no such law with respect to sending public school teachers into private schools of Missouri.

So, accordingly, --

QUESTION: I just want to put State law aside for the moment. Did they, did the Court of Appeals construe the federal Act as requiring, because it required comparable training, did it construe the federal Act as meaning that if, if certain programs were carried on in public schools during school hours that comparable programs must be carried on, be made available to the private school?

MR. SULLIVAN: It construed the Act that way, but only in the sense and in the background of the evidence and facts presented to them.

QUESTION: Well, that's all right. Nevertheless, as I understand it, the local educational agency in Missouri, if it's going to furnish a program on public school property, must furnish a like program on private school property.

MR. SULLIVAN: In Missouri, that's right, Mr. Justice.

QUESTION: Well, it would be true anywhere, wouldn't it?

MR. SULLIVAN: No, Mr. Justice.

QUESTION: Well, at least they construed the Act in this case to require that.

MR. SULLIVAN: They did, but, as I say, only in the light of the evidence and the background that was presented to them in this case.

QUESTION: Well, only in light of, I thought you said, Mr. Sullivan, the Missouri law that has an alternative, dual enrollment, was, as a matter of State law, prohibited?

MR. SULLIVAN: That's right, Mr. Justice.

QUESTION: And it's based on that consideration that the statute was applied the way it was.

MR. SULLIVAN: That's right. Based on that consideration, and the further element inherent in the Court of Appeals opinion and in the injunction, that it only applies where the Title I benefits are rendered on very regular school hours on public school premises.

Now, there are at least one, and perhaps more, local educational agencies, that is a school district, as we generally use the term. In Missouri, due to their size or due to their nature, who do one of two other things --

QUESTION: After hours?

MR. SULLIVAN: -- there's one that has no Title I grant, and they won't request it, for reasons of their own. They're a well-funded school district. They won't request it,

and they haven't.

And that's regardless of how many educationally deprived are in the private school there in that school district, they just are local --

QUESTION: They take care of the problem themselves?

MR. SULLIVAN: That's right. And in the eligible, otherwise eligible children in private schools, they have no right, under the Act, to request that --

QUESTION: Well, are there any school districts that have after hours --

MR. SULLIVAN: One or two, yes.

QUESTION: Yes.

MR. SULLIVAN: Yes. And they have it, the entire program is either after hours or in the summertime. They are smaller districts, where those programs seem to -- at least I'm not an educator, but it seems, as I understand it, they work in those school districts.

I think, though, it is clear -- and the court, the District Court in its injunction, and the Court of Appeals excludes that. They don't say they have to provide the services in private schools for educationally deprived children across the State.

They say only when it is provided in the public school in Missouri, in light of the compulsory attendance statute.

Now --

QUESTION: But this injunction, anyway, applies only to the school districts we have involved here; is that right?

MR. SULLIVAN: No, it only applies to the State Board of Education. That was the only -- and the Commissioner. Those were the only defendants in the case. Those were the only ones sued.

That is -- the first section of the Petitioners' brief, then, if that is the meaning of it, of course, that if they're saying that the Act does not mandate assignment of publicly employed teachers to teach in religious schools during the regular school hours, if they are saying that the Act does not infer but literally says that you must send in public school teachers to teach in the non-public schools for educationally deprive children, we -- of course, that's their own windmill that they're charging.

The Court of Appeals never said that, and I've never said that, and our complaint never said that.

The Court of Appeals said just the opposite, really. The Court of Appeals said that -- as I mentioned before, it's on page A26 of the Petition for Writ of Certiorari, on page 1354 of the Federal Second citation -- the Court of Appeals says: "We further observe that no particular program or service is mandatory under the Act."

And that, of course, is what the Congress intended, and that's what the United States Commissioner and Office of Education intended.

They presented outlines and methods, but most particular, service is mandatory.

Then they went on to say: But, granted these other conditions, in Missouri they must send in Title I, publicly employed Title I teachers into the private schools; and that of course is further subject to the regulation, that they can teach -- of course, special educational subjects for eligible educationally deprived children under this essentially welfare act, it seems to me -- but, furthermore, they cannot teach, they cannot teach any course which is already being taught in the private school; and the regulation clearly provides for that.

So it's still a very narrow, very narrow situation.

QUESTION: Mr. Sullivan, why shouldn't the District Court have abstained here? If, as Mr. Pfeffer said, that the Petitioners requested them to do, if there's a significant undecided question of Missouri law involved?

MR. SULLIVAN: Well, he should not have abstained, because we were seeking relief under the federal Act.

QUESTION: But the Court of Appeals itself, which ended up granting you relief, was able to do so only after it had resolved what it conceded to be an important and undecided

question of Missouri law.

MR. SULLIVAN: He did, but he -- well, let me withdraw that.

In the first instance he did abstain. And he also held that we hadn't exhausted administrative remedies. We had to take that to the Eighth Circuit. And of course that was reversed by the Eighth Circuit because, in the earlier opinion they said this is not a case for abstention.

QUESTION: Well, but --

MR. SULLIVAN: Judge -- excuse me.

QUESTION: Why was it not a case --

MR. SULLIVAN: Because of the --

QUESTION: -- for abstention?

MR. SULLIVAN: Because these youngsters were seeking their federally established right.

QUESTION: Well, but that just begs the question, I think. If the Court of Appeals in the Eighth Circuit conceded in its opinion that there was an important question of Missouri law involved, it went ahead and decided that question. So, in its view, and the view I'm talking about in which you prevailed, it wasn't just a federal right, you had to prove a question of Missouri law, too.

MR. SULLIVAN: Well, we proved the question of Missouri law, but I still think the basic question was always federal, under Title I, our rights under the Title I Act.

Now, on the abstention cases, and the way the Eighth Circuit Court of Appeals decided this case, under the abstention cases, never dealt, that I can recall, with a federal statute; it was a question of contrasting a State law with the Federal Constitution. And --

QUESTION: Mr. Sullivan, suppose there had been a decision of the Supreme Court of Missouri, reaching a contrary result on this issue of State law, at the time this case got to the Court of Appeals,reaching a different decision on State law than the Court of Appeals came to. Do you think that --

QUESTION: Namely that --

QUESTION: -- dual enrollment --

QUESTION: -- dual enrollment was permissible.

QUESTION: -- was permissible. Now, if that has been the state of the Missouri law, when this case was in the Court of Appeals, now, do you suppose the Court of Appeals would have come out with the interpretation of the federal statute that it did?

MR. SULLIVAN: No, they would have said either one is all right.

QUESTION: We might not have had this case.

MR. SULLIVAN: I still think we would have the same position on the part of the State Board of Education, I don't think that the decision of the Court would have meant anything

to them. I still think they would have denied the rights to these private school children.

As they say in their brief, that --

QUESTION: You mean you think if the Missouri Supreme Court had said that dual enrollment was a proper -- was proper under the educational law of Missouri, that the State Board of Education would have ignored that?

MR. SULLIVAN: The State Board says in their own brief, and particularly in their reply brief, that it is the State Department of Education that determines what the relevant State law is, and they're the ones --

QUESTION: Even if the Missouri Supreme Court --

MR. SULLIVAN: I think so. I mean, that's what they say in their reply brief. They say they determine what the applicable State law is.

QUESTION: But assume what Mr. Justice Brennan just suggested to you, then your position is that merely would have widened the options available --

MR. SULLIVAN: Certainly.

QUESTION: -- to get this remedial training to the students?

MR. SULLIVAN: I would have hoped that the dual enrollment would have been -- provisions would have been made for dual enrollment. I would have hoped that the children could have participated and had received their genuine

opportunities, in the language of the guidelines, to participate in comparable programs. I would have hoped that was the case, if dual enrollment was clearly permissible.

QUESTION: But the injunction that would have been entered was to cease disapproving any program that provides either for dual enrollment or furnish it on private --

MR. SULLIVAN: I beg your pardon, Mr. Justice?

QUESTION: Well, the injunction that was entered, that was ordered entered by the Court of Appeals, ordered the State agency to quit disapproving programs for that suggested, furnishing services on private school property?

MR. SULLIVAN: Yes.

QUESTION: Now, if the decision of the Supreme Court of Missouri had been the other way, the Court of Appeals injunction would simply have, as the Chief Justice said, widened the options.

MR. SULLIVAN: With respect to dual enrollment?

QUESTION: Yes.

MR. SULLIVAN: Well, I don't -- if there was a -- if dual enrollment was available, I mean that would have been a, maybe a little more cumbersome and awkward, but a -- certainly have been a valid way for these children to receive their educational benefits. And I would have hoped that it would have been done. It would have been carried out in the programs and projects.

QUESTION: Mr. Sullivan, certainly what I had conceived to be the undecided point of Missouri law was what the Court of Appeals refers to at page A20 of the Petition for Certiorari, where they say it's conceivable that under Missouri law the use of all funds might have been prohibited. So it isn't just a question of -- that the Supreme Court of Missouri might have said dual enrollment is okay. They might have said neither of these is okay.

And, as I read the Court of Appeals, their opinion says if that had been the Missouri law, they would not have issued the injunction which they issued here.

So, it is -- although, if the Chief Justice's hypothesis is right, and the Missouri Supreme Court had said what he said, the options would have been broadened, it's conceivable that the undecided point of Missouri law, that all funds are barred from this kind of a thing, might have gone the other way and then you would have gotten no relief, I would think.

MR. SULLIVAN: Well, Mr. -- Judge Lay, in the majority opinion, said -- he hypothesized a situation, if this is, I think, an answer, that -- on page -- I'm looking at the slip sheet, 23 -- A23 in the Appendix, he says: State law must be accommodated, but he said, suppose Missouri passed a law that prevented -- said just this: that no textbooks, school books, Title I aid, any other ESEA aid,

the federal milk program, in the State of Missouri shall be permitted to go on the private school premises, nor shall there be dual enrollment.

QUESTION: State support put all its rights under Title I of the Act.

MR. SULLIVAN: There would be no Title I, that's right, Mr. Justice, Mr. Chief Justice. That's exactly right.

QUESTION: But that's a State constitutional matter, isn't it? It would be an issue under the State Constitution as to whether Missouri law barred all of these programs.

MR. SULLIVAN: Yes. And if it were to assume the existence of such a law or statute, which there is none, they don't profess to -- there is a constitutional -- there is a constitutional article in the State of Missouri which says generally that any federal program can be, will be accommodated in Missouri. And that's part of the Missouri Constitution, cited by Judge Lay towards the latter part of his opinion.

And that was --

QUESTION: That's the one, "Money or property may also be received from the United States and be redistributed together with public money of this State". Is that the one?

Missouri Constitution, III, Section 38(a).

MR. SULLIVAN: Missouri constitutional amendment, it's -- Article III, Section 38(a).

QUESTION: Yes.

MR. SULLIVAN: And so I think we've obviated that situation.

But, again, if there was such a law, if they just block everything, or attempt to block it by statute, as Judge Lay says, assuming that the equal protection problem would be overcome, there could be no Title I.

QUESTION: But the Wheeler decision that barred dual enrollment was a statutory construction matter, wasn't it?

MR. SULLIVAN: Yes, it was, Mr. Justice.

QUESTION: It was a matter of saying that the State's compulsory attendance laws required --

MR. SULLIVAN: That the child was to stay in its own school --

QUESTION: -- was to stay in his own school.

MR. SULLIVAN: -- for so many hours of the day.

QUESTION: And it would be a rather different question as to whether a public school teacher could be sent into a private school?

MR. SULLIVAN: Oh, that wasn't included in that case. The only thing that was --

QUESTION: Well, I understand, I understand that.

MR. SULLIVAN: The only thing that was included in that, there was a mention in that case that public school teachers employed -- just touched on it in the opinion -- but

for public school teachers employed out of Missouri public school funds to teach in public schools, they can't be sent to private schools.

QUESTION: But if there were a case in Missouri about sending public school teachers into private schools, the argument would be based on -- what -- the Missouri Constitution?

MR. SULLIVAN: The fiscal elements of the Missouri Constitution. And I think that was in that same case, but only the fiscal elements. There's no question in Wheeler vs. School District --

QUESTION: I understand.

MR. SULLIVAN: -- of the First Amendment or anything else.

QUESTION: I understand.

MR. SULLIVAN: They say when you're paying a public school teacher out of public school funds, he must be used for public school purposes, and you can't send him to a private school. The fiscal part of the Constitution.

QUESTION: But it still would be a constitutional construction problem, though.

MR. SULLIVAN: Yes, unh-hunh. There's certainly no statute that affects us in any degree, that I know of, except the one that -- maybe some statute on public school funds.

But, as I say, the opinion of the Attorney General certainly was that there -- on which the Handbook says, points out in the Handbook of the Office of Education, the opinion of the Attorney General was to the effect that there was nothing wrong with sending a teacher into the private school.

And that, the constitutional provision that was referred to, that Mr. Justice read portion of, all of those things were what prompted -- and the inequities that were consistently perpetrated in this Act against private school children, educationally deprived private school children in Missouri for these eight years, or seven years under the Act, all of those things were what prompted the Court of Appeals to issue its, frame its opinion, and prompted the District Judge -- of course he issued the mandate and compliance therewith, issued an injunction and compliance with that mandate, and properly so.

And I come back, neither one of them construes the Act as saying that it's mandatory under the Act, by the wording of the Act, to send the teacher in.

QUESTION: Now, there was no issue of abstention raised in the District Court, was there?

MR. SULLIVAN: The first time there was, yes, sir.

QUESTION: There was? Who raised that?

MR. SULLIVAN: The -- nobody. The District Judge

raised it.

QUESTION: But neither the defendants -- the defendants didn't ask for --

MR. SULLIVAN: No, the defendants didn't raise it.

QUESTION: So the argument for abstention is that you should await a State court construction of its Constitution, in order to avoid a federal statutory question?

MR. SULLIVAN: Well, I -- I guess --

QUESTION: Because that's all -- that's all that the Court of Appeals got to, was a federal statutory question.

MR. SULLIVAN: Well, the District Judge also raised, in that same plane, he mentioned that we hadn't exhausted administrative remedies, of which, you know, there were none. And that was reversed by the Court of Appeals in the Eighth Circuit on both counts.

But the abstention question was not, as counsel suggests, raised by defendants, the abstention question was raised by the District Judge only. And I think clearly, in proper situation, the abstention cases like the Alabama -- excuse me, the Alaska Fishing statutes, things like that, were questions where a State statute could be interpreted as being in conformity with the Constitution.

And not a question of whether you're going to implement properly the federal benefits provided by federal

law.

I do want to mention the constitutional issue, of course, since counsel raises it and goes into it.

The essential thing is that all of the secular benefits to be rendered under this Act are clearly demarked, prescribed, and confined by the -- not only by the statute but by the regulations.

Now, this is not, as counsel would suggest, suggests in his brief and again today, this is not a case of general educational aid across the board. That's not it at all.

This is not a case of just supplementing the private school curriculum. That is expressly forbidden by the Act. The Act and the statute are confined to special and particular educational benefits for educationally deprived children. They are not designed, as a general aid to education in non-public or public schools, either one, but particularly in private schools can these benefits be used to add to -- to replace an existing program.

I think that is made abundantly clear throughout.

The provision that's suggested in the brief as to the payment of private school teachers is a -- well, the one example suggested by the Petitioners is without any merit at all, they refer to the Handbook as giving authority to pay private school teachers. What the Handbook says is that

when private school teachers are attending an in-service training session, they can get their lunch money and their transportation money, if they're working on Title I projects. It has nothing to do with this Act whatsoever.

The other portion, of course, if a person is working full time in a private school, then that person can be, if he is a teacher in summer school in a Title I program, or anything else, can be paid by the -- take other employment.

QUESTION: Mr. Sullivan, what -- you say this is no aid to the program, but isn't it true that if these pupils don't get this aid, they're in bad shape?

MR. SULLIVAN: No, this has got nothing to do with aiding the limited or slow --

QUESTION: Aiding children in learning how to read?

MR. SULLIVAN: Oh, I thought you meant the schools, the programs --

QUESTION: Oh, no, the children.

MR. SULLIVAN: I thought you meant the programs in the schools, Mr. Justice.

QUESTION: I'm talking about the children.

MR. SULLIVAN: Oh, the children --

QUESTION: And if this money didn't come, and the private schools wanted to give their children an adequate education, they would have but one thing: they'd have to put the money up themselves.

MR. SULLIVAN: No. They just --

QUESTION: Well, how else would they do it?

MR. SULLIVAN: They just can't give and haven't been giving the, generally speaking, educationally deprived children in private or in public schools the --

QUESTION: Well, assuming that it's necessary for them to have this special help, and the private school decided they should have the special help. But for this, the only way that could be done would be for the private school to pick up the tab. That's true, isn't it?

MR. SULLIVAN: Well, it's true if the special educational benefits are going to rendered to educationally deprived children.

QUESTION: Right.

MR. SULLIVAN: If the government doesn't do it, somebody else will. But --

QUESTION: Well, their parents might have to send them to a special teacher.

MR. SULLIVAN: That's one element, there are others. The parents could, as the Petitioners says here, as the Petitioners say in the record, that they give them equal opportunity to participate by withdrawing from the private school and attending the public school. Or coming after hours. Those are the two options that were expressed in the record.

QUESTION: Well, then, I would ask about the point made: where is the protection against these teachers teaching religion?

MR. SULLIVAN: Well --

MR. CHIEF JUSTICE BURGER: I just want to alert you that you've got five minutes of your own time left.

MR. SULLIVAN: Thank you, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Four minutes, approximately, now, if you will.

MR. SULLIVAN: There are several provisions. There is the provision that -- of course these teachers remain strictly under public control all the time. There are none of the funds can be used for worship or religion --

QUESTION: Well, that's up to the teacher. How is that supervised?

MR. SULLIVAN: The same way they are in the public school, by the -- if they have some teacher who is bootlegging religion in to a Title I class, they, the public school agency discharges that teacher, just as they do today --

QUESTION: Well, somebody would have to tell them, somebody would have to report on them.

MR. SULLIVAN: Beg pardon?

QUESTION: Somebody would have to report them?

MR. SULLIVAN: That's right. But we don't, Mr. Justice, we don't establish a national system of --

QUESTION: Policing.

MR. SULLIVAN: -- reporting, or we're not going to bug these classrooms, I hope, Mr. Justice, in order to find out and determine just which teachers are sneaking this religion in to Title I classes, or in public school classes, wherever they are.

Now, the ordinary -- Petitioners' brief talks about going into the -- going into public school classes and maintaining surveillance. That isn't done in any kind of a routine basis in the public schools, we haven't established any nation of -- the case of this Court, the Kichian? case, we don't establish any particular orthodoxy in our classrooms, to which everybody must conform. The public school teachers, whether they're teaching in the ordinary public schools or Title I in a public school, or Title I special remedies in a private school, they operate, they do the best they can, they're human beings, I'm sure that, at this moment, some public school across this country, there's somebody that's putting out a little religion.

But we're not -- I don't know there's very much that you and I could do about it, Mr. Justice.

QUESTION: They get as much supervision as the teachers that are teaching in the public schools get.

MR. SULLIVAN: The Title I teachers should, that's the idea of it. And it can be -- that Title I teacher, to

my mind of thinking, can give a sermon at his Baptist Church the night before, he can go to his Knights of Columbus meeting the night before, he can sit and watch television, as most of them are doing, and never give a thought to religion from one day to the next, and that teacher can walk in and give his Title I class in remedial reading the next morning, whether it's in a private school or whether it's in a public school, or whether it's any place else that the local educational agency might provide.

And that is where, that is where we say that there is no surveillance of that type required.

In Lemon and DiCenso, what we're concerned about, it seems to me, was that the words kept running clear through the opinion, "a dedicated religious person", "a person deeply committed to her own religion", "teaching under religious supervision", those were the phrases that I think were in that opinion, the majority opinion, at least four or five times.

And we don't -- we're not talking about, as far as we know, dedicated religious persons. We may be. The public school teachers might be dedicated religious persons. I don't know.

But those are -- we don't have that conflict that the Court saw in Lemon that required the surveillance.

It seems to me that we have a much clearer case

than the Allen case, because in the Allen case, at least in two of the dissenting opinion, it seemed to be predicated on the relief that these people could, in the private schools could select their own books about historical events and so forth.

We don't have that here. The public school agency selects that Title I teacher, not the private school teacher, there is no religious test or anything like that.

So I don't think we have any problem at all under the Establishment Clause. I think it's well within the rule of Allen, and I don't think there's any question here about secular purpose, or even the primary effect.

I think the Congress anticipated the words of this Court, as set out in Norwood vs. Harrison, that any program with a legitimate purpose that stays between the effect and entanglement problem, is constitutional under the Establishment Clause, and that's what the Congress did here, and that's what the Office of Education requires in all of its regulations.

MR. CHIEF JUSTICE BURGER: I think your time is up now, Mr. Sullivan.

MR. SULLIVAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE UNITES STATES AS AMICUS CURIAE

MR. FRIEDMAN: Mr. Chief Justice, may it please the Court:

At the outset I would like just briefly to explain to the Court how Title I of the Elementary and Secondary Education Act of 1965 operates, because I think that is crucial to the case.

The statute was passed because of a recognition by the President and the Congress that there were a large number, literally millions, of educationally deprived children in this country who, because of lack of adequate education, would not be able to assume their rightful and proper place in American society.

And the basic purpose of this statute, as described in the Congressional Declaration of Policy at the outset of the statute, was to enable the local educational authority to meet the special educational needs of educationally deprived children.

The focus of the Act, the way the Act is created, is to turn over vast amounts of federal money to the State educational authorities in order to collect, in order to improve the deficiencies that existed in the education of these educationally deprived children. And it deals with children who come from poverty. The basic touchstone for

getting the aid is that the children must come from areas of the city or the country where the income level is low.

Now, the plan, as it's envisaged, basically is as follows:

The States initially apply to the Commissioner of Education for authorization, a rather simple document which they all filed, and these documents were approved eight or nine years ago, saying they wished to participate in the program, and they will meet the statutory standards.

The statutory standards are very general. What is says basically is that the State educational authorities shall approve applications filed by local authorities, which are consistent with the guidelines promulgated by the Commissioner of Education.

The Commissioner of Education has promulgated guidelines. The statute leaves it to the informed discretion of the local educational authorities, the local boards of education, to determine what is the most appropriate method, the most effective method for meeting the special educational needs of these educationally deprived children. At the --

QUESTION: While you're doing that, I take it, Mr. Friedman, though, within any limitations that may be imposed by State law.

MR. FRIEDMAN: Yes, Mr. Justice.

QUESTION: That is, I mean the local educational

authorities.

MR. FRIEDMAN: The local educational authorities --

QUESTION: They have to adhere to State law, do they not?

MR. FRIEDMAN: -- have to adhere to State law, and, indeed, the regulation specifically recognize and contemplate that -- and recognizes that because of certain requirements of State law there may be situations where particular programs have to be worked out.

But the programs, of course, are all supplementary services. These basically are services that would not be provided in the schools, public and private, under the school's normal operating procedure.

These are children who are not able to meet, who are not able to meet the normal standards. The regulations of the Commissioner define an educationally deprived child as one whose educational achievements do not reach the level customarily associated with children of this age group.

This is the basic part, the basic thrust of the statute is to help bring the level of all the children up; and of course the statute is not, in any way, directed to aiding schools, the statute is designed to help the problem of the children. And the statute, unlike those that this Court had before it in some of these other cases, is not in any way designed to aid the private schools. These are not cases

such as Lemon, DiCenso, Nyquist, in which the State has decided that the private schools have a serious financial problem and they need an infusion of government aid to keep them going. This is a statute in which Congress decided that the children, not schools, children need help. Children need help to enable them to achieve their rightful place in America.

And the Congress recognized that these children who need help are not only in the public schools, they're also in the private schools. Poverty draws no lines between the public and the private schools. Religiously affiliated schools have just as many as poor children as the public schools. The very, in this very case, the two parochial schools involved are in the ghetto of the city of Kansas City.

QUESTION: Well, and affluent people have just as many people with reading problems as poor, in general, do they not?

MR. FRIEDMAN: Yes. It's unfortunate it's a condition which draws no lines, it's a condition that can happen.

MR. CHIEF JUSTICE BURGER: I think we'll resume there after lunch, Mr. Friedman.

[Whereupon, at 12 o'clock, noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Friedman, you have about ten minutes left, I see.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING RESPONDENTS -- [Resumed]

MR. FRIEDMAN: Mr. Chief Justice, may it please the Court:

I'd like to continue briefly with my discussion of the way that the statute operates, and the next point I'd like to make is that this program is completely under the control of the public authorities. It is the local school district and the State educational authorities, that formulate the plans, the State educational authorities review the plans for compliance with the standards. The teachers who provide these services are all employees of the public school agencies, they're no teachers provided these schools who are employed by any of the religiously affiliated schools.

The teachers are subject to the control and supervision of the public school authorities, not under the control of the private school authorities.

And of course, and I think it's been clear -- it's clear by now, there are no funds at all under this statute paid to the private schools. The funds are all paid to the

State, and it's the State who provides these services.

Now, in addition to that, the vast bulk of these services go to --

QUESTION: Mr. Friedman, did you say -- does the law require that only public school teachers be used?

For example, could a local board of education employ some trained professional in teaching in a parochial school?

MR. FRIEDMAN: Not -- they could only -- they could only employ them, for example, during, say, in a summer situation.

QUESTION: I see.

MR. FRIEDMAN: I think -- let me explain that if I may, Mr. Justice, the way it is set up.

The actual control of the teachers, the actual content of the program is all handled by the local authorities.

Now, to the extent, I suppose, that State law would permit, the State public authorities to hire someone who is teaching in the parochial school part time, during the summer, to conduct remedial reading program, I would see no problem to that.

But what they cannot do is they cannot say a teacher, who is teaching in one of the parochial schools -- You are to spend part of your time now providing these Title I services. The services must be provided by the public school

teacher.

QUESTION: You mean the people on the local educational agency's payroll?

MR. FRIEDMAN: Yes. Yes.

QUESTION: Well, couldn't a State or its subdivision hire a teacher who did nothing else but this, didn't have any other teaching duties in the public school, but taught only remedial reading, went around, maybe, to various public schools and did so?

MR. FRIEDMAN: Oh, yes. Oh, yes. I'm sorry, perhaps I misspoke myself.

QUESTION: Or perhaps I missed it.

MR. FRIEDMAN: I am not suggesting that they have to be regularly otherwise utilized teachers in the public schools.

QUESTION: Yes.

MR. FRIEDMAN: They could certainly, I am sure --

QUESTION: And many of them in fact are, aren't they?

MR. FRIEDMAN: Yes. Yes. But they --

QUESTION: Hired for this purpose alone.

MR. FRIEDMAN: For this purpose alone.

QUESTION: Right.

MR. FRIEDMAN: But they are employees of the public school authority; that's the point I wanted to make, to get to.

QUESTION: Right.

MR. FRIEDMAN: Yes.

Now, the vast bulk of the children who are receiving the benefits of these services are enrolled in the public schools, the indication we have is that approximately only five percent of the children who are receiving the benefits of these services are in fact enrolled in the private schools.

Now, one other thing I think is important. In contrast to the situation with the plans involved in the Lemon case, in the Lemon case the grants were made for the provision of secular educational services, and therefore you had the excessive government involvement -- I'd like to stress that the standard this Court has always recognized is excessive government involvement. There may be situations where there is some government involvement, but the thing is there cannot be excessive government involvement.

QUESTION: The others used the phrase "entanglement" rather than "involvement", it may mean the same thing, but --

MR. FRIEDMAN: Entanglement, yes. I stand corrected, Mr. Chief Justice.

QUESTION: -- it has other connotations.

MR. FRIEDMAN: Excessive government entanglement.

There, in the Lemon type of situation, it was necessary for the State to subject the activities in the religious schools to surveillance, to be sure that the

teachers who were being subsidized, or the school, the money which the school was receiving was used solely for secular purposes. And that was one of the serious vices that this Court found in the Lemon case.

Here, there's no use at all of any moneys possible for that purpose, and the educational authorities, the State authorities do not have to make any determination what is secular, what is sectarian, whether the teachers are strictly observing the limitations; that the parochial school teachers, when they are paid with the State funds are in fact limiting themselves to secular services. There's not that problem in this case.

Because here what you're having, basically, as I have indicated, is the provisional supplemental services, namely, remedial reading, remedial mathematics, speech, that kind of thing, which is necessary to bring the children up to a decent educational level.

Now, I'd like to turn now to the question of the -- the statutory question in the case, and there's been a lot of discussion here as to what the Court of Appeals held in this case.

The actual holding on the issue of what is permitted or required under the statute, I think is set forth in the first sentence of page A25 to the Petition for Certiorari, and what the Court said at the top of the page is:

"Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes" -- authorizes, not requires -- "Title I authorizes special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises."

I think what the Court of Appeals.

QUESTION: Well, what about the next sentence?

MR. FRIEDMAN: Well, what the Court is saying, I think, Mr. Justice, is that there is a requirement under the Act that the services provided be comparable, and if the only way in which the State is providing the services is by providing them during hours, during the school hours, on the premises of the public school, that the children regularly attends, then they have to provide comparable services in the private schools, to send the teachers on.

But -- but, as this case now stands, we don't know what the State of Missouri is going to formulate in the way of a plan. Perhaps -- perhaps the State of Missouri may now decide, in the light of these decisions -- in the decision of this case, that it will provide these services in the public schools after hours. And if it provides them in the public schools after hours, under the injunction issued by the District Court it is not required also to provide these services in the private schools after hours.

Or, conceivably, the State of Missouri may now decide --

QUESTION: I know, but the claim is the State shouldn't have to respond to an injunction like this.

MR. FRIEDMAN: Well, but, Mr. Justice, that is because of the -- the reason, the reason the State has to respond to this is because of the requirement in the statute that it's comparable, that they have to provide comparable service.

QUESTION: I know, but part of the issue is whether comparability, as used in the Act, requires that the programs be furnished on the premises of private schools if they are furnished on the premises of public schools. That's part of the issue here.

MR. FRIEDMAN: That is part of the issue, Mr. Justice, but we don't know -- we don't know at this time: one, whether the State is going to undertake to furnish them on that basis; or, two, precisely how it's going to furnish them.

It -- in this case, it strikes me as a somewhat strange situation. The Court of Appeals specifically declined to rule on the constitutionality of these, this issue, because, it said, we have no precise plan before us. We don't know exactly how these services are going to be provided.

Or, as they described it, as a conjectural hypothetical state of facts.

QUESTION: Well, do you think the injunction that

was issued in compliance with the mandate was consistent with the opinion of the Court of Appeals?

MR. FRIEDMAN: Yes, I do. I do, Mr. Justice. I think the District Court has interpreted the opinion of the Court of Appeals as saying that if you provide services on the public school premises, which the child customarily attends, that is, in the school where the child attends, and if this is done during regular school hours, in the light of testimony that when you had that kind of a situation after hours or Saturdays or summer school, is not educationally comparable in that one situation, the Court of Appeals said that it is necessary to provide similar services in the private schools.

QUESTION: Let's see if I get this, Mr. Friedman.

Looking at A46, this is the modified injunction consistent with the Court of Appeals opinion.

"Defendants are enjoined from disapproving any application ... on the basis that such application includes the use of Title I personnel on private school premises during regular school hours."

And what you're suggesting is that the Missouri authorities may, in fact, go, say, to a dual enrollment way of complying with the statute.

MR. FRIEDMAN: If that's permissible under State law.

QUESTION: Yes. And that if they did so, then they

would not be violating this injunction.

MR. FRIEDMAN: I believe that's correct, Mr. Justice.

QUESTION: Unh-hunh.

MR. FRIEDMAN: I see my time has expired.

Thank you.

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

Mr. Pfeffer, you have ten minutes.

REBUTTAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. PFEFFER: Thank you, Mr. Chief Justice.

May it please the Court:

I must take exception to the last statement made by Mr. Friedman. It seems to me that this is -- the mandate of the District Court is clear and ambiguous, and it leaves us no options.

It says: "Defendants are enjoined from disapproving any application of a Local Educational Agency ... on the basis that such application includes the use of Title I personnel on private school premises during regular school hours."

There's no way of interpreting this to allow shared time. Shared time would certainly -- or dual enrollment is not within this. It's not -- use of private school premises --

QUESTION: Well, that's just the point of this, it's not within this. And if an application is submitted that

says: the way we propose to enforce the program is on dual enrollment. Then it's not an application which states that it's going to use personnel on private school premises during regular school hours.

MR. PFEFFER: And therefore it would have to be rejected. It would have to be rejected, because we are enjoined, we're enjoined from doing anything but sending public school teachers into private schools during school hours.

Anything else, this is the -- we are enjoined from doing that.

Now, there was one other point I wanted to make in respect to that.

I would like to call the Court's attention to the fact that we do not concede that the only permissible alternatives under the Act are dual enrollment and sending teachers in.

We call the Court's attention to the statute, the language of the statute, which is on page 3 of our brief, which says -- what I'd like to call the Court's attention to is at the bottom of the page -- it's not page 3 -- page 3 of the Petition for Certiorari is just as good.

QUESTION: Thank you.

MR. PFEFFER: Yes, page 3. I'm sorry, page 3 of the Petition for Certiorari.

Sorry. Petition for Certiorari.

It says, dealing with private schools: "such as dual enrollment, educational radio and television, and mobile educational services and equipment".

I respectfully suggest that the statute does not limit, and there is no basis for saying that the only alternatives open to a State are either sending the public school teacher in or dual enrollment.

The "such as" indicates that these are illustrative of things which are permissible.

Another point I should like to make, and this is in response to a statement made by Mr. Sullivan, in response to a question by a member of the Court; that if the State of Missouri, the Supreme Court of the State of Missouri had ruled, for example, that dual enrollment under Title I is not inconsistent with State law, the State Board of Education takes the position it could ignore that, and deem itself to be the only judge.

I think that obviously is not so. Of course, we are a State agency, we're subject to the judgments of the State Supreme Court, and, indeed, our position is based upon our interpretation of the State Supreme Court decision.

If the State Supreme Court says to us, it is not a violation of State law to do your dual enrollment or sending teachers in. We're bound by that. If not, there will be a

judgment of contempt against us.

We say only that in between, in respect, the relationship, the intergovernmental relationship between the State of Missouri and the United States Office of Education, that the initial responsibility of determining State law rests with the State Board of Education.

Now, that leads us to another point in respect to the application. In the District Court, when the case first came up, we did not initially ask for abstention. The reason for that was that we took the position that State law was clear, and that our responsibility under State law was clear, that there was no question of State law, as far as the federal district was concerned, the question was the State of Missouri speaking through its State Board of Education ruled that this was not permissible.

Then the Court, on its own, raised this, and we then replied that if this Court deems that this is relevant, then it should abstain, and we so argued that it abstain, until a State Court decision could be reached, but the Court of Appeals said that State law is irrelevant.

QUESTION: Well, may I ask a question?

MR. PFEFFER: Surely.

QUESTION: The District Court, I gather, refused to abstain, did it?

MR. PFEFFER: The District Court initially abstained.

QUESTION: I know.

MR. PFEFFER: Abstained. Then the Court of Appeals reversed and said that State law is irrelevant.

QUESTION: I see.

MR. PFEFFER: Because it's a federal law, and therefore --

QUESTION: That is in this opinion, is it?

MR. PFEFFER: No, that's in the first -- that's referred to, that's the initial one. Then we -- they sent it back and we had a trial.

QUESTION: May I ask, would it be your view, Mr. Pfeffer, that it's open to us still to direct abstention if we thought that was the appropriate thing to do here?

MR. PFEFFER: No, Mr. Justice Brennan, it is our view, initially, that State law is irrelevant in a sense.

QUESTION: I know, but suppose we were to disagree with you and we thought that there ought to be --

MR. PFEFFER: State law -- then the only thing could be done would be -- and I think there's a procedure where you, where the State law question could be satisfied to the Supreme Court of Missouri. Assuming that, that that is --

QUESTION: No, my question is whether it would be appropriate for us to vacate and send this back and direct abstention. In your view, we could do that?

MR. PFEFFER: You could do that, Mr. Justice Brennan,

although that -- you could do that, but our contention, of course, our second contention is that even if State law is not violated, that this does violate the Establishment Clause.

QUESTION: Yes, I know.

MR. PFEFFER: So that neither --

QUESTION: But I gather, any State under this program, its Legislature could adopt a law forbidding any school district of the State from applying to participate in this program?

MR. PFEFFER: I assume so.

QUESTION: Yes. Well now, if the Missouri Constitution is to be read as in effect prohibiting any State, any school district from applying, then we'd never have to reach the Establishment Clause question in this case, would we?

MR. PFEFFER: I would assume so. The -- I think -- I think that would be correct. But we would -- we would --

QUESTION: Well, then that, if that were so, I think you'd agree, Mr. Pfeffer, then at least there's an issue here that might be avoided by directing abstention.

MR. PFEFFER: The only thing on that, Mr. Justice Brennan, is that that's what we originally argued, but we couldn't convince the Court of Appeals.

QUESTION: Well, maybe you've convinced us.

QUESTION: Mr. Pfeffer, do you agree with the Court

of Appeals, that under the Wheeler case in the Missouri courts, that dual enrollment is not consistent with the State statute?

MR. PFEFFER: I could only say -- I'm not -- you're asking my opinion or the opinion of the State Board of Education?

QUESTION: Well, I'm asking yours --

MR. PFEFFER: The State Board of Education --

QUESTION: -- I'm asking you what's your position here in this Court as to what State law is on dual enrollment.

MR. PFEFFER: Our position on State law is that dual enrollment and sending teachers into the --

QUESTION: That isn't what I asked you. I'm talking about dual enrollment.

MR. PFEFFER: Both. Yes. Both equally forbidden by the State Constitution of Missouri.

QUESTION: No. That isn't -- Mr. Pfeffer, I asked you whether you agreed that, under the Wheeler case, dual enrollment had been outlawed under State statute.

MR. PFEFFER: Yes, that's true. But --

QUESTION: So it is contrary to State law whether it's contrary to the State Constitution or not?

MR. PFEFFER: Yes, it's contrary to State law, whether it's -- yes. Yes. I think --

QUESTION: And your position is that under the State

Constitution, both forms are forbidden?

MR. PFEFFER: Exactly.

QUESTION: And which does bring in, into the spotlight, Mr. Justice Brennan's question, I must say.

MR. PFEFFER: Yes.

My only position is that as we interpret the statute, the federal statute, the federal statute requires accommodation to State law, constitutional, statutory, and decisions.

QUESTION: I understand.

MR. PFEFFER: Therefore, that it's the whole conglomeration, not merely one aspect of it.

QUESTION: Well, unless you were going to abstain, then, I would suppose that under this -- and if you agree that State statute bars dual enrollment, then you really are up against a federal constitutional question in the -- which is what you say is your position, that you are up against it?

MR. PFEFFER: Yes. In a sense, yes. The only thing I can also answer is that, as I interpret it, I would -- as I interpret the statute, and I mentioned earlier, those aren't the only two alternatives permitted.

QUESTION: Yes.

MR. PFEFFER: Dual enrollment and sending in. But these are possible, there are a variety of alternatives. We have been foreclosed by the decision of the District Court on remand, to use one option -- and the option which we want,

which we believe is the best option, we've been foreclosed, we've been foreclosed, we believe it's violative of our State law, our State Constitution, to send public school teachers in.

We've been told to forget that. You cannot use that as a criteria. We were enjoined from it. If we use it, we're under contempt.

This is the issue before the Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:22 o'clock, p.m., the case in the above-entitled matter was submitted.]

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