In the

Supreme Court of the United States

BENSON A. WOLMAN, ET AL.,

Appellants,

v.

FRANKLIN B. WALTER, ET AL.,

Appellees.

No. 76-496

Washington, D.C.
April 25, 1977

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v.	:	No. 76-496
FRANKLIN B. WALTER, ET AL., Appellees.	:	

Washington, D. C.,

Monday, April 25, 1977.

The above-entitled matter came for argument at 1:12 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOSHUA J. KANCELBAUM, ESQ., 2121 The Illuminating Building, Cleveland, Ohio 44113; on behalf of the Appellants.

THOMAS V. MARTIN, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Appellees.

DAVID J. YOUNG, ESQ., 250 East Broad Street, Columbus, Ohio 43215; on behalf of the Appellees.

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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 will hear arguments next in 76-496, Wolman v. Walter.

Mr. Kancelbaum, I think you may proceed.

ORAL ARGUMENT OF JOSHUA J. KANCELBAUM, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KANCELBAUM: Mr. Chief Justice, and may it please the Court: I am Joshua Kancelbaum, arguing on behalf of the appellants.

The appellants in this case are taxpayers of the State of Ohio who are appealing a decision of the United States District Court for the Southern District of Ohio which upheld the establishment clause validity of Ohio's latest statute which provides massive aid to the nonpublic elementary and secondary education in Ohio. The massive aid I referred to amounts to funding of in excess of $88 million for the bi-annium.

This case presents variations on the theme explored in 1975 by this Court in Meek v. Pittenger and indeed the statute here challenged, which is codified as Ohio Revised Code section 3317.06, and which we have generally referred to in the briefs as Senate Bill 170, was enacted in direct response to this Court's decision in Meek v. Pittenger.

At that time we had an appeal pending before this Court from the predecessor Ohio statute which was virtually

identical to the one decided in Meek v. Pittenger. A few days after the Meek decision, this Court remanded that appeal on the Ohio law for further proceedings and the response was the repeal of that law and the enactment of the present law.

The current Ohio law provides the following programs: Section A, textbook loans; Sections B and C, material and equipment loans; Section D, speech and hearing diagnostic services; Section E, physician, nursing, dental and optometric services, which incidentally we do not challenge; Section F, diagnostic psychological services; Section G, therapeutic psychological and speech and hearing services; Section H, guidance and counselling services; Section I, remedial services; Section J, standardized test and scoring services; Section K, programs for the deaf, blind and emotionally disturbed, crippled and physically handicapped; and, finally, Section L, field trip transportation.

It is our contention that except insofar as the narrow physically oriented health services are concerned, all of these programs fall afoul of the establishment clause. The essential pattern in this case which differentiates it from Meek v. Pittenger is basically that as far as equipment and material loans are concerned, the present law purports on paper to make these loans to pupils or parents rather than outright loans to the educational institution, and insofar as the services are concerned the services are now dichotomized so

that diagnostic services are performed on the parochial premises as they were under previous laws considered by this Court, whereas the so-called therapeutic services are now moved at least some minimum distance beyond the walls of the nonpublic schools.

QUESTION: All these services set out on page seven and eight of your brief that you have just run through for us, all of them you find violate the religion clauses of the First Amendment, is that your position?

MR. KANCELBAUM: All except physician, nursing, dental and optometric, Your Honor, except to the extent that therapeutic services are permitted under this Act to be performed on a public school premises as part of a general program applied across the board to pupils in the public and nonpublic schools.

QUESTION: But you do object to F, the diagnostic psychological services?

MR. KANCELBAUM: Yes, Your Honor.

QUESTION: And speech and hearing and --

MR. KANCELBAUM: Yes, Your Honor, those are the two categories of diagnostic services we object to, the speech and hearing and the psychological. In our judgment, these services are materially different from the other diagnostic services in that they are far more subjective, they are framed under the law in a very loose fashion which permits a large degree of

unrestricted intercommunication between the diagnostician and the person receiving the diagnosis.

So at the risk of skipping ahead for a moment, what we have is -- and the record is clear as far as psychological diagnostics are concerned -- interviewing and projected procedures are specifically mentioned in the stipulation and guidelines, and so far as these items are concerned, what it amounts to is government employees evaluating the attitudes, behavior, et cetera, of children in a church school, and this is fundamentally inconsistent with the establishment clause.

Nonpublic education in Ohio, as it has been where this Court has considered similar types of statutes arising in other states, is overwhelmingly sectarian and, in fact, of some 262,628 nonpublic pupils enrolled in Ohio during the 1974-75 school year, 243,545 were enrolled in the Catholic schools, only 8,700 were enrolled in nonsectarian schools; of 720 nonpublic schools throughout Ohio, only 29 were nonsectarian.

The court below determined that although there were perhaps some differences between the conduct of sectarian education in Ohio in the profile which appeared in this Court's opinion in Meek v. Pittenger, sectarian education in Ohio was substantially comparable to what this Court found to be the situation in Lemon v. Kurtzman, and indeed this Court in affirming the successful challenges by these appellants of previous Ohio measures to provide sectarian aid in Wolman v.

Essex and Grit v. Wolman which arose on similar stipulated records in effect held that sectarian education in Ohio is subject to the same strictures as applied in Pennsylvania, New York, New Jersey, and indeed appellees have conceded that because of the religious mission of these schools they are defending this statute based upon its secularity and not upon any differences between sectarian education in Ohio and elsewhere.

Turning to the material and equipment loan provisions, there are essentially three distinctions between these provisions and the provisions considered by this Court in Meek v. Pittenger. First, there is a clause in the Ohio statute which says that materials which are capable of diversion to religious purposes cannot be loaned. Secondly, there is the provisions which I alluded to earlier that loans are to be made to pupils or parents; and, thirdly, unlike the previous statutes in Marburger and Meek, the implementation of the equipment and material loans is to be accomplished with the assistance of publicly paid staff which is authorized to go onto the parochial school premises to do such things as collect, catalog, distribute and store the equipment and materials.

Dealing with the first of these distinctions first, the divertable to religious purposes clause, all that does is put this case in exactly the same posture as far as equipment and material loans are concerned that Meek v. Pittenger was in

when it arrived at this Court, because the District Court in Meek v. Pittenger had already held that the Pennsylvania Act was invalid under the establishment clause insofar as it permitted equipment and materials which were capable of diversion to religious purposes to be so loaned.

What this Court did was strike down these provisions insofar as they authorized the lending of materials which was ostensibly a fixed neutral content on its face.

Dealing with the loan concept, the pupil loan concept, we must first commence with the understanding that the very same equipment and materials which were to be loaned under the prior Ohio Act which were substantially the same as the equipment and materials which were to be loaned in Meek v. Pittenger are available under this enactment.

The stipulated record contains a list of the items which were furnished under the prior Ohio Act and it is agreed that these same materials, except to the extent that the incapable of diversion clause can have some effect, will be loaned again, and these include such items as wall maps, science labs, expensive pieces of electronic equipment.

The point is that we are not simply handing out items which are the functional equivalent of textbooks here, and the applicable principle I think was well set by this Court in its consideration of the Committee for Public Education v. Nyquist when this Court determined that a mere conduit device, saying

that you are giving or lending the benefit to the pupils or to the parents, does not suffice to evade the function and effect of the enactment.

The Meek rationale which is equally applicable to this statute as it was to the Pennsylvania statute considered in Meek v. Pittenger was that substantial aid -- I am quoting from the Meek opinion now, on page 23 of our brief, pages 7, 8 -- I'm sorry, 657 of the Meek opinion -- "substantial aid to the educational function of such schools accordingly necessarily results in aid to the sectarian enterprise as a whole. This factor does not change whether you call this a loan to the pupils or whether you call it a loan to the schools."

Now, we are left with the necessity of harmonizing this aspect of the case with Board of Education v. Allen and the textbook portion of the Meek opinion.

Part of our burden is, of course, to ask this Court to overrule those textbook decisions. We have always felt that they were not in harmony with the other holdings of this Court under the establishment clause, but it is not necessary to overrule Board of Education v. Allen to reach this result. There are practical distinctions between the materials and equipment on the one hand and the textbooks on the other.

First of all, there is a history in Ohio of lending textbooks to public school pupils as well as parochial school pupils. The applicable statute is section 3329.06, wherein the

boards of education treat the furnishing of textbooks to public school pupils as a loan. There is no comparable statute for the treatment of material and equipment in public schools as a loan to pupils. No one would ever think of calling these items collective loans to the pupils, a wall map a loan to the pupils, but for the evident necessity of getting around this Court's opinion in Meek.

QUESTION: Mr. Kancelbaum, what is the difference between a geography book and a map?

MR. KANCELBAUM: Your Honor, first of all --

QUESTION: I mean for these purposes.

MR. KANCELBAUM: For these purposes, if the item such as a map is not given to the pupil to carry about with him, perhaps take home, there is something very stretched about the notion of calling it a pupil benefit. I agree that it makes still more sense as far as I am concerned and as far as the clients I represent are concerned to say that the textbook going to the core of religious education also ought not to be furnished in parochial schools at state expense, but it is not necessary to say that because the distinction remains valid.

Moreover, here we have a case where the statute broadly authorized all kinds of material and equipment to be furnished. The State Department of Education passes some guidelines, then throws the matter under the statute to the administration of the 600-some-odd local school districts who may

consult with 33 field coordinators in the implementation of the Act.

The notion that the pristine distinctions we make here will find their way into what is actually done under this Act is I think not consistent with the facts.

QUESTION: Can't that await the events so that you can go into the federal courts with the particular textbook, a particular film, a particular functional equivalent of books and show that that one does bear on religious education?

MR. KANCELBAUM: Your Honor, what I fear the danger in that would be that the gravamen of our complaint as taxpayers under Flast v. Cohen is that the expenditure of this money ab initio violates our First Amendment rights. Now --

QUESTION: Of course, you are making that claim with reference to the textbooks, too, so that makes it a little difficult to delineate your position. Now, we have settled the issue on textbooks, haven't we?

MR. KANCELBAUM: At least for the time being, I suppose, Your Honor, but --

QUESTION: Well, for quite a while?

MR. KANCELBAUM: -- but at least we know that a textbook is a textbook. Under an Act like this, all kinds of things are authorized, and this gets part and parcel into the concept that in this case the state has not met its obligation to insure that religion will not be inculcated and that

excessive entanglement will not occur when it passes an act which in effect passes the administration to the far-flung local school districts without any policing, without any system of surveillance, which of course would present its own excessive entanglement problems --

QUESTION: Well, in modern education, just as we moved from something a hundred years ago with a slate about as big as today's loose-leaf notebook and a piece of chalk, we moved on to something else, now haven't we moved on from textbooks to the use of closed-circuit television and movie films and other graphic displays as the functional equivalents, I think you used the term, of textbooks?

MR. KANCELBAUM: Your Honor, I think the appellees use the term, but the fact is that this statute first of all goes far beyond the functional equivalent of textbooks and deals with matters which are historically classroom rather than pupil equipment. And secondly, I think the argument proves too much because the equipment such as closed-circuit television can be as readily employed to videocast a religious show as a secular one.

QUESTION: Well, so can the textbooks, can't they, but surveillance takes care of that, doesn't it?

MR. KANCELBAUM: Your Honor, I think there has been no surveillance in the textbook cases. The court has made the assumption that the textbooks being of fixed content and

secular once will stay that way. It hasn't done that in the equipment and materials case.

QUESTION: Well, any of the people who view the matter as your clients do and found textbooks being furnished in public schools that were religiously oriented, they would be in federal courts rather quickly, wouldn't they?

MR. KANCELBAUM: Your Honor, if we were to have to take these cases on an applied basis, we would be in federal court not only quickly but incessantly and every day and forever. Just on the school prayer decisions alone, we could be in federal court in 88 counties constantly. It is essential that this Court continue its pattern of making facial adjudications in this area, leaving clear guidelines as to what can and cannot be furnished and making it abundantly clear that the state must be willing to watch these statutes and show the secularity.

The usual burden upon one who is challenging the constitutionality in this area, where aid is given by a willing donor to a willing recipient, and those who are concerned about the spending of their tax dollars for religious purposes are not parties to the transaction. The placing of the burden on them to police these enactments is as far as I can see the end of the establishment clause in this area.

QUESTION: Mr. Kancelbaum, as I read your brief, you do not go so far as to suggest that the Allen case be overruled,

do you?

MR. KANCELBAUM: Yes, Your Honor, we have gone that far, but we have recognized that in view of the Meek opinion last year that it is asking rather a lot and we have also indicated the ways in which the Allen case can be harmonized. I might say this as well --

QUESTION: You have been more hesitant than other counsel at times?

MR. KANCELBAUM: I'm sorry, Your Honor?

QUESTION: I say you are more diffident than other counsel have been.

MR. KANCELBAUM: Oh, we would love to have you overrule Allen, Your Honor, but --

QUESTION: Well, if we did all of your problems in your colloquy with the Chief Justice would be overcome, would they not?

MR. KANCELBAUM: I think many of them would be indeed.

QUESTION: That is like burning down the house to get rid of the mice.

MR. KANCELBAUM: Well, Your Honor, with all respect, I wonder which is the Allen case.

QUESTION: May I come back to materials and equipment. In the public schools in Ohio, how are these made available to the pupils?

MR. KANCELBAUM: I examined title 33 over the week-end looking for this, and as nearly as I can determine it emerges from the general power of the boards of education, which this Court noted in the Mt. Helvey case recently, is a quasi-autonomous body to acquire personalty and to equip classrooms. And I might add that should the Court desire, I would be most happy to furnish a supplemental memorandum on this point. But there is no comparable statute for the lending of materials and equipment as opposed to textbooks.

Now, turning to the problem of the on-premises diagnostic services, I would add that the remarks which appellants made concerning the psychological services apply at least to an extent to the speech and hearing services as well because the definition in the statute is unrestricted. There is no requirement that only standardized tests be furnished, and again the opportunity for abuse is there.

A diminished probability under Meek that sectarian infusion will take place is an insufficient safeguard, and the good faith of these personnel is also under Meek an insufficient item to be relied upon by the state.

Now, when we get to therapeutic services, the position becomes somewhat different. First of all, it is clear that these are services which could not under Meek v. Pittenger be furnished on parochial school premises, so the question arises of what effect is removing them to the three categories

of institutions on which they can be performed.

They can be performed on public school premises, so-called public centers, or in mobile units parked off the premises but close by, in effect at the curb side.

Now, I repeat that the appellants do not object to what Professor Freund, writing in the 1969 Harvard Law Review article referred to in our brief and repeatedly in decisions of this Court, said was shared time which, as he put it, was the limit to which our policy of neutrality toward religion can carry us.

To the extent that this type of therapeutic service program can be effected across the board as part of a genuine general program, either in a public school or in a facility which is truly made available for that service to the general community of which the parochial school pupils are a part, we do not object. We do object to public facilities which really are not public facilities at all but are special satellite facilities furnished by the public for the special use of the parochial facilities, in effect public annexes to church schools.

We see a grave danger that this is exactly the kind of scheme that this statute engenders. First of all --

QUESTION: Are you speaking now of a mobile annex or a --

MR. KANCELBAUM: Your Honor, I think that both of

those are possible, and the term annex applies with equal force to both of them. The matter is not far-fetched and in our reply brief I have cited the case of Moore v. Board of Education which is an example arising out of a common pleas court in a rural community in Ohio, Mercer County, of a permanent church school annex in which the public school was stationed next to the parochial school and the entire administration of two are so intertwined that, as the trial judge found, the pupils would have no way of knowing when they were receiving services in one and when or what they were receiving in the other.

QUESTION: Well, let me confine that now to the mobile unit. Suppose a mobile unit with medical services is going around and giving polio inoculations, for example, do you object to that?

MR. KANCELBAUM: Your Honor, I don't object to the polio inoculations if they are performed by medical personnel on the parochial school premises. On the other hand --

QUESTION: And speech and hearing, do you think that falls in the same category as inoculation for polio?

MR. KANCELBAUM: No, Your Honor, I think that speech and hearing therapy involves an ongoing relationship between the therapist and the pupil which is similar in character to remedial reading, guidance counselling and what have you, and that when that mobile unit parks at the church gates and makes

itself available and it is stipulated that while it is parked there it would be most unusual for that facility to be performing services for anything other than the sectarian school which it is parked next to. When it is parked there, I think every bit of opportunity for sectarian influence in that situation that was present in Meek v. Pittenger remains present.

QUESTION: Well, what are you talking about, hearing therapy, do you mean something more than "now write the numbers you hear in the third column," I take it? An ordinary hearing test certainly doesn't involve any great intimacy between the therapist and the patient, does it?

MR. KANCELBAUM: Your Honor, what you have described would be classified under this Act not as therapy but as diagnosis. That can take place under this Act on the parochial school premises.

QUESTION: But do you object to that?

MR. KANCELBAUM: Yes, Your Honor, but for definitional reasons. If all that were being given here were standardized tests, we would have more of a problem with that aspect of hearing diagnosis.

QUESTION: Well, what precisely is your objection to the diagnostic hearing test?

MR. KANCELBAUM: My objection is that although the appellees assert that only standardized speech and hearing diagnostic tests are available under this Act, that isn't

spelled out anywhere.

QUESTION: Well, the District Court upheld the Act, didn't it?

MR. KANCELBAUM: Yes.

QUESTION: Well, if there is a doubt or a presumption, isn't it in favor of the District Cour's ruling on that aspect?

MR. KANCELBAUM: Your Honor, I think that, given the clarity of the record in this case, this Court can come to its own conclusion as to the kinds of potentials that are involved in sectarian advancement and excessive entanglement under this Act.

QUESTION: In an ordinary hearing test?

MR. KANCELBAUM: Your Honor, the notion that it is an ordinary hearing test which will be administered under the blanket caption speech and hearing diagnosis is an assumption.

QUESTION: You wouldn't say to the contrary that they are going to infiltrate -- that the Catholic Church is going to infiltrate this and fill the testing process with religious dogma, is that the assumption that you want us to draw?

MR. KANCELBAUM: First of all, Your Honor, I would by no means limit this or even emphasize this as a Catholic problem, but --

QUESTION: Well, let's be realistic, that is the largest single group you are talking about, isn't it?

MR. KANCELBAUM: It is the largest group but it is by no means the only group, Your Honor. However, yes, we feel that it is the obligation of the state to insure that these items are secular.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Martin.

ORAL ARGUMENT OF THOMAS V. MARTIN, ESQ.,

ON BEHALF OF THE APPELLEES

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

The State of Ohio has included nonpublic school children in programs providing education materials and auxilliary services since 1967. And although this Court in the Meek case struck down programs providing similar benefits, we did not interpret that decision as prohibiting all programs providing such benefits.

The opinion itself states that the authority of the state to furnish free auxilliary services to all students in the state, including nonpublic school students, was neither challenged nor questioned.

And in the later Roemer case, the opinion states that religious institutions themselves need not be quarrantined from public benefits mutually available to all; we therefore assume that children attending religious institutions need not be quarrantined from such benefits.

The State of Ohio enacted the present statute in order to conform to the governing constitutional principles set down in the Meek case.

The Pennsylvania program for instructional materials and equipment loan these materials directly to the sectarian schools. The opinion explains that the teaching process in these schools was devoted to the inculcation of religious beliefs. Aid to the educational functions of these institutions therefore resulted in aid to the religious functions. No materials or equipment are loaned to sectarian schools in Ohio. They are loaned directly to the student or his parent.

QUESTION: Are the students getting these big maps?

MR. MARTIN: Your Honor --

QUESTION: What kind of maps are they talking about? Are they maps that you put up on a wall?

MR. MARTIN: In our stipulation we did stipulate that the materials available under the new Act will be similar to those under the old Act. The statutory language has changed a little bit. The statute now provides that the loan is to be upon the individual request of the student or the parent, assuming that the state court would construe that broadly enough to permit a wall map.

QUESTION: So you would think that if the schools gets the parent and the student to say give our school the map, that takes it out?

MR. MARTIN: Your Honor --

QUESTION: Don't ask me to believe that.

MR. MARTIN: All right. Your Honor, I believe this was passed on the educational value of the student, and I believe the educational value to the student would be the same whether he is using a map with other students in a group or whether he is using a map individually.

We submit that the most important educational benefit of the textbooks comes from their group use in the classroom in a particular course.

QUESTION: Is there any obligation that these maps are in some way tainted with religious dogma?

MR. MARTIN: I do not believe there is, Your Honor.

QUESTION: Just to continue, I am curious about how this works as a practical matter. Let's say a big wall map in a fifth grade geography class of thirty students, each one of the thirty is a loanee of an undivided 1/30th interest in the map, I guess?

MR. MARTIN: Your Honor, if that is how -- it may be that the Ohio statute as interpreted by the higher courts would not permit that. What would happen would be if the non-public school authorities would make an application with the personnel from the local school district, the -- if it was administratively approved there and formally approved by the board of education, it could be purchased by the local school

district. Then when there was a need for it, the student would come in and make an individual request for a loan. If it had been purchased and was in the inventory and was otherwise -- and assuming that it would be proper under Ohio law as interpreted by the state court, that would be loaned then --

QUESTION: To an individual student?

MR. MARTIN: Either to an individual student or --

QUESTION: And he would take it home every night?

MR. MARTIN: In that situation, Your Honor, it might require that it be by all the students in the class.

QUESTION: So then I am right in my first assumption that each one would be the lender of an undivided 1/30th interest in the wall map?

MR. MARTIN: In that situation, yes, Your Honor.

QUESTION: And then May or June comes and they graduate and go into the sixth grade, do they take the map with them even though they have finished studying geography?

MR. MARTIN: Your Honor, where that map would be stored would be in the determination of the Department of Education.

QUESTION: Well, when does the loan cease or terminate?

MR. MARTIN: It would cease when the map was turned back to the local public school personnel.

QUESTION: And then it is lent again the following

year to the students in the fifth grade geography class, is that it?

MR. MARTIN: Assuming that that is permitted under state law, yes, Your Honor.

QUESTION: Well, that is my question, what is permitted and what is contemplated under the state law?

MR. MARTIN: We have assumed for the purpose of this case that it is, although the statute is different and the statute does require that the loan be based upon individual request.

QUESTION: Well, if it is individual request, then I guess one student then is the custodian of the map for the whole class? Is that it?

MR. MARTIN: Your Honor, in that situation I believe you would be right, it would be every student -- every student would be the loanee.

QUESTION: But if half of them got promoted and the other half stayed there, what happens?

MR. MARTIN: I don't know, Your Honor.

QUESTION: It is a lot like the Meek case, isn't it?

MR. MARTIN: Yes, Your Honor, it is.

QUESTION: The trouble is with this Ohio statute.

MR. MARTIN: I don't believe so, Your Honor. We believe that by making the student the beneficiary we have solved the constitutional objection in Meek. If in Meek the

educational functions and the sectarian functions of the sectarian schools are so interrelated that no aid could be given to the educational without aiding the religious, we do not believe that that is true of a loan to the child. The educational or special educational needs of the school child are different and distinct from the religious nature of the sectarian school he attends. A child using a modern educational material or device which makes learning more interesting will receive the same educational benefit from that material whether he attends a sectarian or a public school. And a child who is deficient or behind in one or more subjects has the same educational need for a new modern educational material or device which is programmed for his individual study and learning.

As we read the -- the Nyquist case, which plaintiffs rely on to show that since it could not be loaned to the school, it could not be loaned to the pupil, we believe is readily distinguishable. We believe that financial assistance is readily distinguishable from aid in the form of secular materials.

Aid in the form of secular materials would go to the child and remain with the child. Unlike financial assistance, it would not flow to the child through the school. In addition, we believe the reasoning in the Nyquist case supports the validity of the instructional materials and equipment. In that

case, the opinion contrasts Allen and Everson by saying that the materials involved were secular and were provided in common to all students in the state.

In this case, no material which is even capable of diversion to sectarian use may be loaned and no materials may be loaned unless they are available to the public school students within the district.

QUESTION: Mr. Martin, if in Parochial School A a map of the United States is a part of aid and a child applies, that map is replaced by the city school board? Am I right?

MR. MARTIN: I assume that is right, Your Honor.

QUESTION: You don't have any problem with that?

MR. MARTIN: Constitutionally I don't, Your Honor. There may be problems whether it would be permissible under this particular statute as a matter of state law.

The opinion in Meek states that the constitutional objection to the auxilliary services was that they were provided in a sectarian setting in schools in which the atmosphere dedicated to religion was constantly maintained. In Ohio, no services, auxilliary, remedial or anything which has anything to do with education, is performed in a sectarian school. They are performed in public schools, public buildings or public mobile units, and they are performed by public personnel who are controlled by public school authorities.

We therefore submit that there is no potential in

this situation for the teacher to allow religion to seep in.

Thank you, Your Honors.

QUESTION: Mr. Martin, before you sit down, will either you or your colleague discuss the field trips?

MR. MARTIN: I believe my colleague will.

MR. CHIEF JUSTICE BURGER: Mr. Young.

ORAL ARGUMENT OF DAVID J. YOUNG, ESQ.,

ON BEHALF OF THE APPELLEES

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

I believe I would like to start out by commenting that perhaps one of the saddest things with respect to this case is the possibility that the true character of this legislation would be obliterated by either a failure on our part to properly explain how it works or on the basis of assumed abuses in administration or assumed illegal applications.

We are sitting here talking about annexes to Catholic schools or to Lutheran schools or Jewish schools, and the law permits no such things. In the briefs, we talk about putting a -- buying a property from a religious organization and putting a mobile unit on it. That can't happen under this Act. And unfortunately we are talking about loans that don't take place under the Ohio Act because the Ohio Act calls for loans to pupils of materials and equipment that are used by pupils and they can't be used for any purpose other than secular purpose.

Now that is what the Ohio Act is all about. I think when we properly understand the Ohio Act, it reflects an honest genuine response to the concerns in Meek. I submit to the Court that it reflects a faithful application of the principles enunciated in Meek, and of the other First Amendment cases that this Court has decided in the past decade.

If counsel is permitted to assume any kind of abuse that they would see fit in a case, no state statute can stand. We would submit to the Court that when we talk about the statute, we must talk about it as it is described on its face, as we have a stipulation of intended administration, and any reasonable inferences that could flow therefrom.

When we start talking about a speech and hearing diagnostician inculcating religion, may it please the Court, I believe we are just beyond the realm of realism and into absurdity. That isn't what diagnostic work is all about. I submit to the Court that there is no significant difference between the function of a speech and hearing diagnostician and that which they concede to be constitutional, a physician, a nurse, an optometrist, or a dentist.

Let me refer, if I might, Your Honors, to the map situation that has been causing so much difficulty. First of all, the only kind of maps as I interpret that are lent under this program -- and I think the stipulations would bear this out -- they have to have two characteristics: They have to be

lendable to a child and nondivertable to religious use. And as we pointed out in our brief, the typical map used today is a map with a cassette. A child checks out a map, he checks out a cassette, he plugs in the cassette to earphones, they explain a map to him and either the map is already filled out or he fills out the map.

For the benefit of the Court, we have left with the Clerk of this Court items of equipment that are described in our stipulation. We have left six of them, going from the very smallest to the most sophisticated. And we would submit to the Court that every single piece of equipment that is lent or material that is lent under this Act is not divertable to individual use, is lent to the pupil and is used by the pupil. The aid is secular, it starts with the child, and it ends up with the child.

In terms of having difficulty with this Act really meeting the test --

QUESTION: You can over my Brother Stewart's point. He takes that map home with him?

MR. YOUNG: May it please the Court, certainly.

QUESTION: He takes the map home?

MR. YOUNG: There is absolutely no reason in the world why he wouldn't take the map home.

QUESTION: But does he?

MR. YOUNG: Surely.

QUESTION: One of these big wall maps?

MR. YOUNG: Justice Marshall, I am not talking about a wall map.

QUESTION: Well, that is what I am talking about.

MR. YOUNG: That is why I am suggesting to the Court that the maps that are lent --

QUESTION: Isn't that the map we are talking about?

MR. YOUNG: No, I am not talking, Mr. Justice Marshall --

QUESTION: What is the map they are talking about in the record?

MR. YOUNG: The record, Mr. Justice Marshall, has a stipulation of the materials that were lent under the prior program, and then it says that with respect to this new program the materials are limited in two respects over the prior program. Some of those listed in there, as indicated, are no longer able to be used either because they are divertable, number one, or they can't be lent to a pupil.

QUESTION: Well, does it say specifically that he takes the wall map home?

MR. YOUNG: Mr. Justice Marshall, I don't believe wall maps are lent to pupils under this program. The only maps --

QUESTION: Is that in the record?

MR. YOUNG: It is not in the record one way or the

other, Mr. Justice Marshall.

QUESTION: Well, it was in -- wall maps were included before, weren't they?

MR. YOUNG: There is absolutely no question because under the prior program they were lent to the school.

QUESTION: Well, is there anything in the record that says that wall maps are not included now?

MR. YOUNG: Mr. Justice Marshall, the record points out that they must -- the only thing that can be lent now is that which is lendable to a pupil for individual use.

QUESTION: My question, yes or no, is there anything in the record that shows that wall maps are no longer included?

MR. YOUNG: I guess I would have to say, Mr. Justice Marshall, I would say yes but it would depend on how you interpret it. I would say yes because --

QUESTION: If you say yes, I am going to ask you where in the record.

MR. YOUNG: Mr. Justice Marshall, I would suggest to you that it is in the record where it is indicated that the only materials that are lent under this program are materials lent to pupils and can be used by pupils.

QUESTION: Did you bring this lawsuit or did the appellants bring it?

MR. YOUNG: Mr. Justice Burger, the appellants brought the lawsuit.

QUESTION: So whatever may be the state of the record with reference to that proof is the responsibility of the appellants, is it not?

MR. YOUNG: I would submit to the Court that that is the case.

QUESTION: Well, are you ready to back up anything you say here now?

MR. YOUNG: Mr. Justice Marshall, I wouldn't say it if I weren't.

QUESTION: Well, where is it in the record? You said that wall maps are no longer taken home. Did you say that?

MR. YOUNG: Mr. Justice Marshall --

QUESTION: Did you say that?

MR. YOUNG: Yes.

QUESTION: Well, where in the record is that statement?

MR. YOUNG: Mr. Justice Marshall, what I have tried to point out is that what we have is a list of things that were used when they were lent to the schools under the old program. The Ohio General Assembly interpreted the Meek decision as indicating that they could be no longer lent to the schools, therefore the classes of materials and equipment that were lent previously are now limited by the new stipulations. One of them is that it has to be lendable to a child.

QUESTION: Without taking up any more of your time, I

don't imagine that this case is going to be tried on the wall map.

MR. YOUNG: May it please the Court, I hope so. I would feel very comfortable if that is the case. As I indicated previously, there are items of equipment and material with the Clerk's office that are described in the stipulation that the Court can peruse and find that they are usable by the child and they are quite clearly secular.

Before I move on to another item, let me suggest to the Court -- and I know the difficult question was put to Mr. Martin, are you having difficulty with distinguishing this from Meek in terms of materials -- I would submit to the Court that as I read Mr. Justice Stewart's opinion in Meek, as it looked at the lending of materials, and as Mr. Justice Blackmun explained it in Roemer, they looked at three things, the character of the recipient, the nature of that which was lent, and the resulting relationships.

Looking at these three features, the Court in Meek said, number one, the character of the recipient is a religion pervasive institution. The material itself is self-policing in fixed content secular; and, third, the relationship is between state and religious organization because it is a loan directly to a religion pervasive organization.

Now, in terms of an honest and genuine response to Meek, if you look at those same three characteristics with

respect to the material and equipment in this case, it is lent not to a religion pervasive institution but to a child. And if we start calling him a religion pervasive child, we have free exercise problems that are beyond this case. So in this case we loan the secular fixed content equipment and materials to a nonreligions pervasive person, a child, a citizen, just like anyone else.

Number two, it remains fixed content and secular, it cannot be used for raligious purpose; and, number three, if you want to determine, as Mr. Chief Justice indicated earlier, whether there is indeed in fact the lending of anything that could conceivably be used for a religious purpose, that is all you would have to do is check with the clerk-treasurer at the local public school district. He has an inventory of that which has been purchased and that which is lendable. You look at the inventory, you look at the catalog and it is either divertable or it isn't.

So in order to police the Ohio program, the relationship is between public and public, so I would submit to the Court that all three features --

QUESTION: Mr. Young, your point about no direct contact between the school board and the religious institution and the loan being to the child, is it not correct that all the paperwork and processing and the contact is between the school and the school board, that they handle these loans on a

collective basis and there is no direct contact between the pupil and the school?

MR. YOUNG: Mr. Justice Stevens, that is partially correct. There is less contact than there would be in the textbook case.

QUESTION: Well, there is none in the textbooks, as I read the statute.

MR. YOUNG: Mr. Justice Stevens, in the textbook case that have been approved by this Court, both in Allen and in Meek, there was collective summaries prepared by the religious schools and they passed these summaries on to the public schools so that occurred in both Allen and in Meek. Now, there is less of that in this case because the public school determines the equipment that is going to be made available based upon what it makes available to its own children, and then the contact between the public authority is when, let's say, a teacher -- we have a child who is behind in multiplication and they would suggest to check out a Rotomatic, and this is just a little tube with a program unit and they keep turning it around and it has questions and answers. The child goes to the clerk-librarian -- and this can either be on the premises, or if the public school is close he goes there, one or the other, he goes to the clerk-librarian, he checks out the Rotomatic and he uses it for a week and he checks it back in.

Now, when counsel talks about, hey, this loan is a

fiction, may it please the Court, the lending of equipment would certainly be much less a fiction than the lending of the textbook. The textbook you keep for a while year, and maybe that is the end of it. All of this equipment is typically a reptitive drill kind of thing. You use it for a week, you don't need it any more. Once you have used --

QUESTION: Where does the child get it?

MR. YOUNG: Mr. Justice --

QUESTION: From his own school? Where are the inventories of this equipment kept?

MR. YOUNG: The statute permits two different situations, depending upon how close the public school is. He either gets it from a clerk-librarian who is a public employee, that clerk-librarian under the statute can either maintain the inventory at the nonpublic school or at the public school, and I suspect it would only be the public school if it were close by. If it were a distant public school, it wouldn't make sense to keep it there. So it does permit him to be on the nonpublic premises.

But when the child checks this out with equipment, it has got to be a loan. You don't give a child a Rotomatic that he only needs for a week. That can be used by hundreds of other children.

Now, counsel has suggested that there is no lending in the public schools. I would submit to the Court that that

is absurd. If a child wants to use a Rotomatic multiplication machine in the public school, is the public school going to give it to him and say this is yours, keep it, when he only needs it for a few days? It is lent to the child in the public school just like in the nonpublic school, he uses it and he turns it back in, and another child uses it.

QUESTION: Is the same thing true with the Speed-Reading or the reading improvement equipment?

MR. YOUNG: Very definitely, Your Honor, the same thing is true. Almost all of this equipment that is used -- I know it is hard for us to visualize it because we didn't have it when we were in school. Almost all of it is drill, repetitive, tutorial kind of equipment. Some kids can use the textbook and the lecture and they catch on. Most need this assistance and they go back in, and all of it is individually used, even the machines, only one child uses it, and it is programmed especially for one child use.

You see, in terms of the equipment, you start out with the smallest little tubes, they call them Rotomatics. They have programmed plastic courses inside and they simply turn it and it drills them. They have a little hand calculator that does the same thing for any of the secular courses. Then you move to a little machine where you push buttons and it programs correct answers, it programs how fast you can do it, and then you can move right on up from the smallest item until the

largest.

And in response to Justice Marshall's earlier question, some of them you can't take home, no question about it. I don't think anyone would suggest to this Court --

QUESTION: Mr. Young, isn't this material actually delivered to the school and not to the child? Isn't that what the statute says?

MR. YOUNG: Justice Marshall, it would initially --

QUESTION: Isn't that what the statute says?

MR. YOUNG: Mr. Justice Marshall, it would be delivered either to the nonpublic school or the public school and then the child must go to the clerk-librarian, check it out, and check it back in.

QUESTION: So it is given to the private school?

MR. YOUNG: Mr. Justice Marshall, very definitely not. It would be given to a public clerk-librarian who has custody of it.

QUESTION: It is given to his custody?

MR. YOUNG: That's correct.

QUESTION: Well, does the child go to the public library?

MR. YOUNG: Mr. Justice Marshall, he either goes to the public library or the nonpublic school, depending on where it is kept, this would --

QUESTION: Well, how did it get to the nonpublic

school?

MR. YOUNG: It would be delivered by the public school to a public clerk-librarian who would have an inventory there.

QUESTION: Well, how does he get to the private school?

MR. YOUNG: By the public authorities at the local public school district or the purchaser or the seller would deliver it to the public school, they would inventory it, and then if it happened to be stored at the nonpublic school they would give it to the clerk-librarian --

QUESTION: Well, how does it get stored in the nonpublic school?

MR. YOUNG: Either the shipper or the local public school would take it there.

QUESTION: Well, how would they get it? Nobody has asked for it yet.

MR. YOUNG: Mr. Justice Marshall, I believe one ingredient I haven't explained about the program is that they get the same equipment that is available in the public school. Okay? In other words, say X school, if nearby there is a public school, whatever equipment they have, that is going to be available for the nonpublic school child, the same equipment. Okay? Now, what a child uses on a given occasion depends on his particular deficiency. If he has a multiplication problem,

then what he will check out is a little Rotomatic that helps him drill in multiplication.

QUESTION: Well, where does he get it from, the child in the private school?

MR. YOUNG: He goes to --

QUESTION: He gets it from the private school.

MR. YOUNG: I respectfully disagree, Justice Marshall. He --

QUESTION: Well, that is how the statute reads, it seems to me.

MR. YOUNG: Well, pardon me, but we read it differently. He gets it from the publicly hired and controlled clerk-librarian who has custody of it and checks it in and checks it out, just like going to a library.

QUESTION: On the premises of the private school perhaps?

MR. YOUNG: Perhaps, yes.

QUESTION: Yes.

MR. YOUNG: No question about it.

QUESTION: Oh, the public librarian is in the private school?

MR. YOUNG: He can be.

QUESTION: He is there with the books and the maps and anything else in the private school?

MR. YOUNG: He can be, and there is nothing wrong with

that in our opinion, Your Honor. I think basically what we are talking about here are the evils which the establishment clause are designed to prevent.

QUESTION: Mr. Young, could you help me back there again on this public clerk-librarian. What does it -- how does it in fact work? They hire an additional group of people who serve in this capacity and go on to different schools on a full-time basis, or do they take someone off the private school payroll and in effect put them on the public school payroll?

MR. YOUNG: The administrator of the program would not permit them to take them off of a private school payroll, they would have to be a public employee. And I may be going beyond the record, but I know as a matter of fact that there can be no hiring of a private teacher. Now, I don't remember whether that is in the stipulation of this case.

QUESTION: Would this person be in the nature of a permanent employee regularly stationed at the private school?

MR. YOUNG: Justice Stevens, this would depend, if there is a close public school nearby --

QUESTION: Assume there is not.

MR. YOUNG: He would be stationed at the nonpublic school, yes.

QUESTION: Something like the school nurse that moves around, if they don't need a school nurse five days a week, a public health nurse?

MR. YOUNG: That's certainly true, Your Honor, except that if it is a large school with -- other than the rural schools, a large school is going to have enough equipment and the children are going to be checking it in and out frequently enough that the clerk would probably have to be there all the time. So I think there would be less mobility, to be honest, in the clerk-librarian than there would be the school nurse. I think there would be less mobility.

May it please the Court, although I have very little time, let me -- I have talked about the materials and equipment -- talk just for a moment about the therapeutic personnel.

It seems what Ohio has done, it has solved the problems that were created in Early v. Di Censo and Meek. It has taken, even though there are auxilliary service personnel, this Court has said there is a possibility they would perform education services, so now they are hired by the public, they are controlled by the public, they are auxilliary personnel, and they perform their services at public facilities.

Now, opposing counsel in their brief has suggested, even so these children must be denied that secular service because they are sectarian children, and when they go to that public facility they are going to intimidate the speech and hearing therapist and turn him into a religion teacher.

This particular branch of the argument I think is perhaps one of the most dangerous assertions that has been made

before this Court in any of the First Amendment nonpublic education cases that has been before this Court in the last ten years. For now we have the ultimate, not a religion pervasive school, not a religion pervasive building, but a religion pervasive child, a citizen who is marked because of the fact that he is a Catholic, a Lutheran, a Jew or a Christian child, and because of that fact and that fact alone he may not go to a public facility and get the same kind of neutral secular service that any other child in this community.

If that proposition can be adopted, what about the Lutheran parent who gets Social Security? Now, we know he doesn't get it because he is a Lutheran, but he happens to be a Lutheran. I would suggest to the Members of the Court that even though some of the clients I represent, whose children are Catholic, Lutheran, Christian or Jew, to be sure they get therapy, they get speech and hearing therapy at a public facility, but they don't get it because they are Catholic or Lutheran or Christian or Jew, they get it because they are a child in need and they get it because they are a citizen just like any other child. And I respectfully suggest to this Court that what we have in the Ohio program is a neutral program of assistance, of secular assistance that applies to all in the community and applies alike.

Now, to be sure, if there isn't enough room in the public school facility, then the nonpublic school child might

get the service in, let's say, a library rather than a public school classroom. We suggest that that makes no difference in terms of establishment clause principles.

This Court, Justice Douglas, in the Zorach case, when the nonpublic school pupils were released from a public school to go to attend religious instruction, Justice Douglas pointed out that the establishment clause doesn't require such hostility that we can make no accommodation whatsoever for these children, so the released time program was approved there.

I would suggest that the mere fact that a Lutheran or Catholic or Jewish child receives his speech and hearing therapy in a library room rather than the public school because the public school doesn't have room or isn't close enough, makes absolutely no difference from an establishment clause viewpoint.

I would submit to the Court that I think we have here in this Ohio program -- first of all, we have pointed out -- and my time is up, I appreciate --

QUESTION: Mr. Young, we haven't given you time to address yourself to the field trip transportation provided by section L of the law, and I gather from your brief that you rely primarily on the Everson case for that, is that it?

MR. YOUNG: Justice Stewart, that is correct. It is suggested that there would be some additional administrative

entanglement in field trip transportation that wouldn't exist in school bus transportation. We would suggest to the Court that there would be far less entanglement, that is all we would do is a month ahead of time X school would say we want to take the same kind of field trip that the public school took and --

QUESTION: Well, is that what it is or might these be field trips to the Catholic Cathedral?

MR. YOUNG: Justice Stewart, the only field trips that are available to the public school, there cannot be field trips that are not made available to the public school child, so they would be the same program, and I don't think there would be any more entanglement, and I do feel that certainly if we can transport to a religious school in Everson, that we ought to be able to transport to a neutral scientific or governmental center.

QUESTION: It is just the transportation?

MR. YOUNG: Yes, it is just simply the transportation and it must be the same, just like everything else in the Act, the same as the public school child.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Kanzelbaum, you have three minutes left.

ORAL ARGUMENT OF JOSHUA J. KANCELBAUM, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. KANCELBAUM: Thank you, Your Honor.

It appears to me that adverse counsel has proved too much with that map example. When I went to Sunday school we used maps all the time. Maps are not like textbooks having a fixed content which is principally useful on a given context. You can track the growth and development of Judaism through the diaspora on a map. You can track the crusades and the sectarian oriented course on a map. And this goes --

QUESTION: Did this happen in this case?

MR. KANCELBAUM: Pardon?

QUESTION: Did you show that in this case, that that was done?

MR. KANCELBAUM: We don't need to show that it was done in this case, Your Honor, because here we are giving for use in a religious school an item which is divertable to a religious purpose. The state has not --

QUESTION: The diaspora and the crusades have a historical significance independently of their religious overtones.

MR. KANCELBAUM: Of course, Your Honor, but in the context of a sectarian school these are useful tools in the teaching of religion and --

QUESTION: Mr. Kancelbaum, do you agree with me that

there is a bare possibility that we can decide this case without mentioning maps?

[Laughter]

MR. KANCELBAUM: Yes, Your Honor, in fact I recall that you have already decided a map case.

Turning away from the example, the fact is that the statute, the guidelines, the stipulation are all silent as to the notion that only items capable of individual use by pupils are to be loaned.

We think another area where adverse counsel has proved too much lies in the fact that we have before us clearly the opportunity for the creation of a public lending library in a parochial school. We think that little argument is involved in stressing the notion that there is something fundamentally inconsistent with the establishment clause in this.

Finally, we do not label children as sectarian children because they leave a church school to go to a secular service off-premises. We simply point out that the place where they are going is not truly a public place. It is put there simply to serve them and where comparable services are available to the public generally are handled in a very different manner.

As far as the influence upon these children upon the secular personnel is concerned, there is not the little child who is going to create a sectarian influence upon the supposedly

secular personnel. It will be the entire weight of the establishment next to which that mobile unit is parked.

Your Honor, Mr. Chief Justice, repeatedly the defendants in this case have responded to decisions of this Court by viewing them as a challenge to greater ingenuity, to a new way to get around the last decision. We submit that there is nothing surprising under the establishment clause that aid to sectarian schools cannot be funded by the state.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:13 o'clock p.m., the case in the above-entitled matter was submitted.]

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