# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE



THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-990

TITLE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, ET AL., Petitioners v. PHYLLIS BALL, ET AL.

PLACE Washington, D. C.

DATE November 5, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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SCHOOL DISTRICT OF THE :

CITY OF GRAND RAPIDS, ET AL., :

Petitioners :

v. : No. 83-990

PHYLLIS BALL, ET AL. :

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Washington, D.C.

Wednesday, December 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

KENNETH F. RIPPLE, Assistant Attorney General of Michigan, South Bend, Indiana; on behalf of Petitioners.

MICHAEL W. MC CONNELL, Assistant to the Solictor General, Department of Justice, Washington, D.C., (pro hac vice); on behalf of the United States as amicus curiae supporting Petitioners.



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on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in School District of Grand Rapids v. Ball.

Mr. Ripple, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH F. RIPPLE, ESQ.

ON BEHALF OF PETITIONERS

MR. RIPPLE: Mr. Chief Justice, and may it please the Court, this case is here on writ of certiorari to the United States of Court of Appeals for the Sixth Circuit.

The principal question is whether a public school system, here the Grand Rapids Public School System, may offer in leased classrooms within religiously oriented non-public schools, enrichment and remedial courses for the children who regularly attend those schools.

Now, unlike many of the religion clause cases which have come to this Court over the last decade, this case is here on a full trial record. And one of the difficulties, quite frankly, judges have had is analyzing that record.

We have, first of all, prepared for you a second volume of the appendix which is an index to that

record, and before I get into a full-blown treatment o the facts, I would also like to mention three particular points which I think would help you in analyzing the facts of this record.

First of all, I think it is very important to recall that there are two very distinct programs involved in this case. The first is a shared time program. This involves public school teachers teaching enrichment and remedial classes in these leased classrooms during the regular school day.

The second program is a community education program. That community education program involves leisure time activities, after school, led by part-time Grand Rapids public school employees.

QUESTION: Are these programs available to all the public schools on the same basis?

MR. RIPPLE: They are available to the children in the public schools as well, Mr. Chief Justice. The shared time program is available as part of the curriculum of the schools. The leisure time activities is available not only to the children in the public school, but also to many other people in Grand Rapids.

For instance, in the local General Motors plant, there is a General Motors community education

program where they hire part -- GM employees to teach programs of leisure time activities.

The second point which I think is important to recall is that not all of the programs which were subject to trial in this case are here on appeal or were before the Court of Appeals. The only programs which are before the Court today are the following:

First of all, the shared time program at the elementary school level in remedial mathematics and enrichment mathematics, remedial reading and enrichment reading, art, music, and physical education; secondly, a single secondary remedial program called Math Topics, designed to help children who can't understand basic mathematical concepts; and lastly, the community education program at the elementary school level.

Lastly, I think it would be -- it is important to help you analyze this record if I very succinctly state our position in the case.

We submit that the criteria developed in Lemon v. Kurtzman, when sensitively applied, are in fact adequate to resolve the constitutional issue before this Court.

We further submit that a sensitive application of the Lemon criteria requires that the Court ground its holding in the actual record which reflects the actual

operation of the program.

We submit that before a Court frustrates the attempt of a local community to give help to 11,000 school children, it ought to find in fact the specific and actual consequence of that program which violates the establishment clause.

We further --

QUESTION: Mr. Ripple, do you take the position that the standing requirements are satisfied in this case?

MR. RIPPLE: We do maintain that the standing requirement is not satisfied. First of all, we believe that Flast v. Cohen and Valley Forge have not been met by the Plaintiffs in this case, and we also submit that if this Court were inclined to view this as muncipal taxpayers standing, that it is time to review the dicta in the Mellon case.

Indeed, it is -- municipal taxpayers standing does, in fact, allow a heckler's veto in this case, because the fact of the matter is, this program doesn't hurt any taxpayer in that town, and there was no problem until the suit was brought.

QUESTION: Was there a challenge to the state statutes providing money, or was it a challenge to the Grand Rapids administrative program?

MR. RIPPLE: It was a challenge to the Grand Rapids administrative program, and not to the legislative appropriation of the money. They did not ask that the statute be enjoined.

And the reason for that, Justice O'Connor, is that the legislation itself doesn't speak in terms of shared time programs on leased premises. It's a general appropriations ~~state~~ statute of money to local school districts and local school districts in Michigan may do what they want with this money.

QUESTION: But these people are Michigan taxpayers as well as Kent County or Grand Rapids taxpayers, aren't they?

MR. RIPPLE: They are, Your Honor, but they did not attack a specific use of the spending or taxing power by the legislature of Michigan.

It is our ~~position~~ submission that under the Flast holding and the Valley Forge holding, they would be required to do so; in effect, that they have failed the first prong of the Flast test.

Our submission is that the difficulty which the lower courts have had with this record can really be substantiated in two very succinct points. First, there is simply a huge gap between the findings established at trial in this case and the legal conclusions of law

reached by the Court of Appeals.

And, secondly, we submit that there is evidence on the face of the Court of Appeals opinion that a reason for this disparity between the facts established at trial and the conclusions of law was the manifest preference of the majority of the Court of Appeals for public as opposed to non-public education, a choice, we suggest, which is not theirs to make.

Now, turning to the facts of this case, the record initially shows two points which we think are very important. The first is the religious plurality of this community of Grand Rapids, Michigan. We're talking here of a community with a long tradition of religious plurality. We're talking here of not only a strong Catholic school system, but a very strong Christian school system in the Dutch reform tradition which has over 50 different denominations under the roof of its school. We're talking about Seventh Day Adventist schools, we're talking about Lutheran schools.

The second significant point I think the record indicates in terms of a background to this case is the commitment, traditionally, of the public school board in Grand Rapids to total community education. At least in their way of doing things, a school board does more than run a public school system.

Now, when you combine these two factors, I suggest, it is quite obvious this local community would want to, in these programs, assist 30 percent of its children, including a good number of inner city children who do not attend public school, and traditionally whose families have not gone to public schools.

It is interesting to note that when this program was set up, the Grand Rapids board showed particular sensitivity to the constraints of the religion clause with respect to four factors which, really, there was a religion clause consideration: the physical arrangement, the hiring of the teachers, the matter of supplies, the matter of teaching materials. And I'd like to address each of those briefly, if I may.

First of all, with respect to the physical arrangements, the touchstone was legal and actual control in public school hands. From a practical point of view, the hands of the local community were really very limited here. There are no public school faciities to which you could take 11,000 children. The busing situation would have cost $830,000 a year; would have entailed moving small children all over town, all day. And many of these kids are kids who need teacher time. These programs are remedial programs in part.

And, for these reasons, it was decided that

indeed the program ought tc be kept in the -- or it had to be kept within the local -- within the school of their primary education.

QUESTION: Mr. Ripple, you emphasized in your original three points, and just now, the remedial character of the program.

Would it be a different case if it were a required course such as English literature or mathematics?

MR. RIPPLE: Yes, Your Honor, we believe it would.

QUESTION: And, if so, why?

MR. RIPPLE: We think that the touchstone here ought tc be non-core, non-substitutionary. We do not believe and we do not maintain that we ought tc be providing courses which are necessary either for advancement in class or for graduation, or that we ought to be taking a financial burden off a school for running courses it already maintains.

QUESTION: But why not? If, say, the non-public schools had difficulty getting mathematics teachers for some reason; their pay scale isn't enough to attract mathematics. Why couldn't you help them cut that same way? I don't understand.

MR. RIPPLE: Well, that is not this case, but

we believe --

QUESTION: I know it's not, but you emphasized the difference, and I'm trying to understand why do you emphasize that difference?

MR. RIPPLE: We think that is a principle distiction to make and it is a good rule of thumb in applying the Lemon test, quite frankly, because it prevents the public school authorities from propping up the primary educational mission of the non-public schools.

QUESTION: In other words, remedial training is not part of the primary education?

MR. RIPPLE: That's correct. And under the law of Michigan, this type of training clearly is not. And there is an independent state interest involved here.

Michigan has an interest in seeing that a dyslexic child can read. It has an interest in seeing that someone understands basic math concepts. It has an independent interest in promoting the cultural arts and in making sure that people are decently physically fit.

QUESTION: It also has an interest in having good math teachers teach all the students.

MR. RIPPLE: It does, and it requires that a license be obtained by a non-public school before -- so

that it can engage in those programs. And if it doesn't, it pulls its license.

Now, the same with respect to teachers as well. We've tried to be careful in the running of this program.

QUESTION: In that regard, Mr. Ripple, do you think there is a greater entanglement problem for the community education program than for shared time because so many of the teachers in the community education program are the private school teachers who are being utilized?

MR. RIPPLE: It is a different situation, Jutice O'Connor.

QUESTION: Do you think it's a greater entanglement problem as a result?

MR. RIPPLE: We submit that the difference justifies the difference in treatment. Studies have shown that unless you can get 12 students interested in a leisure time activity, you can't run it fiscally.

The only way you can get 12 students interested, these studies show, is in fact to have the teacher be someone they know. The GM local plant, the GM employee who knows about rug hooking or something, that might teach it at these private schools, would be a teacher that the students would know and will stay after

class with.

We believe that the fact that there is still a public school chain of command, first of all, and secondly the nature of these leisure time activities make the possiblity of religious inculcation so slight that the situation does pass muster under the religion clause tests.

QUESTION: Mr. Ripple, on the enrichment program, what percentage of the regular school day is taken up by --

MR. RIPPLE: It varies from student to student, class to class, but --

QUESTION: What's the average, 10 percent?

MR. RIPPLE: No more than 10 percent. That's the maximum figure.

QUESTION: What would the students be doing during the regular school hours if they weren't in these enrichment classes? They would be in some other classes, wouldn't they?

MR. RIPPLE: They would be in other classes during the day.

QUESTION: Then isn't this a substitution?

MR. RIPPLE: It is -- they are, as I understand it, taken out, not from the course, but from certain hours of the course.

QUESTION: Well, nevertheless, they're filling the time that the private school would otherwise fill itself.

MR. RIPPLE: They are doing that.

QUESTION: With its own professors.

MR. RIPPLE: Yes, but they still must take all of the courses in the school, so they are in effect being excused from class to take the remedial or enrichment class, but still must --

QUESTION: But still, they can't be in two places at once.

MR. RIPPLE: No.

QUESTION: So they are in one of these classrooms when otherwise they would be in the private school's classroom.

MR. RIPPLE: But they can have two responsibilities at once, and they do. They still maintain responsibility for taking and passing the core curriculum.

QUESTION: Well, I just wonder. If you really think this is crucial to your case, then I think you may have a problem.

MR. RIPPLE: I submit it is not crucial to our case, simply because they maintain both responsibilities.

QUESTION: Yeah, all right.

QUESTION: May I ask one other question? Are the hours that are devoted to this part of the hours that are needed to achieve a degree to fulfill what the state standard is for graduation from high school?

MR. RIPPLE: They are the same -- the student -- normally, the hours required are somewhat less than children actually are in school, I believe, in most states, sir. These are normal school hours.

QUESTION: Do they count toward the fulfillment of the hours?

MR. RIPPLE: The students are required to be in the school building at that time; yes. These are the normally scheduled hours.

QUESTION: May I ask, Mr. Ripple, does the State require certification of private schools?

MR. RIPPLE: Yes, it does require that they be licensed. And to be licensed, they have to offer --

QUESTION: Do they have to be accredited in terms of approving them as suitable to educate children for higher education?

MR. RIPPLE: The Michigan statute says they must give comparable education, and that has been -- to the public schools -- and that has been interpreted as meaning they must give classes in language, art, social

studies, science, and mathematics.

QUESTION: Do the teachers have to be certified by the state board of education?

MR. RIPPLE: I believe they must have a state license.

QUESTION: And that requires a certain level of training to teach.

MR. RIPPLE: It does. And these, of course, are public school teachers who are teaching in the shared time program under the normal hiring practices of the public school.

QUESTION: I'm asking about teachers in general at private schools.

MR. RIPPLE: I believe they must have a license as well. That is my understanding.

In sum, we think we have given one message to the Grand Rapids community. We care. We care about all of you, and we think that that message is compatible with the strictures of the religion clauses.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. McConnell.

ORAL ARGUMENT OF MICHAEL W. MC CONNELL, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. MC CONNELL: Mr. Chief Justice, and may it please the Court, Grand Rapids is not alone in its

decision to provide supplemental educational services to school children in the schools that they regularly attend, whether those schools are public or non-public.

Indeed, it's an extremely common practice under Title I of the Elementary and Secondary Education Act of 1965, and is a practice that has been explicitly blessed by Congress.

QUESTION: Mr. McConnell, do you see any significant differences at all in the Grand Rapids shared time program and the Title I program?

MR. MC CONNELL: Your Honor, I see some relatively minor differences. I see none that in our view should be of decisive significance.

QUESTION: Does the payment of lease money to the school constitute a significant difference in your view?

MR. MC CONNELL: That is a difference. Under the Title I program, there is no lease payment to the private schools.

The record here shows that that lease payment is based on an objective analysis of the actual cost of maintenance of the classrooms and thus if for value received.

I think that it should not be viewed as a financial subsidy, but rather as an actual arms-length

purchase of the facilities, and on that basis I would think that it would not be distinguishable.

QUESTION: Is the supervision of teachers in the Title I program significantly greater than in the Grand Rapids program by the public school administrators?

MR. MC CONNELL: Your Honor, you should understand that the precise arrangements for the Title I administration vary from school district to school district. The basic contours of the supervision in both programs as I understand it is essentially the same, and it is this: that the teachers who are providing the services on the private schools are supervised to the same extent and for the same ends as the teachers would be in the public schools themselves.

In many cases they are, in fact, the same teachers, as you see in the record here. An individual teacher may be teaching in both public schools and private schools. The teacher is intinerant and the relationship of that teacher to his or her supervisors does not change merely because of a different building.

QUESTION: Do you see a difference in the community education program and the shared time program in Grand Rapids for purposes of your comparison?

MR. MC CONNELL: Yes, Your Honor, we do.

There are two difference between the Title I program and the community education program. First, the community education program does emplcy, cn a part-time basis, teachers from the regular private schools; and secondly, in a few instances, the administration of the community education program is also handled by personnel of the private schccls.

Both of these practices would, in fact, be illegal under Title I and do not exist in Title I.

And, Your Honor, we do believe that this is significant, but I would say this in defense of the community education prcgram; that it is really a different type of program altogether than an educational supplement within the private schools, because it's truly a community-wide program. Factories, hospitals, senior citizen centers, and it's leisure time activities; it isn't the type of teaching that has concerned this Court in its decisions in this area.

And on that basis, I think that it may be subject to a certain degree of more latitude, because it doesn't present the same problems, Your Honcrs.

As Professor Ripple mentioned, the essential problem with the Ccurt of Appeals opinion is the gap, as he puts it, between the factual findings and the factual reccrd and the legal conclusions in the case.

And I would like to emphasize four particular examples of that, and I select these because they are principles or aspects of the Grand Rapids program which it has in common with the Title I program, and thus I think it is of particular importance to this Court.

We also believe that each of them is constitutionally significant, although perhaps not individually decisive.

The first is neutrality. It's quite important that this program treats all children alike, without regard to whether they are attending public schools or non-public schools, and without regard to what religious sects they may belong to.

In this respect, it is not possible to say that this program constitutes a preference or an establishment of a religious sect. It simply respects the choices that parents and children have independently made.

Secondly, is the secular character of this program. The program provides the same classes, that is, the same topics, indeed the same curriculum, in many cases by the same individual teachers, but certainly all of the teachers under the same control and with the same training, in both the public schools and the private schools.

There has been no instance of religious indoctrination in this program, as even the Court of Appeals acknowledged in its opinion.

The purposes of this program are purely secular and the methods selected, including the placement of the program on the premises of the private schools, is solely for sound educational reasons. This is not a program which is designed to prop up or benefit or help religious schools. It is an educationally oriented program, entirely secular in character.

The third point Professor Ripple has already touched on in some detail. That is, that the program is supplementary in the sense that it provides services that would not otherwise be available to the children in these private schools.

Justice White asked some questions concerning this distinction, and certainly the distinction --

QUESTION: I didn't question that distinction.

MR. MC CONNELL: I'm sorry, Your Honor. Perhaps I misunderstood. The distinction that is considered important here is that these are services that the schools would not otherwise provide, and thus that the children would not otherwise receive.

We do believe that that's important for

determining that the benefit of this program is for children, and it's not a benefit that flows to a religious institution.

QUESTION: On that point, Mr. McConnell, would it be a different case if one of the non-public schools said we'd like to provide these remedial programs; we just don't have enough money to do it -- because I would think most schools would like to provide it.

Would that make a difference?

MR. MC CONNELL: Your Honor, I do not believe it would, because if the principle were that any services that a private school might conceivably and desirably, given infinite resources, provide to the students could be provided, and that that were a constitutionally valid way of looking at the program --

QUESTION: And in order to match the --

MR. MC CONNELL: That would mean the transportation, textbooks, any forms of assistance that have been approved by this Court as being benefits to the children, would become suspect.

We believe the test is whether, as a practical matter, the private schools are being relieved of an obligation or financial burden that they would otherwise bear. We think this is important, not just --

QUESTION: You are suggesting they would not

bear this burden, even if they could afford to do it? They wouldn't have remedial instruction for their children?

MR. MC CONNELL: If they had infinite resources, I suspect that they would provide not only this, but also transportation and textbooks and numerous other benefits as well.

We believe that the child benefit theory would altogether collapse if that were the test to be applied.

Let me stress that this is important, not just constitutionally from not benefitting the religion, but it's also important educationally, because the purpose of these programs as an educational matter is to provide services to children who would not otherwise receive them.

And I'd like to point out in this respect that Title I has exactly the same supplement, not supplant provisions as applied to public schools as it does to the private schools. The point here is to enhance educational opportunities for children that they would not otherwise receive.

The fourth specific point where the factual record and the legal conclusions of the Court of Appeals simply are not consistent is that this program is -- and

here I am talking specifically about the shared time program in connection with Justice O'Connor's question earlier This program is truly separate and independent of the private school control.

It is controlled exclusively by public school districts. The public school curriculum is used. The teachers are hired, assigned, supervised, - if needs be, fired -- exclusively by the public schools. The shared time teachers are subject to precisely the same forms of supervision in the public as in the private schools.

The private school role in the matter is exceedingly limited. Their responsiblities are essentially two: They provide a religiously neutral classroom that's empty, for use by the shared time teachers; and they perform very minor administrative scheduling functions.

The consequences of this is that the occasions for government intrusion into the religious aspects of these schools are minimal.

QUESTION: Is there anything in the record that shows how many times state supervisors investigate private schools in Michigan?

MR. MC CONNELL: Your Honor, there is evidence in the record that the public school officials do attend, on a regular and non-announced basis, the

classes conducted by the public schools.

QUESTION: Once every 26 years would be regular. But does it say how many times?

MR. MC CONNELL: I believe, Your Honor, that the practice is, on a general basis, once per month.

QUESTION: That's in the record?

MR. MC CONNELL: I believe so, Your Honor. I know that that is the case with respect to the Title I program in New York City, and I believe that I recall that that's in the record in this case as well.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. McConnell.

Mr. Howard.

ORAL ARGUMENT OF A. E. DICK HOWARD, ESQ.

ON BEHALF OF RESPONDENTS

MR. HOWARD: Mr. Chief Justice, and may it please the Court, I would like to address myself, if I may, to the specifics of the actual operation of the Grand Rapids program and touch three points.

First, I'd like to say something about the nature of the schools in question, specifically the pervasive sectarianism of the schools being benefited; secondly, say something about the nature of the aid itself. The particular effect of that aid is to give a direct benefit to these private schools and in

particular to their religious mission.

QUESTION: Is that aid different in principle from textbooks that are being supplied at public expense?

MR. HOWARD: Mr. Chief Justice, I think it is different in principle and in fact, especially as we looked at this particular case.

QUESTION: At some point, it's your own time.

MR. HOWARD: I would like to develop that point, sir, if I may.

Thirdly, I would like to say something about the relationship -- and this does bear, sir, on your question -- and that is not simply the manner of the aid or the nature of it, but the kind of relationship created between the schools themselves and governmental authorities.

First a word or two about the schools. These schools in Grand Rapids, these non-public schools, are not schools in which religion plays some incidental or subsidiary role. These are schools in which religion permeates and informs the very reason for their being. It is their distinguishing factor.

There is, in the operation of these schools, an integration, coming together of religious purpose and secular instruction. Now, if one looks to the record,

one finds this fact explicitly affirmed in the prospectuses and the handbooks and the bylaws, in the various publications of each of the schools that has benefited in Grand Rapids.

One example: The handbook of the Lutheran school in this case says -- and I quote: "All subjects," -- all subjects -- "are taught with a Christian approach and from a Christian point of view. The bible forms the core and center upon which all instruction is based."

If one turns to --

QUESTION: Is that true --

MR. HOWARD: Sir?

QUESTION: Do you say that apply to remedial reading or dyslexics?

MR. HOWARD: It's the proclamation of each of these schools that in their teaching of a given subject, in each classroom, each subject, each course, that school is dedicated to infusing secular education with a religious point of view.

Now, your question, I take it, deals with the shared time courses, and there has obviously been an attempt in the structure of these courses to not have religion inculcated in those classrooms.

The thrust of my argument will be that because

these schools are so pervasively sectarian, that the operation of these shared time and community education courses, even assuming there was, in fact, no indoctrination in those classrooms, will be of direct benefit to the ongoing enterprise of the private school as such.

In addition to these statements of purpose in the various handbooks and prospectuses, one may look to such things as governance of the schools. The boards of trustees or managers are either elected by local congregations or sometimes have doctrinal requirements, as is true in the Christian and Lutheran schools here.

The faculty of each of these schools is overwhelmingly of the same religious persuasion. For example, the superintendent of the Catholic schools has testified to the effect that in addition to clergy and nuns who teach in these schools, that 90 percent of the lay faculty are Catholics.

The admissions policies are often limited by sectarian requirements. The student bodies, as a result, are strikingly homogeneous. For example, one of the schools in the case is the Immaculate Heart of Mary School which has a student body of 424, of whom 410 are Catholics. There are requirements of religious instruction and exercises.

If one looks to all of these indicia and others, one will find that the schools dedicate themselves to fully merging, in their classrooms, in their courses of instruction, both the religious and the secular.

QUESTION: Do you feel, Mr. Howard, that that factor distinguishes the parochial and sectarian schools involved here from other sectarian schools that have involved in our earlier cases?

MR. HOWARD: What we have in this case is perhaps the fullest record that this Court has had in a paroch-aid case since the cases first started coming to the Court in the early '70s or early '60s, and the remarkable thing about this record is that given the completeness of the documentation, I know of no case in which one has to resort so little to surmise about the pervasive sectarianism of the schools, that they look instead to the --

QUESTION: Well, do you think the Court in its earlier decisions assumed that the sectarian schools really weren't sectarian?

MR. HOWARD: Well, it seems to me that in the earlier cases, there were often profiles which were indulged in. Sometimes, one would suppose that a Catholic school must therefore be pervasively

religious.

As I understand the Court's decision upholding certain programs of aid, they basically are of two kinds. You have the higher education cases like Hunt v. McNair, Tilton v. Richardson, cases in which because of the nature of the student body, the less impressionable audience as it were, the aid was permitted.

The other cases which took place at the level of primary and secondary schools were cases in which the form of the aid itself, for example, a textbook, a school bus, diagnostic testing, et cetera, were aid of such a kind that even though the school might be pervasively sectarian, one saw no first amendment violation of those facts.

Now, it seems to me that the teaching of the Court's cases is that if the record be fairly read as finding these schools to be pervasively sectarian, then, as it was said in Meek v. Pittinger, that substantial aid to the educational function of these schools is necessarily aid to the religious enterprise as a whole.

Let me turn, therefore, to my second point.

QUESTION: Is there any evidence, Mr. Howard, that in teaching the remedial reading, for example, they used religious materials, the bible or other religious materials?

MR. HOWARD: Mr. Chief Justice, in the shared time programs, there is no evidence in the record that religious materials were used in those classrooms or in fact that religious doctrines were taught.

QUESTION: The evidence is just to the contrary, isn't it?

MR. HOWARD: It's a lack of evidence, Justice White. It seems to me to be rather odd to assume that the lack of any complaint really proves anything. Consider, if you will, the classrooms in these schools. They are -- and the record is quite clear on this. They are made up entirely of students of that same religious persuasion.

So far as the record shows, not one public student ever attended a shared time class in any of the private schools benefited by this program in Grand Rapids. That being the case, you have a sort of receptive audience.

Who would complain? Not the parents who have chosen religious education, not the students who are used to it, surely not the schools' teachers or administrators. It seems to me that the lack of complaint doesn't really --

QUESTION: Wasn't there any evidence, any testimony about this at all?

MR. HOWARD: There was evidence, testimony --

QUESTION: What about the teachers?

MR. HOWARD: Some of the teachers testified that they did not.

QUESTION: The only evidence there is is that they did not.

MR. HOWARD: It seems to me --

QUESTION: Isn't that right? Isn't that right?

MR. HOWARD: If I may say so, it's self-serving evidence.

QUESTION: Well, nevertheless, I'm right.

(laughter.)

MR. HOWARD: You are right that the only evidence is that the teachers in question did not teach religion.

QUESTION: Most evidence in trials is self-serving. Your remedy for that is to cross-examine. If you don't adequately cross-examine a rebuttal statement, the test stands.

MR. HOWARD: Justice Rehnquist, my remedy would be to have a mix of public and private students in the same classroom where you then have an automatic kind of safeguard.

QUESTION: Well, when you're designing school

programs, maybe you can do that.

MR. HOWARD: Well, let me develop that idea, if I may. But one thing I think we should get straight on the record of what happened in Grand Rapids -- this goes back to Justice Stevens' point just a moment ago. And that is the question that you put, sir, about the difference between supplemental and core courses.

There's a summarical distinction being offered by the Petitoners in this case. Now, they have argued that the shared time courses of the community education courses are supplemental to some kind of core curriculum; that they are not required by Michigan law.

Now, this effort to divide the school curriculum into that which is core and that which is supplemental creates a distinction which is nowhere found in Michigan law. You will search the Code of Michigan in vain for any talk about not only core courses, but any courses at all.

The fact is that in the Michigan Code, not only does the Code not require the courses which are here being labeled supplemental, it does not require any other courses. So the logic of the Petitioners' argument would lead you to the conclusion that the Grand Rapids School District could, if it liked, offer any and all courses now being offered by the private schools in

Grand Rapids, excepting I suppose theology or religion.

Similarly, the State Board of Education lays out not requirements as to what must be taught either by the public or the private schools in Michigan.

Justice Powell asked a question earlier about acrrediting processes. In the University of Michigan's accrediting process, there is an accrediting process for high schools only. There is not requirements laid down as to the elementary schools in this case. The accrediting agency is the North Central Council of Schcols and Colleges.

There is, however, one relevant section of Michigan law that I would call your attention to, and that is a section which says that for a child to be relieved of the obligation to attend public school, one must be attending a private schcol which offers -- and I quote -- "subjects comparable to those taught in the public schools, as determined by the course of study of the public schools of the district in which the non-public school is located."

So there are two ccnclusicns I wculd draw about Michigan law. First is that the supplemental core distinction does not exist. In other words, each school decides for itself what it thinks to be core and what is not. The definition, therefore, is totally elastic.

Alternatively, if one turns to the section that I just quoted, if indeed a non-public school must teach those courses "comparable to the programs offered in public schools," that it is not fair to say that the public fisc is not taking over and relieving a private school of courses which it must offer by law, because Michigan law, if read this way, require that kind of comparability.

Either, therefore, one reads Michigan law as allowing the school district progressively to take over the curriculum, or one reads it as saying that the district is in fact fulfilling the schools' present legal obligations. Either one, it seems, to me runs into the establishment clause problem.

Now, let me turn, if I may, to the argument that -- which has been made by the Petitioners -- that the shared time elementary courses in this case were not in fact offered by the non-public schools. In other words, they are in this sense something new, something which had not been offered before,

That, I maintain, is contrary to the record in the case. In fact, the non-public elementary teachers of these schools did teach these very subjects, albeit in more limited form. They were simply not split off as separate courses, but the subject matter was in fact

taught.

There is testimony of the superintendent of the Grand Rapids Catholic schools and the principal of the Lutheran school, both to the effect that courses such as art, music, physical education were all taught by the regular classroom teacher. Then came shared time and these regular classroom teachers now do some of those same subjects, but simply devote less time to them.

QUESTION: How about remedial reading and make-up math?

MR. HOWARD: They would have taught remedial reading. They would have taught enrichment reading, remedial math, enrichment math, within the scope of their ability and their time. This is --

QUESTION: But no special classes such as these.

MR. HOWARD: That's correct, Mr. Chief Justice. No special classes.

So it seems to me to suggest that somehow because these classes are being taught as classes, misses the point that these subjects would be taught in some fashion in the regular classroom.

QUESTION: Mr. Howard, in this regard, is the Grard Rapids case different from the Title I case that

we were about to hear later this morning?

MR. HOWARD: Well, Justice O'Connor, it seems to me that the Grand Rapids case has yet more indicia of a public school system taking over the functions of a private school, because in the Title I case, all of the programs there are remedial.

In the Grand Rapids case, one has not only remedial courses, but enrichment courses as well, a much fuller spectrum.

Indeed, it might be worth noticing that in addition to the courses which are on appeal in this case, elementary school remedial math and enrichment match and reading, and art and music and physical education, that the Grand Rapids shared time program has offered an extraordinary range of subjects at both the elementary and high school level, including things like journalism, Spanish, French, year book, quite a remarkable list of courses.

Those, of course, would not be involved in a case such as Title I.

Consider, if you will, the benefits which flow from this program as I've described it, to the private schools in Grand Rapids. To the extent that classes are created, separate classrooms in which one teaches art, music, physical education, remedial subject, and

enrichment subjects, to that extent the regular classroom teacher can spend more time with fewer students, doing a more efficient job of that which the school has hired that teacher to do. And that which the teacher is hired to do is to teach courses in a religious context and a religious setting.

I would submit, therefore, that this effort to draw some kind of meaningful line between core and non-core simply has to collapse on the facts of this case.

Let me turn now, if I may, to the Petitioners' argument that all non-public school children had the opportunity to participate in the challenged programs. I take this to be a variation on the equity or child benefit theme; that the program is somehow a program of benefit for children and not for schools.

The fact of the matter, in this case it is the schools and not the parents and not the children who make the decisions about going into or not going into this program.

In the first place, each non-public school decides for itself whether or not to accept shared time with community education classes at all. Secondly, having made that decision, each school decides for itself which of those courses it wants. Thirdly, once

those courses are in operation, it is the regular classroom teacher who teaches math and reading who will decide which students are to be offered to the shared time classroom.

So at every important decisionmaking point in the chain, the decisions are not those of parents, not those of individual students, but decisions of the schools themselves.

QUESTION: Is that different from Title I programs, Mr. Howard?

MR. HOWARD: Well, Justice O'Connor, I think there is some of the same opportunity in Title I for a non-public school to opt out of the program if they see fit, and I can't, on the face of it, see a dispositive difference there.

QUESTION: Well, Mr. Howard, the classroom teacher can't force the student into the --

MR. HOWARD: Justice White, that's quite correct.

QUESTION: So there is a choice by the student and the parent.

MR. HOWARD: Well, not really.

QUESTION: Well, they have the choice to turn it down; right?

MR. HOWARD: If the -- turn it down by whom,

the school or the --

QUESTION: No. Doesn't it -- I thought you said the student could refuse to go.

MR. HOWARD: No, I'm sorry, sir; I didn't say that. I said that --

QUESTION: You mean that the school -- the classroom teacher can assign and require the --

MR. HOWARD: The regular classroom teacher, the private school teacher decides which of his or her students need remedial work --

QUESTION: Exactly.

MR. HOWARD: -- or would profit from enrichment work, and sends those children to the public employee who is teaching shared time courses.

QUESTION: So, again, could the student or the parents of the student say sorry, but we do not want the child to participate in that program?

MR. HOWARD: That would be a negotiating process, no doubt, between parents and school.

QUESTION: Well, there isn't there an answer, yes or no, to that?

MR. HOWARD: The answer is yes, but.

QUESTION: Yes, but what?

MR. HOWARD: And the yes, but -- the "but" part is that if the regular classroom teacher thinks

that the student would not benefit and therefore doesn't send that child for it --

QUESTION: Then he can't go in.

MR. HOWARD: That's right.

QUESTION: But if he says here's one that should go in, the student can say, and his parents can say, sorry, we don't want him to.

MR. HOWARD: The parent could say no to that. Yes, sir, that's correct.

QUESTION: That's all I really wanted to know.

QUESTION: Mr. Howard, are the books and instructional materials used in the shared time program provided by the State?

MR. HOWARD: Yes, sir; they were.

QUESTION: Does Michigan approve textbooks and classroom materials?

MR. HOWARD: Michigan has, as I understand the State system, a very decentralized sort of educational system. There are a few states in which textbooks are approved at the State level.

QUESTION: That's true in Virginia.

MR. HOWARD: True in Virginia, true in Texas, true in some others. My understanding in Michigan is that those choices and those approvals would be made by

local school districts subject to the general supervision of the superintendent of education.

QUESTION: There's some flexibility in Virginia for local school boards to make choice of additional text material, but it has to be approved byt the State.

MR. HOWARD: As I understand Michigan, it's striking in the degree of autonomy it gives to its local school districts. Milliken v. Bradley, for example, turned on that very point.

QUESTION: But the material used in the shared time program is approved by their local school board?

MR. HOWARD: And are therefore appoved by the public authorities. Yes, sir; that's correct.

QUESTION: The same material used in both public and private schools.

MR. HOWARD: That would be correct. Just as the teacher who teaches the shared time course will be teaching essentially the same course, whether he or she happens to be in a public school or happens to be in a private school.

Yes, sir; that's correct.

Let me turn, if I may, to another argument that the Petitioners have made. And that, in effect, is that there is not a narrow class of religious

beneficiaries. And this is another variation on the child benefit argument, the argument being that there is no preference being given to religious students, because the same subjects are available through the public schools to students there; that there's a comparability in terms of subject matter.

I think it's simply not fair to say that there's one class. As I view the program in Grand Rapids, there are two generically distinct classes of students, and therefore two generically distinct programs.

One of those programs is in the public schools, open to all students who take part and teaching the shared time courses. The other is the program which operates in the religious schools, and which as I mentioned a moment ago, not one public school student has ever attended. So that program, the second program, the one being challenged here, is one in which there is total identity of the students in those shared time classrooms with the religious persuasion of that particular private school

And that, I think, makes this a distinct program and therefore, in effect, a double benefit to the private schools. One has in the first place the enlarging of the school's curriculum, the opportunity

for the school to offer additional courses which it might not otherwise be able to fund or might not wish to fund, the opportunity to sort of siphon off the slowest and the fastest students from various classrooms, and have those taught at public expense, but of top of that sort of financial benefit, one has the benefit that this program operates entirely within the religious school, entirely on its premises, and the students who are being taught are entirely of that school, and no mix with any other.

Let me turn, finally, to my third point which is that of excessive entanglement. This is a claim in the case by the Petitioners that the court below has in effect neglected the record, that there is per se reasoning in the air.

Now, I would like to respond to that by way of suggesting that if this Court affirms the Sixth Circuit, it may do so without resort to hypotheticals or suppositions or profiles or anything outside the record. It seems to me the actual relationship between the Grand Rapids School District and the private schools being benefited is ample to affirm the decision below.

First, a word about the actual entangelement. This is not hypothetical or supposed, but the actual relationship which goes on between the Grand Rapids

School District and the non-public schools.

First, in the community education program, there is a complete merger of the administration of that program, because the administrators of the non-public schools are hired to be the coordinators of the community education program. This is true, for example, at several of the Catholic schools in Grand Rapids.

Secondly, as to the hiring of teachers, I think this is a question that Justice O'Connor touched on a moment ago, virtually every one of the community education courses at a private religious school in Grand Rapids is taught by a full-time employee of that school, not by people brought in from the outside, but by teachers already known to be part of that religious community.

Thirdly, as to the assignment of shared time teachers, a fair number of those shared time teachers had been employees of private religious schools, were then hired by the --

QUESTION: What percentage, Mr. Howard?

MR. HOWARD: About 10 percent, Justice O'Connor. Something like -- it depends on which programs we are counting -- between 10 and 13 in absolute number, or about 10 percent of the shared time teachers.

And these teachers were hired by the public and sent back to those same private schools.

Perhaps, most importantly, there is an abdication by the Grand Rapids School District of control over many aspects of the program. It has no control over the enrollement. It can refuse to offer the program, but once it's offered it, the decision as to which students will be enrolled are the decisions at the outset of the schools themselves.

QUESTION: How would abdication tend to prove entanglement?

MR. HOWARD: It would mean that you're taking public money, public programs, putting those programs into the hands of religious authorities, letting them make decisions about allocation of resources, which seems to me a classic case of entanglement.

There are also actual entanglements in the days of operation, the hours of operation. School holidays are basically worked out by the private school. Parent-teacher conferences are worked out by the private school. The public really has no control over that.

The cases of this Court have made statements that the State must be certain that the State aid does not result in religious inculcation. Now, one need not

resort to that language, though it is the language of the cases. However one characterizes that obligation, it seems to me there is no escaping that the State has an affirmative obligation, once the Plaintiff has shown that there are facts giving rise to a sufficient danger of forbidden effect.

And I would characterize it somewhat as follows. The more pervasively the sectarian school, the greater the benefit conferred by the State, the more closely related the aid to the school's instructional process, as these courses are, and the greater the actual entanglement of the kind I've described, then the greater the duty imposed upon the State to ensure that and show that it's ensured that the forbidden effect does not come to pass.

In the Everson case in 1947, the Court said the following: Neither a State nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups, or vice versa.

The Grand Rapids program violates this injunction because there is concurrent jurisdiction and shared responsibility.

Recently, this Court, in Larkin v. Grendel's Den, cautioned against -- and I quote -- "the mere

appearance of a joint exercise of legislative authority by Church and State because of the significant symbolic benefit to religion."

In the Grand Rapids program, we have not only the appearance, but the fact of a joint exercise of authority by religious schools and public authorities over programs which are publicly funded on those schools' premises.

QUESTION: But the facts are quite different, are they not? In Grendel's Den, it in effect gave the local parish priest the veto over liquor licenses, quite a long step for this point, isn't it?

MR. HOWARD: Mr. Chief Justice, I'm simply drawing upon the principle that lies behind the Grendel case, which makes it clear that when you merge authority over decisions in the public arena, you've entangled Church and State.

And I would suggest that the analogy in this case is the merger is so many points of operation of this program.

Let me finally dwell on this point. To put all these pieces together, I would like to argue that this case should not turn either on isolated facts or on sweeping generalizations about the Grand Rapids program. We should look, as the Lemon v. Tilton --

Kurtzman case -- has instructed, to the program's cululative impact, not simply a piece at a time, but all of it put together.

Consider, if you will, the cumulative impact of the fcllowing factors: First, that public employees at public expense; secondly, teach on the premises cf pervasively sectarian schools; third, that they teach courses of substantive instructional content, involving ongoing student-teacher contact; fourth, that there is no mix of students -- the students are all of the same religious school; fifth, that we're talking not about college students, but about students at the most impressionable age, the elementary schools; sixth, that some of these courses, community education, are taught by full-time teachers cf the same school; seventh, that it is the school and not the parents or the students who decide what will be offered; and finally, that there is the appearance and the fact of a joint exercise of authority.

My submission, therefore, would be that this program in Grand Rapids has become, for all practical purposes, a functional part of the religious schools' curriculum and instructional program. And it's hard for me, therefore to imagine a more palpable violation cf the establishment clause of the First Amendment.

CHIEF JUSTICE BURGER: Very well.

Did you have anything further, Mr. Ripple?

MR. RIPPLE: Yes, Mr. Chief Justice.

ORAL ARGUMENT OF KENNETH F. RIPPLE, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. RIPPLE: This case is not only a religion clause case, but it also a fairness case. Like many very complex legal matters, it can be reduced to elemental principles.

There are two in this case. Plaintiffs have the burden of proof. Cases ought to be decided on a record of trial.

Now, with respect to matters which have arisen over the last few ~~months~~ moments, first of all, there is no art, music, or physical education course in these schools before the shared time program -- kids did draw pictures. Kids did sing in the non-public schools, and they did play in the playground at recess.

But we are not talking about programmatic instruction with a specialist teacher, and those programs are in this record of trial.

The case law of Michigan does establish a core curriculum. Statutes ought to be interpreted by virtue of the State case law. It is not true that the non-public school teachers said who was going to be in

those remedial classes. An independent screening was done by the public school teacher to determine who would be in those classes.

There was one class of people here, two methods of delivery because of the physical necessity of dealing with kids at two different locations.

With respect to the teacher hiring, it is important to remember that every shared time teacher was hired by the independent hiring process of the public schools which, under the union rules, require them to take the laid-off public school teachers first, and then applicants second.

There were, at most, 10 percent of the teachers in the shared time program had any denominational teaching experience. At most. It's somewhat less because the high school programs are not involved in these cases.

Today, we have seen the Respondent basically take the same position the Court of Appeals took; that this pervasively religious atmosphere -- these are not the schools Bing Crosby dealt with in Bells of St. Mary's -- they are modern educational facilities.

But the record shows there was no religion taught in these schools, that there was no religious inculcation. The record shows that these schools were

relieved of no ongoing responsiblity. The record shows that in fact, while there were relationships between public and non-public, there were in fact no impermissible entanglement.

QUESTION: Mr. Ripple, Professor Ripple, you feel the record here is different from that in the recently decided Missouri case.

MR. RIPPLE: We believe the record in this case does, in fact, substantiate that the relationships here were so structure so that this was a professional working relationship which, in fact, did not -- which did not and could not overstep the bounds of impermissible entanglement, Mr. Justice.

QUESTION: Would the decision here govern and control the Missouri case if that ever comes --

MR. RIPPLE: We do not believe that it ought to. We believe that this case should be decided on the record.

QUESTION: So that the Missouri case might go the other way on its facts.

MR. RIPPLE: We do, sir, because we believe that what has happened here is the people of Michigan have established and structured a program which is good for them.

QUESTION: I want to be sure of your

concession in that respect.

MR. RIPPLE: And we believe that in that respect, they have a constitutional right to live with their good planning.

Mr. Chief Justice, thank you.

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

We'll hear arguments next in Aguilar v. Felton and the consolidated cases.

(Whereupon, at 11:03 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-990 - SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, ET AL., Petitioners
v. PHYLLIS BALL, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)