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THE SCHOOL BUS CHALLENGE

George E. Reed*

For the past two decades federal and state legislatures have been reframing their legislative structures in order to make them more responsive to the needs of the people arising from the rapidly changing economic and social conditions of our times. Essential to this program of social reconstruction is the emphasis on the interest of the state in the health and welfare of all of its citizens apart from considerations of race, creed, or color. Laws providing for civil rights, free school lunches, social security, minimum wages, and health care programs are but a few of the many examples of this enlightened attitude.

Mindful of this trend, eighteen states,[1] obviously impressed with the salutary success of school bus transportation for children attending public schools, have extended the state's mantle of protection to children attending nonpublic schools. In doing so, they saw no wisdom, justice, or constitutional inhibition in providing such an essential service for one group of children while denying it to another group of children, all of whom attended school in accordance with compulsory education laws of this state. This sound progressive social legislation probably would have encountered little opposition but for the fact that a large number of the children benefited attend schools conducted by religious bodies.

Whenever legislation of this type is proposed, the argument is advanced that the measure violates the policy of separation of Church and State. For example, in 1957 the Legislature of the state of Connecticut considered a bill which would enable towns and municipalities to transport children to nonpublic schools if the people of the communities

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[1] Alaska; California; Connecticut; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maryland; Michigan; Mississippi; New Hampshire; New Jersey; New Mexico; New York; Oregon; Rhode Island; and West Virginia.

expressed this desire in a special referendum. Resolutions were passed by various Protestant sects condemning the proposed law on the ground that it breached the wall of separation of Church and State. Opponents of the measure in the legislature constantly advanced this argument, disregarding the fact that the Supreme Court of the United States ten years ago decided that legislation providing school bus transportation for children attending nonpublic schools does not violate the policy of separation of Church and State.[2]

GEORGE E. REED

The *Everson* Decision

Although the *Everson* case was decided but twelve years ago, it is already corroded by confusion. It is, therefore, necessary to re-examine the Court's holding in order to secure a clear understanding of this key decision. The Supreme Court was confronted with the allegation that a New Jersey statute, extending free school bus transportation to children attending public and nonprofit private schools, violated the First and Fourteenth Amendments to the federal constitution. With respect to the Fourteenth Amendment, it was alleged that the state took public property and bestowed it on others to be used for their private purposes. In response to this argument, the Court stated:

> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. (Cochran v. Louisiana State Board of Education, 281 U.S. 370.)[3]

The public purpose character of transportation legislation is no longer an open one.

The First Amendment argument was predicated on the proposition that public money was being used to support church schools, and thus violated the alleged guarantee of separation of Church and State of the First Amendment. The Supreme Court broadly interpreted the clause of the First Amendment forbidding an establishment of religion, saying:

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

The Court then examined the New Jersey law in light of this interpretation and reasoned that

> . . . other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans . . . or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[5]

The Court observed that the legislation helps the children to get to school, just as the policeman at a busy intersection protects children going to and from a parochial school. It did not conclude that the state is engaged in the direct support of parochial schools, but on the other hand decided:

> The State contributes no money to the schools. It does not support them. Its legis-

[2] Everson v. Board of Educ., 330 U.S. 1 (1947).

[3] *Id.* at 7.

[4] *Id.* at 15.

[5] *Id.* at 16.

> lation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.
>
> The First Amendment has erected a wall between church and state. . . . New Jersey has not breached it here.[6]

This decision is not equivocal. It squarely holds that legislation designed to transport children to and from parochial schools does not involve a violation of the policy of separation of Church and State. Opponents of such legislation consistently ignore this fact. Yet, it is of the essence of the decision, and may and should be quoted as the authoritative statement on this issue.

Second, the Court fully analyzes the questions as to whether transportation legislation supports parochial schools. It concludes that it does not, but on the contrary merely helps parents discharge their duty of complying with the compulsory education laws. These statutes were enacted at a time when traffic hazards were, comparatively speaking, at a minimum. Today, with increased hazards, transportation legislation is more than ever a necessary implementation of compulsory education laws.

A contrary decision would render nugatory the parental right recognized in the Oregon School Case,[7] particularly with respect to parents whose children live in remote or highly congested districts. It is significant that the Court cited the Oregon School Case in connection with its evaluation of the impact of the compulsory education laws. It is quite logical to conclude from these premises that the State has the responsibility of providing a safe means of transportation for all children attending recognized schools under compulsion of law. The Court, however, did not go this far. For instance, Justice Black in speaking for the Court said: "[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools. . . ."[8]

In short, the Court recognized the right, but not the *duty* to provide transportation for all children in similar situations. Some advocates of free school bus transportation have failed to recognize this anomalous limitation in the *Everson* case, with the result that actions have been brought to force school boards to extend transportation service in the absence of essential enabling legislation. Uniformly, the courts have ruled adversely, the latest case being *School District v. Houghton.*[9]

There is every reason to believe that state courts will continue to rule that there must be enabling legislation before a school board is warranted in transporting students, even public school students, for school boards may only exercise delegated authority.

Latest Decision in Maine

The extent to which this rule applies to municipalities is currently the subject of interesting litigation in the state of Maine. The city of Augusta, relying on the proposition that it, unlike a school board, has authority to legislate for the welfare and safety of the community, adopted an ordinance providing for transportation of nonpublic school children. The ordinance was challenged in the case of *Squires v. City of Augusta.* The Superior Court upheld the

[6] *Id.* at 18.

[7] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[8] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[9] 387 Pa. 236, 128 A.2d 58 (1956). See also Connell v. Board of School Directors, 356 Pa. 585, 52 A.2d 645 (1947).

ordinance and the case is now pending on appeal to the Supreme Court of Maine. This is the first time an issue of this nature has been before the courts.

Although the legislative road is frequently a long one, it affords the best prospect of ultimate success, especially if the legislation is carefully drafted. The *Everson* decision, for instance, will not prevent a state court from holding that transportation legislation is unconstitutional if there is a violation of a particular provision of a state constitution. For example, most states have constitutional provisions which limit certain school funds to public school use. Legislation, therefore, which authorizes the use of such funds for transportation of children to nonpublic schools is often vulnerable. The latest case illustrating this point is *McVey v. Hawkins*.[10] The state of Missouri amended its transportation statute in 1939 by adding the following provisions:

> [P]rovided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit.[11]
>
> [P]rovided . ... that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools.[12]

For many years children were transported under the authority of this law. In 1952 the law was challenged. It was argued, among other things, that the constitution of the state of Missouri provided that the fund upon which the transportation statute was dependent was to ". . . be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."[13]

The Missouri court held that the amendment extending transportation to nonpublic schools resulted in the use of money for purposes other than the support and maintenance of public schools; consequently the whole transportation statute was invalidated.

Another example occurred in Kentucky in the case of *Sherrard v. Board of Educ.*[14] The highest court of the state held that an action extending transportation to nonpublic school children was unconstitutional, since the implementation of the statute was dependent upon the use of funds reserved by the constitution to public schools. The next year the legislature enacted a new transportation law,[15] which in many respects is a model one. The enacting clause is preceded by a preamble consisting of five short paragraphs setting forth the need for the legislation.[16] The substantive portion of the law extends free school bus transportation to children attending nonpublic school. Moreover, it provides that the money to support such transportation shall be appropriated from general funds. The statute was immediately challenged. This time the high court of Kentucky upheld the law since it was not dependent on a public school fund.[17]

A Problem of Social Justice

Concerning the other issues raised, the Kentucky court declared:

> In this advanced and enlightened age, with all of the progress that has been made in

[10] 364 Mo. 44, 258 S.W.2d 927 (1953).

[11] MO. ANN. STAT. § 165.140 (1949).

[12] MO. ANN. STAT. § 165.143 (1949).

[13] MO. CONST. art. 9, § 5.

[14] 294 Ky. 469, 171 S.W.2d 963 (1942).

[15] KY. REV. STAT. § 158.115 (1955).

[16] Ky. Acts 1944, ch. 156.

[17] Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945).

> the field of humane and social legislation, and with the hazards and dangers of the highway increased a thousand-fold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced, as they are, it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church. . . .[18]

Undoubtedly this is one of the most effective analyses of the factors pertaining to the transportation question. Technicalities are brushed aside in the interests of social justice. The whole problem is examined in the light of conditions which today confront our children. Actually, the quoted portion of the Kentucky opinion is but a paraphrase of the preamble of the transportation statute. This technique of legislative drafting is characteristic of the great body of social welfare legislation enacted during the past twenty-five years. Frequently the clear expression of legislative intent in the law has been the determining factor in judicial tests of the constitutionality of such measures.

Opposition to Be Expected

Despite the intrinsic merits of transportation laws for all children and the skillfulness of draftsmanship, invariably the proposed legislation will encounter strong opposition when introduced and every conceivable argument will be used against it.

A typical example of the type of opposition which may be expected was demonstrated in Connecticut last year. The proposed legislation was permissive. It would have allowed Connecticut communities, if they so desired, to provide health and safety services, including transportation, to children attending nonprofit schools. The legislation was introduced to clarify an admittedly ambiguous law; some communities were transporting children, others were not. All the states adjoining Connecticut had legislation authorizing transportation of children to nonprofit schools. Some of these laws were mandatory. Over half of the people of the state were supporting both public and private schools.

Despite these facts, the opponents of free school bus transportation for all children came within one vote of defeating the modest request. They succeeded in deleting from the bill the general provisions relating to health and safety. The legislation enacted involved only transportation.[19] We have already noted how reliance was placed on the "wall of separation" concept in total disregard of the *Everson* decision. Equal emphasis was placed on the proposition that the legislation would weaken the public schools, which were described as a "cohesive unit." One of the leaders of the opposition stated flatly that the bill presented "an inevitable conflict between the Catholic Church where the children are indoctrinated in one faith and the public school theory."

In elaborating on this proposition, the Chairman of the Education Committee of the State House of Representatives stated:

> We are for the public schools. All children are welcome there. If any are to be withdrawn, nothing prevents, but any proposal to encourage such withdrawal by financial assistance should be met with an emphatic "no."

Though the proposed legislation has been enacted into law, opposition to children riding to parochial schools continues. For example, the town of Newtown conducted

[18] 191 S.W.2d at 934-35.

[19] CONN. GEN. STAT. § 10-281 (1958).

a referendum in which the people voted to have the benefits of the new law extended to all of the children in the community. This action precipitated litigation designed to test the constitutionality of the Connecticut law *(Snyder v. Newtown).* Complainants allege that it violates the state and federal constitutions and that they will take the case to the United States Supreme Court if necessary.

A more forceful example of the refusal of opponents of the nonpublic schools to acquiesce in the expressed will of the people is reflected in litigation just filed in the courts of New York.[20]

In 1939 the people of New York amended the state constitution to provide school bus transportation for children attending nonpublic schools.[21] This amendment was expressly adopted in the interest of the welfare of the children. The legislature, without dissent, proceeded to enact a law providing that when the people of a school district extend transportation facilities to children in the nonpublic schools such facilities shall be extended to all children attending nonprofit schools.[22] This law has worked well since its inception. Recently, however, a school board refused to follow it. The Commissioner of Education ordered that the board adhere to the law, with the result that an action has been filed to test the constitutionality of the amendment to the New York constitution and the statute implementing it. Plaintiffs allege that this organic and statutory law is repugnant to the federal constitution despite the fact that the United States Supreme Court has expressly passed on the issue. Like the opponents of the *Brown*[23] decision, outlawing school segregation, the opponents of the private schools ignore the obvious civil rights implications of the decision by the Supreme Court in *Everson.* Apparently they will not rest until a decision has been secured curtailing the liberties of children attending schools other than public institutions.

In other words, even though health and safety of school children are at stake, they contend that the state may not take any action which enables parents to exercise the constitutional right of sending their children to nonpublic schools. The Supreme Court, in *Everson,* was confronted with this precise issue and, noting that but for the New Jersey legislation, some children might not be sent to church schools, declared: "State power is no more to be used so as to handicap religions than it is to favor them."[24]

The Court gave a positive and realistic emphasis to the mandate of "state neutrality,"[25] whereas the opponents of free school bus transportation for all children associate neutrality with inaction. But failure to act, in order to protect a right, has the same vitiating effect as the deliberate denial of a right.

In the last analysis, the argument is predicated on the assumption that all children belong in public schools. This proposition frequently is insinuated when legislatures are considering transportation legislation. It is doubtful whether such a narrow attitude accurately reflects the conviction of many communities. Let it be remembered, however, that this conscience may be tempo-

[20] Board of Educ. v. Allen *et al.* The suit has been filed in the New York Supreme Court, Albany County.

[21] N. Y. CONST. art. 11, § 4.

[22] N. Y. EDUC. LAW § 2021 (19).

[23] Brown v. Board of Educ., 347 U.S. 483 (1954).

[24] Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[25] *Ibid.*

rarily blinded by the propaganda of national organizations. Invariably these groups intervene in these issues, even to the extent of contacting all of the legislators and furnishing them with material designed to stimulate emotionally a fear of the Catholic Church and its parochial school system. Though of recent origin, this practice is now quite common.

A Matter of Public Safety

Fortunately, there are also constructive forces at work. Last year, for instance, the Committee for the White House Conference on Education made the following recommendation:

> This Committee recommends that all children, regardless of whether they be enrolled in public or nonpublic schools, receive basic health and safety services at public expense; the extent to which "basic health and safety services" should go and the question of whether public school funds be used to provide them must be determined at the State and community levels to reflect existing laws and desires.

This more truly represents the attitude of the public. The White House Conference arrived at this conclusion after a mature consideration of the issue. It evaluated critically informed opinions from every section of the country.

Today, thousands of children attending nonpublic schools are confronted with ever-increasing highway hazards. The social conscience of the American people has before it a real challenge. On the one hand, may freedom, and on the other hand, discrimination in sharing public welfare benefits, coexist in a nation dedicated to the concept of equality?

The gravity of the situation calls for a speedy answer. Prudential application of the basic principles of the *Everson* case in the framework of the judicially tested legislative techniques of the Kentucky experience provide the basis for the answer. In applying the principles of *Everson*, the mistake of associating the decision exclusively with the "child benefit theory" should be avoided. When the Supreme Court held the New Jersey law fulfilled a public purpose and cited the *Cochran* case as a precedent,[26] it implicitly reaffirmed the child benefit theory.

But in upholding the transportation law against the challenge that it violated the First Amendment, the Court went beyond this theory. It based its ultimate decision on the free exercise clause of the Amendment. This is the significance of the Court's language: ". . . the [First Amendment] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[27] This is the real strength of the decision, the basic principle of the case.

In summary, we may conclude that the New Jersey bus decision affords strong support for transportation legislation; but initially, legislation must be sought. It must be framed with the state constitution in mind and with full knowledge that it will be subjected ultimately to a judicial test.

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[26] See Everson v. Board of Educ., 330 U.S. 1, 7 (1947).

[27] *Id.* at 16.