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National Coalition for Public Education & Religious Liberty v. Harris

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NATIONAL COALITION FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY v. HARRIS

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Title I of the ESEA[1] is a federal program under which the federal government provides money, usually to local school boards, with which the local school boards hire teachers to provide remedial educational services for students in both public and nonpublic schools. The issue in the *National Coalition for Public Education and Religious Liberty v. Harris*[2] case was whether it is constitutional for a local educational agency, in this instance the New York City Board of Education, to hire teachers with this federal money and send them into parochial schools during regular school hours to provide those remedial services. This is how the New York City school board provides Title I services to the public school students. The issue is whether it can provide the services to parochial school students in the same manner.

The *Harris* case was filed in February of 1976, but it has a far more distinguished history, going back 10 years earlier. The original challenge of Title I was *Flast v. Cohen*,[3] the case which established federal taxpayer standing to raise an establishment clause challenge to federal aid programs. The expectation after *Flast*, which was decided on standing grounds, was that, on remand, the parties would litigate the substantive issues. In fact, nothing happened to *Flast* after remand. During the course of the *Harris* litigation, we discovered why nothing happened. We learned that Leo Pfeffer, through timidity, let the *Flast* case lapse. Mr. Pfeffer stated in an affidavit filed in support of a motion for a preliminary

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[1] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C. (1976)).

[2] 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980).

[3] 392 U.S. 83 (1968).

injunction that after *Board of Education v. Allen*,[4] a case decided on the same day as *Flast*, the legal climate was not quite ripe for his challenge of Title I. So, Mr. Pfeffer decided to wait until the legal climate became more favorable. In the meantime, Mr. Pfeffer travelled around the country challenging state programs, winning his cases, and creating the more favorable legal climate he was seeking. In 1975, the Supreme Court decided *Meek v. Pittenger*,[5] a case involving a Pennsylvania statute that, I think it is fair to say, was molded after Title I. There are some distinctions, but the basic thrust of the *Meek* program was similar to a Title I program. The Supreme Court held it unconstitutional. According to Mr. Pfeffer, the time was ripe to go back after Title I, and with that catalyst, he filed the *Harris* case in 1976.

From the beginning, Mr. Pfeffer contended that *Meek* established a *per se* rule that prohibits the use of public money to pay the salaries of teachers who work in parochial schools during the school day. Mr. Pfeffer said the case was over.

Well, we did not quite agree with Mr. Pfeffer. We went to one other case, *Wheeler v. Barrera*,[6] a Missouri case decided a year before *Meek*, involving Title I. In *Wheeler*, the Court suggested that there may be circumstances in which an on-premise, school-hours program under Title I would be constitutional. We also took a much closer look at *Meek* than I think Mr. Pfeffer had. In taking that closer look, it occurred to us that the Court was not expressing concerns about what actually had happened in Pennsylvania under the *Meek* program. It was a new program that had been enacted only in 1973. The trial court record was sparse, and there was very little experience under the program. The Court in *Meek* said that it feared certain consequences if publicly paid teachers were placed in what it characterized as sectarian schools.

In New York, we were dealing with a Title I program which was 10 years old in 1976. By the time we received our decision 3½ weeks ago, it was 14 years old. It was a program with a history appropriate for review to determine if the fears expressed by the Court in *Meek* had materialized in New York City. The record included some fifty-eight affidavits ranging from federal officials to parents of students receiving Title I services. The bulk of the affidavits, however, were from the administrators of the New York City nonpublic school Title I program and the Title I teachers themselves. We also put together voluminous documentary exhibits and received the indulgence of the Court for two one-day evidentiary hearings during which we had testimony from key people who had filed affidavits—the administrator of the program and several teachers.

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[4] 392 U.S. 236 (1968).
[5] 421 U.S. 349 (1975).
[6] 417 U.S. 402 (1974).

The result was a unanimous decision upholding New York City's Title I program for nonpublic school students. Significantly, the opinion is laced with citations from the record that we developed, tying the legal analysis very tightly to the factual record before the court.

The question now is, what is next? To that, I cannot give an answer at present. Mr. Pfeffer has been uncharacteristically silent since the Court ruled 3½ weeks ago. His style, at least based on my own experience, has been to rush to the Court as soon as possible with his notice of appeal, presenting his jurisdictional statement to the Supreme Court before one has the chance to digest what the district court has held. Throughout the district court proceedings in *Harris,* Mr. Pfeffer said he fully expected to lose—an incredible position for a man who was relying on *Meek*—and promised that if he lost, he would appeal. To date, he has been silent. There is, in my opinion, some reason to believe there may not be an appeal. I base this on three factors. One, the opinion itself is tied very tightly to the evidentiary record. The record contains only the evidence we entered. Mr. Pfeffer put in no evidence of his own, no evidence that controverted our evidence. So, if the case reaches the Supreme Court, it will be an uncontroverted record with little room for the Court to maneuver. The Court cannot, as it did in *Meek,* ignore the record because of the way the district court opinion was written.

Secondly, Mr. Pfeffer does not have in this case what he had in prior cases. He is without a record and a dissent to provide a rationale for a favorable ruling on appeal. Those of you familiar with *Lemon v. Kurtzman* may recall that the district court upheld the Pennsylvania teacher salary subsidy program by a 2-to-1 vote.[7] Judge Hastie dissented. His dissent became the rationale for the majority opinion in the Supreme Court. So, Leo Pfeffer does not even enjoy the advantage of having a dissenting opinion upon which to lean. Finally, all that *Harris* decides is that the way New York City implements Title I is permissible. During the evidentiary hearing and arguments in *Harris,* Mr. Pfeffer conceded that New York was implementing Title I in a constitutional fashion. I think, therefore, that it will be difficult for him to maintain a successful appeal.

What, then, are the implications of *Harris*? Since we do not know whether an appeal will be maintained, we cannot be certain that the rationale in the opinion will endure. Assume for a moment that there is no appeal or, in the event of an appeal, the Supreme Court affirms without disturbing the district court's rationale. In one sense, *Harris* is a very narrow and limited decision. It breaks no new doctrinal grounds; it simply applies existing establishment clause principles to the facts of the case before it. It decides only that the way New York City administers the

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[7] 310 F. Supp 35 (E.D. Pa. 1969), *rev'd and remanded,* 403 U.S. 606 (1971).

Title I nonpublic school program is constitutional.

I think, however, that there are some encouraging aspects to this decision. First, it rejects out of hand any contention that *Meek* intended to establish a *per se* rule of any type. Second, it demonstrates that despite the string of defeats school aid programs have suffered in the 1970's, the courts still seem willing to evaluate such cases on their merits, if the merits are presented to them. Finally, along with the Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Regan*[8] this year, it suggests that in the 1980's the courts will be less willing to accept the presumptions of invalidity that characterize the aid litigation and aid decisions of the 1970's. I think one lesson of *Harris*—one that we take away from it when we go on to Missouri where there is another Title I case pending—is the importance of the evidentiary record. Had we met Mr. Pfeffer on his turf and quarreled solely over whether *Meek* established a *per se* rule, with no evidentiary record before the Court, I think we would have lost. I think the evidentiary record provided the victory, a victory, I hope, which will be sustained if there is an appeal. I am also optimistic that despite its limited nature, the *Harris* decision bodes well for the future and is a sign that, in the 1980's, schools will begin to share in tax revenues.

Thank you.

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[8] 444 U.S. 646 (1980).