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Joseph G. Skelly

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MEEK v. PITTINGER: WILL IT PRECIPITATE A SOLUTION?

JOSEPH G. SKELLY*

Since we last met, last year about this time, the Supreme Court has handed down further decisions relating to aid to nonpublic education. On June 25, 1973, it added to the previous cases of *Lemon v. Kurtzman*,¹ *Tilton v. Richardson*,² and *Earley v. DiCenso*.³ In the case of *Levitt v. Committee for Public Education & Religious Liberty (PEARL)*⁴ arising in New York, the Court struck down a statute providing reimbursement for costs for certain testing and record keeping. These were the so called "mandated services"—testing and record keeping services mandated by the state for which reimbursement was given to the schools. In the case of *Committee for Public Education & Religious Liberty v. Nyquist*,⁵ the Court struck down three programs in the state of New York: one which provided for maintenance and repairs for schools, another which provided for tuition reimbursement to parents, and a third which provided tax credits or tax deductions to parents of nonpublic school children. With respect to the latter, the Court could not quite decide which to call it—tax credit or tax deduction, but said that whichever it was, it was very similar to tuition reimbursement and it too, had to fall. In *Sloan v. Lemon*,⁶ a Pennsylvania case, the Court struck down a parent reimbursement act which, it found, was substantially similar to the New York act in *Nyquist*.

In all three of these cases—*Levitt*, *Nyquist*, and *Sloan*—the Court found that the primary effect of the statutes was to aid religion, primarily because each of the statutes furnished direct grants to the schools and there was no provision for separating whether these grants would be used for the secular or religious functions of the schools. Therefore, there was the potential that the money could be expended for religious purposes, and therefore, the acts must fall. With respect to the parent reimbursement for tuition, the Court found no significance in the fact that the money was

* Ball & Skelly, Harrisburg, Pennsylvania.

¹ 403 U.S. 602 (1971).

² 403 U.S. 672 (1971).

³ 403 U.S. 602 (1971).

⁴ 413 U.S. 472 (1973).

⁵ 413 U.S. 756 (1973).

⁶ 413 U.S. 825 (1973).

given to the parents, not to the schools.

In *Hunt v. McNair*,⁷ however, the Court upheld a program in the state of South Carolina, which provided benefits for constructing projects or facilities for strictly nonsectarian purposes in colleges.

Those, then, are the major decisions of the Supreme Court last summer. In essence the Court invalidated: (a) payments to nonpublic schools for testing and record keeping services, or state mandated services; (b) payments to nonpublic schools for maintenance and repairs; (c) payments to parents of nonpublic school children for reimbursement for tuition payments; and (d) tax credits (or tax deductions) to parents of nonpublic school children. These programs were all at the elementary and secondary education levels. The Court left standing a program relating to construction of facilities at the college level.

With those cases as a backdrop, we went to trial in Pennsylvania, in a case known as *Meek v. Pittenger*,⁸ over the constitutionality of two statutes which had been passed a year before. They were passed in July of 1972 and had been in operation for a year. These were statutes known in Pennsylvania as Acts 194 and 195.⁹ Act 194 provides for auxiliary services to nonpublic school students, and Act 195 provides for the loan of textbooks, instructional materials and instructional equipment to nonpublic school students.

If I may, I will briefly review these statutes. With respect to the auxiliary services statute, legislative findings recite that the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools, and that it is the intent of the General Assembly to extend the providing of these auxiliary services in such a manner that every child in the Commonwealth will equally share in the benefits. Now what do we mean by "auxiliary services"? Auxiliary services are defined by the Act as "guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged [and the retarded] . . . , and such other secular, neutral, and non-ideological services [as are] provided [in the public schools] of the Commonwealth."¹⁰

The other statute, as I stated, provides for the loan of textbooks, instructional materials and instructional equipment. "Textbooks" are textbooks in the classic sense as you understand them. "Instructional materials" include books, periodicals, documents, pamphlets, photographs, reproductions, pictorials or graphic works, musical scores, maps, charts, globes, sound recordings, slides, transparencies, films, film strips, video-

⁷ 413 U.S. 734 (1973).

⁸ 374 F. Supp. 639 (E.D. Pa. 1974).

⁹ PA. STAT. ANN. tit. 24, § 9-972 (Supp. 1974).

¹⁰ *Id.* § 9-972(b).

tapes and the like. "Instructional equipment" includes projection equipment, recording equipment, laboratory equipment and the like, but the equipment must be such that it cannot be affixed to or form a part of the real estate.

In the *Meek* case, the plaintiffs filed a complaint in the United States District Court for the Eastern District of Pennsylvania (Philadelphia), asking for the convening of a three-judge court. They were represented by our good friend and civil and religious libertarian, Leo Pfeffer, together with an ACLU attorney from Philadelphia, Mr. William Thorn, who had been involved in the original bus case in Pennsylvania. They filed a complaint on behalf of three individuals and four organizational plaintiffs. The complaint was substantially similar to the complaints which had been filed in prior cases, although modified of course to conform to the latest round of Supreme Court decisions. Plaintiffs basically alleged that each of the acts on its face and as construed and applied, was a law respecting the establishment of religion, contrary to the establishment clause of the first amendment and a violation of plaintiffs' free exercise of religion, contrary to the free exercise clause.

With respect to the establishment clause, the complaint alleged that the acts constituted governmental financing and subsidizing of schools which were controlled by religious bodies, organized for and engaged in the practice and propagation and teaching of religion, and schools limiting or giving preference in admission and in employment to persons of a particular religious faith. The acts, according to plaintiffs, constituted governmental action whose purposes and primary effects were to advance religion; they gave rise to excessive government involvement and entanglement with religion; and they gave rise to an intensified political fragmentation and divisiveness along religious lines. In their prayers for relief, they prayed that a three-judge court be convened to declare the acts unconstitutional, and that a preliminary and permanent injunction be granted against the further operation of the programs.

The named defendants were John Pittenger, Secretary of Education of the Commonwealth of Pennsylvania, and Grace Sloan, Treasurer. Bill Ball of our firm represented several parents, who were parents of students enrolled in Catholic, Protestant, Jewish and nonsectarian schools, and made a motion to intervene in the action in accordance with rule 24(a) of the Federal Rules of Civil Procedure,¹¹ intervention as of right, in order to interpose a defense in their behalf. The motion was, of course, granted. Also intervening was a group of parents from the Pennsylvania Association for Independent Schools, a group not represented by our firm.

The court consolidated the hearing on the preliminary injunction and the final injunction, so we had one trial on both issues. At the trial of the

¹¹ FED. R. CIV. P. 24(a).

case, nine witnesses testified, six of whom were presented by us representing our intervenor defendants. Essentially, in presenting the testimony we gave a composite of how the program worked in Pennsylvania in order to show the court and to make a record for the Supreme Court as to exactly how this program worked and to show that the allegations of the plaintiffs were totally without merit.

Essentially, we presented a school psychologist, a Ph.D. actively involved in the program, Dr. Bosenhoffer from Allentown. We presented a young speech therapist, Pauline Stopper, who testified as to how the program worked in the nonpublic schools and as to her employment by the public school entity.

I should point out that the services are provided by a public school entity known as an Intermediate Unit by public school personnel who come into the nonpublic school to provide these services. We also presented testimony from a Dr. David Horowitz, who is primarily in charge of the administration of the program in the Philadelphia school district, and who had had vast experience over the past years in the administration of the ESEA programs in Philadelphia. We had a Sister Mary Dennis from the Diocese of Pittsburgh, who is employed by that Diocese as the coordinator of human relations education, and who is actively involved with the administration of the program. And we had a Mrs. Mary Binz who is a mother of a child with a very severe hearing defect which, in turn, resulted in a speech defect for her child. She testified both as a parent and as an employee of the school in which the programs were carried out. In fact, her testimony was very impressive. She testified about her little girl of about nine years old, who, because of her hearing defect, had never been able to speak properly or indeed to communicate both at school or with her family. She testified as to how, after one year in the program, the life of this child changed dramatically by virtue of the equipment and the instruction she was able to get in her nonpublic school. This child was able to read and write and speak and hear. Her total life changed in one year to the extent that she is now able to pursue her education in a regular school. She had been enrolled in a special nonpublic school for those with defects and impairments. And it was in that school where she received these aids; as a result of her receiving these services, she was indeed able to go on and continue and is satisfactorily continuing her education in a regular school. So our testimony developed a composite of the program. The testimony established that the secular and nonideological aspects of the program were indeed the purposes of the program, that there was no advancement or intermixing of religion in any phase of them. The testimony also established that there was no involvement or entanglement of the state with the schools in order to effectively administer the program. This was brought out well by Dr. Horowitz's testimony. And most importantly, I think, we exploded the mythical assumptions of the Supreme Court in *DiCenso* and *Lemon*, and the assertions of the plaintiffs, that teachers in nonpublic

schools cannot be trusted, or that they are under undue influence or compulsion to inculcate religious values. This was brought out well by Miss Stopper, Dr. Bosenhoffer and Sister Mary Dennis. There was even some indignation on their part when they were asked whether they would in any way manipulate the program to advance religion or inculcate any values. All of them testified that they were bound by the ethics of their profession to teach the subjects and to provide the services as is customarily done in the public schools and that there were no pressures or influence of any sort put upon them by nonpublic school officials to inculcate religious values. They testified that they provided these services in the nonpublic schools no differently than they provided them in the public schools.

With respect to plaintiffs' allegations of political entanglement and divisiveness, we presented the deposition of a prominent Pennsylvania newspaper reporter, Carmen Bruto, who covers the activities of the legislature. He testified that during the time the acts were before the legislature, there were no religious controversies or no political divisions along religious lines. In fact, he testified that the legislation was passed with bipartisan cooperation of members of the legislature of all faiths.

Of significance, I think, is the fact that at the close of our testimony, plaintiffs presented no witnesses and no evidence whatsoever, nor did they even offer any, to contradict our testimony. And I submit the reason they did not do it was because they could not do it, even though they had alleged in their complaint the horrendous things that happen in nonpublic schools, particularly that the teachers are subject to all manner of pressures to indoctrinate the children. They presented no evidence either during their case in chief or on rebuttal to substantiate their allegations, and indeed, at the close of our testimony, not only did they not put in any evidence, they sought to amend their complaint to delete the provisions challenging the programs as applied. They wanted to then limit their attack to the facial constitutionality of these acts, abandoning their claims that these were also unconstitutional as applied. The court, however, refused to allow them to do this.

I should point out that with respect to the free exercise allegation, it was established through our cross-examination of plaintiff, Sylvia Meek, that she did not practice any religion. This, of course, established that she had no valid free exercise claim as per *Board of Education v. Allen*.¹² The other individuals did not testify but stipulated their testimony would, if called, be the same as Mrs. Meek's.

The court came down with a favorable decision upholding the constitutionality of both acts on February 12, Abraham Lincoln's Birthday. As a personal note, that was a great day for me, because I got the news of the

¹² 392 U.S. 236 (1968).

decision from Bill Ball while I was at the hospital awaiting the birth of our son.

The decision, we feel, and as George Reed mentioned in his introduction, is a fine decision and shows an excellent grasp of the issues by the three-judge court and a very good analysis of the Supreme Court decisions. The court looked at the four separate programs provided by the two statutes, the auxiliary services program contained in Act 194, and the textbook loan program, the instructional materials loan program, and the instructional equipment loan program contained in Act 195. It then reviewed all of the school aid cases of the Supreme Court over the past few years. It stated generally, that the test to be applied was that set forth in *Lemon v. Kurtzman*,¹³ i.e., that for a program to sustain constitutional validity, it must have a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and of course, the new third prong of the Court's test in *Lemon v. Kurtzman*,¹⁴ the statutes must not foster excessive government entanglement with religion.

As to the question of secular legislative purpose, the court readily recognized that that was not a seriously contended issue, the plaintiffs having conceded a secular legislative purpose based on the cases of the Supreme Court. With respect to primary effect of advancing religion, the court reviewed *Levitt v. Committee for Public Education & Religious Liberty*,¹⁵ *Committee for Public Education & Religious Liberty v. Nyquist*,¹⁶ and *Sloan v. Lemon*,¹⁷ cases all having a finding of primary effect, and contrasted these cases with *Allen, Walz v. Tax Commission*,¹⁸ *Tilton*, and *Hunt v. McNair*,¹⁹ cases having no finding of primary effect. The court after analyzing and contrasting these cases, concluded:

- that expenditures will violate the primary effect test
 - (a) if payment is made directly to a sectarian school and is not effectively restricted to use by that school for secular nonreligious purposes, or
 - (b) the payment is made directly to parents as a reimbursement for expenses incurred in sending their children to a sectarian school, and the payment is not effectively restricted to reimbursement for expenses for identifiable secular nonsectarian pupil activities or needs.

Levitt, Sloan and Nyquist.

Further, the court found

- that expenditures will not violate the primary effect test

¹³ 403 U.S. 602 (1971).

¹⁴ *Id.*

¹⁵ 413 U.S. 472 (1973).

¹⁶ 413 U.S. 756 (1973).

¹⁷ 413 U.S. 825 (1973).

¹⁸ 397 U.S. 664 (1970).

¹⁹ 413 U.S. 734 (1973).

- (a) if, although payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity, clearly identifiable as secular or nonreligious,
- (b) if, although property or service is furnished directly to a student, it is clearly identifiable as secular or nonreligious property or service, or
- (c) if, although a payment or service is furnished directly to a secular institution, its use is effectively restricted to the secular nonreligious activity of the institution.

Allen, Walz, Tilton, Hunt.

As to the entanglement issue, the court, after noting that this refinement first appeared in *Lemon v. Kurtzman*,²⁰ after having been recognized by the Court briefly in *Walz*, reviewed again the Supreme Court cases which considered entanglement, stating that it must contrast *Lemon* and *DiCenso* on the one side with *Allen, Tilton* and *Hunt* on the other side. From analyzing those cases, the statutes would involve undue entanglements between government and religion, if:

- (a) the statutes authorize payment of money for the furnishing of materials or facilities through a religious institution, and
- (b) the nature of the thing provided or the character of the institution is such, that the government, in order to assure only secular use of the payment of materials or facilities, will be required to be involved in the internal operations of the institution, both religious and secular on a continuing basis.

Lemon and DiCenso.

It found that the statutes would not involve undue entanglement between government and religion, even if:

they authorized payment of money or the furnishing of materials or equipment to an institution, it would not be necessary for the government to be directly involved with the internal operations of the school in order to insure the secularity of the program.

Tilton and Hunt.

The district court then proceeded, with those tests as a background, to analyze each of the statutory programs involved in Acts 194 and 195. As to the auxiliary services, the court found that there was no primary effect of advancing religion nor was there any entanglement. The court stated that the legislature, in its wisdom, found it necessary to deal with the reality of such things as hearing impairments, speech defects, psychological maladjustments and problems, and that these problems were as prevalent with nonpublic school children as they were with the public school children; that the state had been treating these problems in the public schools, and indeed were able to do so for the children in nonpublic schools. It also stated that the Commonwealth had to deal with the reality

²⁰ 403 U.S. 602 (1971).

of not being able to provide these services at a central learning facility—*i.e.*, a public school where the nonpublic school children could go, or a public facility. And, indeed, part of the testimony which we had developed, especially through Dr. Horowitz, through Dr. Bosenhoffer, the school psychologist, and through Miss Stopper, the speech therapist, was the fact that even though all of these programs, technically, prior to the enactment of these statutes, had been available to nonpublic school children in the public schools, the problems of scheduling, the distance of transportation and all the rest of the administration problems of shuffling children back and forth between schools, prevented the effective giving of these services to nonpublic school children. The court found that the primary effect of providing these services was the state meeting its objective of assuring individual students of the individual services necessary to pursue their education and learning processes outside the general program of instruction. The court said that while it was true that a child with sight defects who is furnished glasses would be enabled to read the Bible, or while a child with hearing defects who is furnished a hearing aid would be enabled to hear the word of God, or while a child with psychological problems would be more receptive to religious education if counseling solved his or her problems, these benefits were indeed remote or secondary and merely an incidental effect, and thus the statute did not have any primary effect which advanced religion.

As to entanglement, the court found that the programs were formulated by, and provided by, the public school entities and there was little or no involvement by the Commonwealth of Pennsylvania or the public school entities and the nonpublic schools, other than simple administrative details. The acts did not involve the state in the ongoing religious mission of the schools. The court thus upheld auxiliary services, with one judge dissenting.

As to textbooks, the court upheld textbooks three-to-nothing, and found that the textbook program was virtually indistinguishable from the New York program which had been upheld in *Allen*. It found that the loan of textbooks to public school children had been provided in Pennsylvania since the early 1800's, and that the purpose of this act was to fairly equalize or give the same benefits to the nonpublic school children which public school children had enjoyed through the years. The court noted that the textbooks were antecedently approved by the public school authorities and were also books approved for use in the public schools, and therefore did not lend themselves to any religious use. The court also noted with respect to entanglements that the contact between the state and the nonpublic school officials was minimal, primarily administrative, and did not involve the religious mission of the nonpublic schools.

As I mentioned, textbooks were upheld three-to-nothing. This was the only program, however, which had the unanimous consent of the court. Textbooks, as with the program in *Allen* in New York, are loaned directly

to the students upon request. However, as to instructional materials, these are loaned to the schools, the reason for this being that the materials are such that they call for group use—maps, charts, globes, recordings and the like. It is simply not practical to loan these to individual students for individual use; they are designed for group use. The court, two-to-one, upheld instructional materials as being virtually similar to textbooks. These materials, the court found (as it had with textbooks), were “self-enforcing,” or “self-policing” because, essentially, they were the same as those used in the public schools, they were selected by the public school officials prior to their being loaned to the nonpublic schools and they were such that they were not capable of diversion by the nonpublic school authorities for religious uses. As to the fact that these were loaned to the schools rather than to the individual students, the court found that this was of no constitutional significance, it being *what* was loaned rather than *how* it was loaned, which was of significance. The court held that the expenditure of money for instructional material was clearly for identifiable secular purposes and again, as with the textbooks, there was no entanglement between the public school authorities and the nonpublic school authorities.

As to the fourth and final part of the program, “instructional equipment,” this was a rather different story. The court looked at the equipment which could be loaned and used and while the Act did not divide this equipment into two categories, the court did: equipment which from its nature was incapable of being diverted to religious purposes, and equipment which from its nature could be diverted to religious purposes by the nonpublic school authorities. The former could be loaned; the latter could not be loaned. As to the type of equipment which could not easily be diverted to religious uses, the court noted that gymnasium equipment or laboratory equipment would be equipment that would fall in this category. As the court observed with respect to laboratory equipment, one could imagine a very ingenious nun storing Holy Water in a beaker, but again this would be a very indirect and incidental effect of the program. As we are getting into this, note that the court is picking up the philosophy that the Supreme Court gave to us in *Lemon*, *DiCenso*, *Sloan* and *Nyquist*, etc.—essentially, the fact that the nonpublic school authorities and those using this equipment may not be able to be trusted, because some of this equipment is “divertible” to religious use. This includes, for instance, slide projectors, or movie projectors, the court noting that there would be no reason why a nonpublic school authority could not slip in a religious film or religious slides to show to the students and that no safeguards against this were provided by the statute. As the Supreme Court did in *Tilton v. Richardson*,²¹ the district court found the statute severable, and permitted

²¹ 403 U.S. 672 (1971).

the loaning of that equipment which is not really divertible but prohibited the loaning of equipment which could be readily divertible. The court thereafter, using its equity powers, directed the Commonwealth to develop guidelines as to what kind of equipment would be permissible and what kind would not be permissible. While we are delighted with the decision generally, this equipment phase poses some practical difficulties. While schools can get the loan of slides and films through the instructional materials program, it is going to be difficult to utilize the loan if they cannot have projectors to show them. The guidelines have been submitted to the court for its approval and we have urged the approval of instructional equipment which is of a "nonsensitive" nature, that is, science and laboratory equipment, micro-projectors used to magnify microscope slides, mathematics equipment, such as items used for counting and computing, industrial arts equipment, physical education equipment, home economics equipment, driver education equipment, reading devices, televisions and radios which will receive only public and commercial communications, storage cabinets and the like. But with all of these, of course, the plaintiffs, in their vigor to strike down anything they can, are challenging approval of these things. To cite one of their objections, they contended that the loan of kitchen ranges for home economics class could be used to cook dinners for a parish bazaar. I suppose industrial arts equipment could be used to build confessionals or altars; I don't know.

In any event, that is the status of the case in the lower court and the case will now be appealed from the three-judge court directly to the Supreme Court. The plaintiffs have filed their notice of appeal.

I posed in the title of this discussion the question as to whether *Meek v. Pittenger*²² will be a solution. I cannot say whether it will be a solution to our school problems or not, but it could be. It well could be. The plaintiffs have appealed those provisions allowing textbooks, auxiliary services, instructional materials and that portion of the ruling on instructional equipment which allows the loan of nonsensitive or nondivertible equipment. After much soul searching, we elected not to cross appeal that part of the ruling which struck down the sensitive equipment. It will be early summer before the plaintiffs' jurisdictional statement will be due before the Court, and so we will be into the next term of the Court before any ruling is made. Ideally, we hope the Court would dismiss the appeal and affirm the lower court decision. At the very least, we hope that the Court will accept jurisdiction and will hear these cases and not reverse out of hand, although it could, based on its prior cases. But I think that if the Supreme Court follows its decisions it has handed down during the past three years, if it follows these as did the district court, I think the *Meek* case very likely will precipitate solution to the school aid problems. It is

²² 374 F. Supp. 639 (E.D. Pa. 1974).

clear to us in Pennsylvania that these programs have been of enormous benefit to the educational process in the nonpublic schools. The students are getting things—the psychological services, the guidance and the counseling, and so forth—that the schools have just, for financial reasons, been unable to supply to the children over the years. The acts compensate for a deficiency in the services which the schools have been unable to provide to the individual students. So if the Court allows the state to provide these services on the same basis that it does to public school students, this could well be a solution.

I should say, however, that I always have a bit of skepticism when I pick up a decision of the Supreme Court dealing with any sort of aid to the educational process involving children in religious schools. All I can say is that the statutes involved in *Meek v. Pittenger* do fall within the framework of what is permissible as has been enunciated by the Supreme Court to date. At least they are totally defensible in light of all of the Court's decisions over the past three years. At the same time, however, when we argued *Lemon v. Kurtzman*, we were able to argue that the statute, the purchase of service statute, Act 109, fell within the permissible scope of aid as had been enunciated up to that time by the Supreme Court. We did not know that in *Lemon*, the Court was going to come down with the third prong to its then existing test, entanglements. I cannot say that when *Meek v. Pittenger* is before the Supreme Court that the Court will not come down with the fourth prong to its test. They very likely could, but I am hoping that if the Court objectively looks at this case, that if they are objectively and truly applying their recent decisions to these acts in an atmosphere of fairness, that there are certainly grounds whereby the Court can sustain the validity of these programs.

I am just reminded—and then I am going to close on this note—when I say that the Court may come down with a fourth prong to its test, of the story that Senator Robert Kennedy used to tell about the black man in Alabama who went to register to vote back in the 1950's. The black man went to the registration office and stated that he wanted to register, and the county commissioners looked at him a little skeptically and said, "Well, alright, but you have to take a test." The black man said, "I'll be very happy to take a test, sir." They gave him a rather complicated test which he passed, and the commissioners said, "Well, now, this is just the first part of the test, you've got to come back next week and take another test." The man came back the following week and he took a very major test in advanced mathematics and calculus. They put it in the computer, and lo and behold, he passed with flying colors. The commissioners then were a little bewildered and they said, "Well, there is one more test, sir, that you have to take in order to register to vote in Alabama." They pulled out a newspaper that was written in Chinese and they said, "Now you have to read this newspaper." The black man looked at them and said: "I know what this says," and the commissioners were in bewilderment and said,

“You do, what does it say?” The black man looked up and said: “It’s very obvious—it says right here, it says that blacks aren’t going to vote in Alabama this year.” This may be what the Supreme Court will come down and tell us, there isn’t going to be any aid to nonpublic religiously affiliated education. I don’t know, but I think that we have a case which is certainly defensible, and one which has an excellent record. For the first time, we’ll be putting before the Court a record which shows a true and accurate picture of what goes on—and, indeed, what does not go on—in Catholic schools. It will present actual facts to the Court on which to base its ruling, and hopefully, the Court will rely upon these facts and not upon mythical assumptions it has made in the past. If the Court notes jurisdiction in this case, we have hopes and prayers for a favorable solution to our educational problems.