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PROBLEMS EMERGING IN ESEA

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A year ago, almost to the day, the United States Supreme Court rendered its opinion in *Meek v. Pittenger*, 421 U.S. 349 (1975). I am sure that most of you are aware of this decision but it might be useful just to take a few minutes to remind you what was decided.

Pennsylvania had three programs enacted to extend to children attending nonpublic schools certain educational benefits received by public school children. These were catch-up programs. Laws were enacted to provide similar services and there were three kinds: textbooks, the loan of materials and equipment, and special education services for children, such as speech correction, guidance, counseling, and so on. The three programs were upheld in the lower court, by vote of two to one. On review, the Supreme Court by vote of six to three struck down two of the programs and upheld the third. Textbooks were upheld based on the rationale of *Board of Education v. Allen*, 392 U.S. 236 (1968). However, the Court declared unconstitutional the loan of instructional material and equipment on an equal basis to children attending church-related nonpublic schools on the basis that the schools in which this equipment was being used were 75% church-related. Therefore, this was an aid to religion in violation of the second of the three-pronged test of the Establishment Clause as enumerated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the reasoning of the Court it was permissible to lend a textbook containing a map to a child attending a church-related school, but it was constitutionally impermissible to lend a map. What the difference is, is inexplicable.

In the area of special services to disadvantaged children, the Court said this could not be done because it created an excessive entanglement of church and state, based upon the *potential* of a public school teacher or other public school personnel to teach religion while providing services to our children. Even though the records show that this was not being done, the majority reasoned that because it was possible for them to do it, it would be necessary to put other public employees in the schools to *watch* them, and this would constitute an impermissible entanglement. There were three dissenters, Justices Brennan, Douglas, and Marshall, who would not have allowed even the textbooks on the rationale which I would characterize as a total or fail-safe rationale, precluding any kind of aid, including buses or anything, because if it cost any amount of money, there would be a divisiveness about the amounts of money. Somehow, this was barred by the First Amendment. Now, there is nothing in the history of the First Amendment to support this conclusion, nevertheless, these three Justices said this is what the First Amendment means. Now, as you know, Justice Douglas has left and Justice Stevens has taken his place. So much for the background.

When the *Meek* decision came down, we were immediately concerned as to what its effect would be upon the ESEA programs. Basically, in 1965, after a struggle of 25 years, Congress enacted the first federal aid-to-education statute in

which aid was provided for all eligible children, including children attending church-related nonpublic schools. This program has been in effect, then, for 11 years.

A brief description of the ESEA program would be helpful. Grants of federal moneys are made to the states to assist disadvantaged children of low income families through the provision of remedial services, such as remedial reading and remedial math, for children who have special problems with speech or hearing, or who are in need of counseling and guidance. From the very inception of the programs, after the protracted legislative struggle, nonpublic school children have been included in the program. They have been included in at least 45 states on a fair basis. In five states they are not being treated fairly. My purpose today is to talk about the children in the 45 states even though we are very concerned about the children in the other five states where little or no services are provided.

In the District of Columbia, and I would like to point out this one particularly because it shows the other side of the coin, there are only 721 children in our schools receiving ESEA services as part of their regular school program. Every one of those youngsters is a minority youngster; 720 of them are black and one is an Oriental child. Of the 721, it is interesting to note that 375 are non-Catholics. I point this out because the profile that the Supreme Court has accepted as a picture of our schools suggests that we discriminate on the basis of religion and that we discriminate on the basis of race. During the argument of the *Meek* case, counsel for the opponents of any aid to our children argued that we discriminate on the basis of religion, we discriminate on the basis of race, then in the latter part of his argument, we simply discriminate and it's all of that. The facts demonstrate that it's simply not true. In New York, 95% of the children in the ESEA programs are minority children. In Philadelphia, 80% are minority children. And so it goes. One representative example of a small area would be in the city of Galveston, where we have 230 children participating in the programs funding \$60,000 worth of services. Of that 230, 185 are minority children.

When this decision came down our concern was that *Meek* would be read as barring the provision of services under ESEA to our children. What happens under ESEA in the 45 states is that every day public school teachers and other personnel come on our school premises, during the regular school day, and provide services to disadvantaged children in a setting in which the children are familiar with their surroundings and with a minimum of disturbance of their educational programs. Now, the rationale in *Meek* for the special education programs was that you couldn't send those public school teachers on the premises because it was possible that they might teach religion. Somehow, the minute they walked through the door, something would happen to them and instead of providing speech correction to a handicapped child, for example, they would begin imparting instruction on the Catholic religion, even though they were Protestants or atheists without any knowledge of our religion.

We were afraid that *Meek* would be misconstrued and misapplied, so we immediately asked for a meeting with the General Counsel of the Office of Education of HEW. They listened to us and we informed them that there are fundamental differences between the two ESEA programs and the two programs in *Meek*. Pennsylvania, even though it was a catch-up program, two invalid programs, was enacted only for nonpublic school students, 75% of whom were enrolled in church-

related schools. On the other hand, ESEA was a program for *all* children and our children were to be included in programs devised by the public schools for all disadvantaged children in target areas to the extent that our children were eligible. This was not a program only for our children. Across the country, 10% of nonpublic school children are benefiting from ESEA contrasted with 75% of the schools in the Pennsylvania programs, where 75% of the schools were church-related. Thus, there was a big difference between the two programs.

Secondly, we argued that this was a Congressional policy which was enacted after long and careful considerations. The Supreme Court has struck down only two statutes enacted by the Congress under the First Amendment and they had to do with a Communist case and with a subversive case. There is no precedent for striking down an education program under the First Amendment. The Pennsylvania program, on the other hand, was yet another attempt to help nonpublic school children after two previous attempts, reviewed by the high court, had failed. Many of us felt that the Supreme Court couldn't see the difference between those different programs that came up from Pennsylvania since they appeared to involve the same dollar amounts of aid flowing to nonpublic schoolchildren or their parents. Then we told them that ESEA had already been before the Court in *Wheeler v. Barrera*, 417 U.S. 402 (1974) where the Supreme Court ruled that nonpublic school children were entitled to receive these services on nonpublic school premises as one of the ways Congress authorized the services to be provided. The High Court did not pass on the constitutionality of the statute in *Barrera*. We told them flatly that they had the chance to do it and they did not do so. Thus, HEW should not under these circumstances give a contrary administrative interpretation of ESEA impeding the flow of services to disadvantaged children in nonpublic schools contrary to the intent of Congress in the absence of a definitive decision of the High Court on the constitutionality of ESEA.

We also pointed out to them that these programs have been in operation for 11 years, and if they now withdraw benefits, the Free Exercise Clause of the First Amendment would be violated, because the only reason the benefits are denied is that these children are in a church-related nonpublic school.

We also argued that if the funding of the programs in Pennsylvania might be divisive, the ESEA programs have been in effect for 11 years, and the funding is always for the public schools. Thus, there is simply no element of divisiveness involved.

They listened to arguments and they appeared to respond favorably. What we were really saying was "Don't change the programs because of this case." They asked: "What if we're sued?" Our response was, lawsuits are brought constantly, and if a suit is brought, that will be the day to consider the suit.

Some suggestions were made to change the administrative regulations for ESEA. Basically, the change in the regulations would go something like this. Where now services for our children are permitted on our premises, and this is the accepted way to provide services in the 45 states, the rule would be changed to require services *not* be provided on the premises of the nonpublic school unless it is demonstrated that they cannot be provided in any other way. The proposed change was so fundamental that we had every reason to fear an overreaction by the public school community. We were gravely concerned that when the public school community learned of the change, and they learned very quickly about

proposed changes, they simply would withdraw public teachers and personnel from the premises. Thus, such change would deny comparable and equitable services for nonpublic school pupils without any court adjudication. Moreover, the ESEA programs would not work for disadvantaged nonpublic school children unless those teachers provide those services on the premises of our schools in the educational setting selected by parents for the education of their children. Another suggestion, which on its face was rather appealing, and reflected some of the language of Justice Blackmun in the *Barrera* decision, would require all public school teachers and personnel serving nonpublic school pupils be itinerant in that the majority of their working time must be spent in the public schools. On its face, this may seem very appealing, but as a practical matter, it simply would not work. Today teachers are organized as they have never been organized before. Generally, they are not going to put up with such an arrangement, allocating time and running from building to building. Moreover, we are informed that there are many labor contracts extant that prohibit this type of itinerant arrangement. This would be yet another way to prevent our children from receiving services. To date, that regulation has not been changed.

Our educators tell us that any program of providing services to disadvantaged children, but only after school and only on public school premises which may be at some distance from the nonpublic school, simply will not work. The parents of a disadvantaged child are not going to subject that child to disruption of his learning schedule, not if they care about the welfare of their child. Most importantly parents of disadvantaged children do care about their children and are anxious to retain these programs. Secondly, removing that child from that school and sending him somewhere else marks him before his peers, that there's something wrong with him, that he's dumb. Therefore, he has to go somewhere else to get some extra help. Receiving the services on our premises during his regular school day allows that youngster to receive the services with a minimum amount of disruption. It doesn't mark him in any way as a Title I child or a stupid child. It provides the services in the most efficient way, and, most important, it works. Keep in mind that most of the youngsters receiving the ESEA services are in the second, third and fourth grades. They are children of tender years. If they must travel to another school, their parents are going to worry about their safety. It's our basic position that the proposed services are not comparable. They are not equitable unless they're provided in just the way they're provided to the public school children. We cannot settle for half a loaf.

In February of this year the National Coalition for Public Education and Religious Liberty, the group known as PEARL, largely consisting of the American Civil Liberties Union, the National Education Association, the Protestants and Other Americans United, the American Jewish Congress, the United Methodist Church, the National Association of Laity, and their constant companions filed suit in the United States District Court for the Southern District of New York to declare unconstitutional the provision of ESEA services to disadvantaged children on the premises of the nonpublic schools, naming as defendants the Secretary of HEW, the U.S. Commissioner of Education and the Chancellor of the Board of Education of the City of New York. The suit was started in a very interesting way in that you had to know someone on the scene to find out about the lawsuit. Normally, the filing of church-state cases is broadcast to the four corners of the world, or at least

the world of the United States. To date, this lawsuit has not been reported by the traditional sources of information in our country. Have any of you seen a reference to it in the New York Times? Or the Washington Post? Or on any national television news program, or Time Magazine or Newsweek? Not a single word. It was reported in the New York Post, hardly a national news source, and that's how we learned about it, because someone in that area saw the story and brought it to our attention.

Counsel for PEARL held a press conference and in the press conference they issued a statement saying they brought suit most reluctantly, and only because the Office of Education would not modify its regulations to prohibit the provision of services on nonpublic school premises. They really don't like what they're doing, they regret it very much, but they have no alternative because HEW refuses to modify the regulations. They also indicated that "We will not make any effort to enjoin the ongoing programs for the current school year." In this regard, it should be observed that a number of the parties in the new lawsuit challenged ESEA in *Flast v. Cohen*, 392 U.S. 83 (1968) where the high court upheld their standing as taxpayers to challenge ESEA but only under the First Amendment. Unbelievably, eight years later, *Flast v. Cohen* is still pending in the Federal District Court, Southern District of New York. It is inconceivable that any court would grant injunctive relief where the parties had eight years to try their case several times over.

The Justice Department is going to defend this lawsuit for the United States Government. Their responsive pleading was due in April, but they requested and obtained some delay. We expect that the federal government will defend the statute. How vigorously is to be seen. This case has been assigned to an Assistant Attorney General of the United States, two years out of law school and with 350 cases assigned to him for his personal attention. We are informed that the defense of the statute will largely be conducted by an Assistant United States Attorney for the Southern District of New York. The suit will also be defended by an Assistant Corporation Counsel for the School District for the City of New York.

A group of disadvantaged children and their parents who receive services in church-related nonpublic schools in the City of New York will shortly seek to intervene in their own behalf and in behalf of their children.

In my judgment, this suit is both a threat and an opportunity. It is a threat in that any adverse decision would, in my opinion, foreclose for the foreseeable future any meaningful aid to children attending church-related nonpublic schools beyond the very limited aid of bus transportation and textbooks. It is an opportunity because it affords a favorable factual setting. Minority children, disadvantaged children, children who really need these services in order to go into the mainstream of American life are affected by ESEA and this suit. When you examine the statistics, and I just briefly alluded to them earlier, nonpublic school pupil recipients of ESEA are largely disadvantaged, blacks and Spanish-speaking. There are very few Caucasians in such ESEA programs in some of the areas of our country. ESEA represents a substantial source of hope for these youngsters. And remember, they're in the second, third and fourth grades!

Those opposing fair treatment for children being educated in church-related nonpublic schools say: "Let them get the services after school; let them go to another building; let them disrupt their education; let their safety be impaired."

In my judgment this is not comparable; this is not equitable; this is not in accord with the intent of Congress; it is not in harmony with all of the provisions of the First and Fourteenth Amendments of the U.S. Constitution.

Under these facts, if a complete record is made in the trial court, the trial court will be required to see the disadvantaged youngsters and their parents. It should understand what these programs mean to them, and be compelled to decide, if that is their will, to remove these programs from these disadvantaged children and their parents. This case presents an opportunity to have the Supreme Court reexamine its fluid, ever-changing doctrines employed in First Amendment cases, particularly the doctrines of potential entanglement and political divisiveness on religious lines. It will be imperative that a good and complete record be constructed, thus confronting the High Court with facts that minority children are being educated in nonpublic schools, not only because of the constitutionally guaranteed rights of parents to select church-related nonpublic schools such as ours for the education of their children, but because such schools represent for many of them the only hope for such children to participate fully in American life.

This is not an easy fight. This will be a monumental struggle. The issues of the constitutional rights of children and parents to free exercise of religion and equal protection of the laws remain with us and will not go away. They cannot be swept under the rug. We have every right to demand and expect that the federal courts examine these issues based upon a complete record in light of the demands of disadvantaged minority children and their parents to free exercise of religion and equal protection of the laws, to a full measure of constitutional protection. The fight will be hard, it will be expensive. The stakes are no less than full citizenship and fair treatment from government under law.