The Catholic Lawyer

Volume 22, Autumn 1976, Number 4 Article 7

State Aid to Rhode Island's Private Schools: A Case Study of DiCenso v. Robinson

Patrick T. Conley

Fernando Cunha

STATE AID TO RHODE ISLAND'S PRIVATE SCHOOLS: A CASE STUDY OF *DiCenso v. Robinson*

PATRICK T. CONLEY*
FERNANDO CUNHA**

In the January 1969 session of the Rhode Island General Assembly, House Majority Leader John Skeffington of Woonsocket, freshman Representative Robert J. McKenna of Newport, and several other prominent Catholic legislators sponsored "An Act Providing Salary Supplements to Non-Public School Teachers." The introduction of this measure precipitated a controversy in the land of Roger Williams over state aid to sectarian education that was ultimately resolved by the United States Supreme Court.

Necessary to a full understanding of the issues involved in the salary supplement case is a brief description of the sociopolitical structure of Rhode Island. According to the 1970 census, the state had a population of nearly 950,000.[1] Of this number, approximately 600,000 were Roman Catholics according to estimates of the Diocese of Providence, a see coterminous with the state itself.[2] Because Catholics comprise sixty-two percent of Rhode Island's inhabitants, a proportion far larger than that of any other state in the union, the Catholic Church can and does exert considerable influence, both direct and indirect, on Rhode Island's educational and political affairs.

The educational impact of the Church is more susceptible to measurement than is its political influence. In the area of elementary education, the domain with which this Article is concerned, the Catholic role is substantial. In the peak academic year 1963-1964, parish-related grammar schools enrolled 38,455 pupils, or 28.3 percent of the elementary school population in Rhode Island. By 1969-1970, the year of the controversy discussed herein, enrollment in these schools was down to 29,340, or twenty

* Professor of History and Constitutional Law, Providence College; M.A., Ph.D., University of Notre Dame; J.D., Suffolk University Law School.
** B.S.E.E., Southeastern Massachusetts University; J.D., Suffolk University Law School; Member, Rhode Island Bar.

[1] This firgure is derived from U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, part 41, at 7 (1970).

[2] *See* DIOCESE OF PROVIDENCE, OFFICIAL CATHOLIC DIRECTORY (1972).

percent of total school enrollment. Despite this decline, the Catholic effect on the educational system was still very significant.[3]

A 1972 Rhode Island Department of Education report on public and nonpublic elementary education in the state revealed that a complete phaseout of Catholic elementary education would necessitate a $20,317,000 annual increase in the operating expenses of the public school system, a jump of 13.4 percent. Some urban centers would be even more adversely affected—the increased educational outlay in the heavily Catholic city of Pawtucket, for example, would be a whopping 26.6 percent.[4]

Hence, for economic as well as the obvious religious and sociocultural reasons, many individuals in Rhode Island are committed to the continued existence of Catholic elementary schools. These institutions, however, are in a grave financial plight which has resulted in numerous school closings. The number of Catholic grammar schools reached a high of 112 in academic year 1966-1967. By the time of the salary supplement controversy of 1969-1970, the number was down to ninety-eight, and by the 1971-1972 school year the number had decreased to eighty-three. This alarming and precipitous decline has been caused by several factors: the enrollment and contribution drop in many city parishes due to the suburban exodus; rising educational costs due to inflation; the less competitive position of Catholic schools as a result of continually increasing government aid to public education; and the decline in vocations, the revolution in religious community life, and the proliferation of clerical "dropouts" which have combined to produce a critical shortage of religious teachers.

The clerical teacher shortage is the most significant cause of the economic ills of Catholic elementary education. It was to remedy this condition that the Salary Supplement Act was passed. Statistics on the teacher problem are alarming: In 1966-1967 there were 959 religious teachers, mostly nuns, in parish elementary schools throughout the state; in 1969-1970 the figure was 691; in 1971-1972 there was an incredible decline to 489. During this same 6-year period, the number of lay teachers rose from 205

---

[3] On the role of Catholic education in Rhode Island, the following sources from the archives of the Diocese of Providence have been examined: DIOCESAN EDUCATIONAL COMM'N, THE CHURCH'S MISSION IN EDUCATION: AN INTERIM AND PARTIAL REPORT (1969); HANDBOOK OF SCHOOL REGULATIONS (1965 ed., as amended); Diocesan School Board Records, Folder 46-1; Minutes of the Board of Education of the Diocese of Providence (1970-1971); Catholic Schools in Rhode Island, Statement to the Rhode Island Board of Regents by the Rev. Edward Mullen, Diocesan Superintendent of Schools (Feb. 5, 1970); Catholic Schools in Rhode Island, Statement to the United States Senate, Subcomm. on Education by the Rev. Edward Mullen (Jan. 18, 1972). Also of use were J. GARDINER, PUBLIC AND NONPUBLIC ELEMENTARY EDUCATION IN THE FOUR LARGEST DISTRICTS OF RHODE ISLAND (1972), a report submitted to the Rhode Island Department of Education, and H. BRICKELL, NONPUBLIC EDUCATION IN RHODE ISLAND: ALTERNATIVES FOR THE FUTURE (1969), a study prepared for the Rhode Island Special Commission to Study the Entire Field of Education.

[4] J. GARDINER, PUBLIC AND NONPUBLIC ELEMENTARY EDUCATION IN THE FOUR LARGEST DISTRICTS OF RHODE ISLAND 14-17, 19, 24 (1972).

to 328. The substitution of a lay for a clerical teacher means a threefold increase in salary costs for a parish school.

It was apparent to the sponsors of the Salary Supplement Act that the parish elementary schools were caught in a cruel dilemma. When the nuns left the schools, lay teachers had to be hired at salaries competitive with constantly rising public school stipends. To meet this cost, tuition had to be raised. The increase prompted some parents to avoid the additional levy by placing their children in free public schools. This move was facilitated by the fact that a Catholic school staffed by lay teachers does not appear to offer much of an alternative to public education. Thus, enrollments declined and schools were forced to close.

To stem this trend, public funding by the state government seemed necessary. Fortunately for the friends of parochial education, the General Assembly was even more Catholic in composition than its constituency. Both houses of the legislature were overwhelmingly Democratic, and the strength of the Democratic Party in Rhode Island derives from a fortuitous political coalition of ethnic Catholics forged during the late 1920's and the New Deal era—Irish, Italians, French, and Portuguese.[5] The General Assembly, it seemed, would be very receptive to a program of state aid to private education. This body appeared especially amenable to a plan that would save the private institution experiencing the gravest fiscal difficulty—the Catholic elementary school. This was the religious, educational, and political setting in Rhode Island at the start of this legal drama. The curtain opened and the plot began to unfold when the January 1969 session of the General Assembly commenced.[6]

At the outset of this legislative conclave, an important but unresolved question concerned the form which aid to private education would take. There were two proposals which received discussion. The first was a straight tuition grant to parents of private school children. This course of action was supported by the Rhode Island Chapter of Citizens for Educational Freedom (CEF). The local affiliate of CEF was, in fact, predominantly Catholic. The membership of this powerful educational group contained several prominent state legislators, including House Speaker Joseph Bevilacqua, Deputy House Leader Aldo Freda, and Robert J. McKenna, an irrepressible freshman representative from Newport. McKenna was an associate professor of politics at Salve Regina College, a specialist in church-state relations, and a prime mover in CEF.

The second legislative remedy for the fiscal ills of the nonpublic schools was a proposal to pay a salary supplement to private school teachers of secular subjects. Advocates of this measure felt such a plan would

[5] For a review of the religious and political affiliations of the Rhode Island legislators, see the legislative biography section of the RHODE ISLAND MANUAL.

[6] The bulk of information on the internal workings of the January 1969 session of the legislature was furnished to the authors by Representative Robert McKenna in an interview on April 16, 1973.

ease the cost burden on private schools and make them better able to compete for qualified teachers. This proposal was designed to raise the salaries paid by private schools to public school levels. It should be noted that in 1971-1972 the average teacher's salary in the public schools was $9,322, while the average salary for lay teachers in Catholic schools was $6,000, or only 64.4 percent of the public school figure. The salary supplement proposal was favored by the Reverend Edward Mullen, superintendent of Catholic schools for the Diocese of Providence. Father Mullen was a lawyer, and he used his legal talents to prepare a draft of the salary supplement bill. Eventually, he prevailed upon CEF to support his recommendation.

Shortly after the opening of the January 1969 session of the general assembly, the original version of the Act was introduced by Representatives Skeffington and McKenna. Among those who assisted in its drafting were Professor McKenna, Father Mullen, and Dr. William P. Robinson, Commissioner of Education of the State of Rhode Island.[7]

Interviews conducted by the authors yielded considerable information on the fate of the measure in the state legislature, but this story is much too detailed and inscrutable for treatment in an Article of this scope. Some developments, however, are worthy of note. The original version of the measure would have allocated $1,500,000 in state aid, covered grades one through twelve, and provided a thirty percent supplement, an amount just sufficient to equalize public and private school salaries. Certain developments made some amendments necessary. First, Governor Frank Licht, who supported the bill, was beset with a revenue shortage and could spare only $400,000 to implement the measure. Second, Dr. Henry Brickell, a state educational consultant, issued a report on Rhode Island's nonpublic schools while the supplement bill was pending. In his report he analyzed four different types of nonpublic schools: (1) private non-Catholic institutions, (2) Catholic private schools, (3) Catholic diocesan high schools, and (4) Catholic parochial elementary schools. The first two cateogories were fiscally sound, the third in a slight economic bind, but the fourth group was experiencing a severe crisis, according to Dr. Brickell, and was in need of fiscal assistance.

On the basis of the Governor's budgetary limitations and Dr. Brickell's findings, the salary supplement bill was amended. Teachers at exclusive, well-to-do private schools, both Catholic and non-Catholic, were eliminated by the insertion of a clause providing that teachers were ineligible in a school where per capita expenditure per student for secular subjects was greater than the public school average. Next, high schools were eliminated, and, finally, the supplement was reduced to fifteen percent. These alterations lowered the necessary first year appropriation to $375,000.

---

[7] Interview with Dr. William P. Robinson (May 2, 1973).

Constitutionally, these amendments were significant. Under the original bill, according to advance estimates, $600,000 of the $1,500,000 allocation would have gone to teachers in non-Catholic private schools. Under the amended version, all $375,000 was to go to teachers in Catholic parish elementary schools.[8] The amendments gave the bill a distinctly Catholic hue and rendered it more vulnerable to constitutional criticism under the "purpose and primary effect" doctrine of *School District v. Schempp.*[9]

Another interesting aspect of the salary scheme concerned the role of the commissioner of education. Legally, he was the executive agent of the state board of education, but in the administration of the Act the commissioner was given an autonomous role while the influence of the board was negligible. Commissioner Robinson, a devout Catholic layman who assisted in the drafting of the bill, contended that this result was intended. Most of the seven-member state Board of Education were non-Catholics who had been appointed by a three-term non-Catholic Republican governor, John H. Chafee. Dr. Robinson, a vigorous supporter of salary supplements, was well aware that a majority of the board opposed the bill; hence, the board was circumvented.[10]

In its final form, the Act empowered the commissioner to establish regulations for the disbursement of funds in February and June of 1970. Eligible for aid were those nonpublic school teachers who *exclusively* taught a subject required by the state, possessed a Rhode Island teaching certificate, and received a salary, including the supplement, which met the minimum salary paid to public school teachers. The effect of this last requirement was to prevent any cleric from receiving funds under the Act.

The measure's preamble declared that it was state policy "to provide a quality education for all Rhode Island youth." It then observed that approximately twenty-five per cent of the state's elementary school population attended nonpublic institutions that were "finding it increasingly difficult to maintain their traditional quality." The preamble concluded that the state's policy of quality education for all "would be seriously impaired if the quality of education provided in said schools were to deteriorate." This rationale was accepted by the state's predominantly Catholic-Democratic general assembly. The measure was reported to the floor by the House Health, Education, and Welfare Committee by a six to three vote which divided along party and religious lines; six Catholic Democrats versus three Protestant Republicans. The bill passed the whole house by a comfortable fifty-six to eighteen majority; fifty-two Democrats and four Republicans including minority leader Oliver Thompson, a Catholic and

[8] This amendment has been characterized as "close to being a 'religious gerrymander.'" DiCenso v. Robinson, 316 F. Supp. 112, 119 n.8 (D.R.I. 1970) (three-judge court), *aff'd*, 403 U.S. 602 (1971), *citing* Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

[9] 374 U.S. 203, 222 (1963).

[10] Interview with Dr. William P. Robinson (May 2, 1973).

a cosponsor of the legislation versus eighteen Republicans, most of whom were Protestant.

In the senate, the road was tougher. As the session drew to a close in early May, HEW Committee Chairman John McBurney informed the bill's manager, Representative McKenna, that he lacked the votes needed to report it to the floor. A vigorous eleventh-hour appeal by McKenna turned the tide and the measure was approved. The margin was eight to seven with Chairman McBurney casting the deciding vote. Once the bill came to public view before the entire senate, its fate was more secure. On the final day of the session it was carried by a twenty-six to thirteen margin in a vote which reflected political and religious divisions. On May 16, 1969, an apprehensive Governor Licht signed the Act privately and without fanfare; its effective date was July 1, 1969.

There were others concerned with the constitutionality of the Act. Paul McMahon, legal counsel to the Diocese of Providence, expressed his reservations to the diocesan chancellor Monsignor Daniel Reilly in a letter dated May 5, 1969. On the other side of the fence, the American Civil Liberties Union (ACLU) also entertained grave doubts concerning the Act's validity, and decided to challenge it.[12] During the fall of 1969, the ACLU sought plaintiffs with standing to contest the law, and this course of action produced six volunteers—Joan Di Censo, Donald R. Hill, Ann Clayton, Alice Chase, Helen King, and Marie Friedel. Some had children in the public schools and all were taxpayers of the state. They provided the ACLU with the "case and controversy" prerequisite to a legal action in federal court. ACLU lawyers relied heavily on the decision of the Supreme Court in *Flast v. Cohen*[13] to maintain a class action and establish standing to sue for the plaintiffs:

> The plaintiff-taxpayer's allegation in such cases [involving the establishment clause of the first amendment] would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.[14]

Once Joan DiCenso and the other plaintiffs had lent their status to the cause, the legal battle began. On December 16, 1969, Milton Stanzler, an able and experienced ACLU attorney, filed a twenty-four point complaint in the United States District Court for the District of Rhode Island. This taxpayers' complaint alleged in substance that Catholic schools were

---

[11] Letter from Paul McMahon to Monsignor Daniel Reilly (May 5, 1969). *See* Letter from Rev. Edward Mullen to Paul McMahon (May 21, 1969).

[12] The authors' insights into the ACLU side of the case are derived mainly from an interview with Milton Stanzler, Esq., on May 2, 1973.

[13] 392 U.S. 83 (1968).

[14] *Id.* at 106.

the primary beneficiaries of Rhode Island's Salary Supplement Act, that the goal of such schools is the propagation of the Catholic faith and that the statute, therefore, had as its purpose and primary effect the advancement of religion.[15] The complaint also alleged that the statute constituted compulsory taxation in aid of religion in violation of the free exercise clause.

The defendants were Commissioner Robinson, General Treasurer Raymond H. Hawksley, and State Controller Charles W. Hill. They were named because of their roles in the disbursement procedure, and were sued in their public capacities. Section II of the complaint, entitled "factual allegations," contained fourteen assertions. While several dealt with the specific provisions of the Act, the most interesting charges were those which attempted to establish a connection between the measure and the Catholic Church. For example, the complaint made the following assertions: (a) "During the 1969 session of the General Assembly numerous spokesmen for at least one religious body and organizations associated with at least one religious body strongly and publicly called for and supported legislation giving state financial assistance to church-operated schools;" (b) "The act will primarily benefit parochial elementary schools;" (c) "Under the language of the act substantially all payments . . . will be made to teachers in religiously oriented schools;" (d) "The act on its face authorizes payments which support sectarian educational institutions;" and (e) the education in parochial schools is "conducted in an atmosphere conducive to the promotion of religious doctrine and one in which it is impossible to separate the sectarian from the secular." The complaint also alleged that as of October 10, 1969, all of the approximately 200 teachers who had applied to the commissioner of education for a salary supplement taught at religiously-oriented schools.

The third section of the complaint set forth the constitutional causes of action based upon the establishment and free exercise clauses of the first amendment.The final section contained a fourfold prayer for relief, asking: (1) that a three-judge court be convened to declare the Act unconstitutional; (2) that the defendants be enjoined permanently from approving payment of any funds under the Act; (3) that a preliminary injunction be granted pending a trial of the issues; (4) "that the plaintiffs be granted such other and further relief as the Court may deem just and proper."

When Milton Stanzler filed the complaint with the clerk of the court he also filed his appearance as counsel for the plaintiffs. The summons was returned on December 17, 1969, indicating that it was duly served on the defendants and filed with the court. Service had been made on Americo Campanelli, a Rhode Island assistant attorney general, who accepted on behalf of Charles W. Hill, Raymond H. Hawksley, and William P. Robinson. On December 19, 1969, William J. Sheehan also entered an appearance as attorney for the plaintiffs.

---

[15] *See* text accompanying note 9 *supra*.

Since the result which the plaintiffs sought was a permanent injunction against the disbursement of funds under a state statute on the grounds of unconstitutionality, the convening of a three-judge court was appropriate. The three-judge court legislation required that where an interlocutory or permanent injunction was sought to restrain the enforcement or operation of a state statute on the grounds of unconstitutionality, the application should be heard and determined by a federal district court of three judges.[16] Therefore, on December 23, 1969, Chief Judge Bailey Aldrich of the First Circuit Court of Appeals designated Circuit Judge Frank M. Coffin and District Judge Hugh H. Bownes of the district of New Hampshire to sit with District Judge Raymond J. Pettine of the district of Rhode Island. Judge Pettine conducted all proceedings between December 16, 1969, the date on which the complaint was filed, and March 18, 1970, the date on which the three-judge court heard the case.

On December 29, an appearance was filed by Benjamin A. Smith, on behalf of the plaintiffs. W. Slater Allen, assistant attorney general, filed his appearance for the defendants on January 5, 1970, along with the answer to the complaint and a motion to dismiss. Judge Pettine denied this motion by written order on January 20, 1970. On January 21, 1970, a hearing was held on the plaintiffs' request for a temporary restraining order. Allan Shine and W. Slater Allen argued for their respective sides at this proceeding. Judge Pettine ruled that a temporary restraining order would not be issued at that time. On January 22, 1970, a separate motion for a temporary restraining order was filed. On February 9, 1970, this motion was heard with Mr. Shine and Mr. Allen again presenting arguments. Judge Pettine, by a written ruling on February 13, 1970, granted a temporary restraining order which was to run until the hearing date of March 18, 1970.

An important development occurred on February 11, when several additional parties filed motions to intervene as defendants. Appearances were made on behalf of the intervenors by Richard P. McMahon, William F. McMahon, Jeremiah C. Collins, Charles H. Wilson, and Edward Bennett Williams, who was principal counsel. The McMahons were Providence lawyers, while Williams, Collins, and Wilson were prominent Washington attorneys and partners in the same firm. These five lawyers represented a group consisting of private school teachers and parents who had children in Catholic elementary schools. The lead intervenor was John R. Earley. Judge Pettine filed an order giving this group leave to intervene under Rule 24 of the Federal Rules of Civil Procedure, which permits intervention in an action

[16] 28 U.S.C. § 2281 (1970) (current version at Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119-1120 (1976)). The three-judge court provisions were substantially amended in 1976 and currently limit the empanelment of such courts to actions "challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any statewide legislative body."

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[17]

These intervenors suggested that because of their status as parents and teachers they could raise constitutional issues related to public aid to private sectarian education that might not be properly asserted by the original defendants.

On March 18, 1970, the case went to trial before Judges Coffin, Bownes, and Pettine. On the trial day, an appearance for the plaintiffs was entered by Leo Pfeffer of New York, a nationally-known civil libertarian and authority on church-state relations. Pfeffer and Milton Stanzler were the principal trial counsel for the plaintiffs, W. Slater Allen represented the defendants, and Jeremiah C. Collins argued for the intervenors.

At the outset of the hearing, Slater Allen made a motion to dismiss which was disputed by Pfeffer. The court chose to reserve judgment on the motion. This tactic allowed the court to hear all the evidence in the case before deciding on the motion. A total of six witnesses were called and twenty-six exhibits were entered. The trial continued through March 19. On that day, summations were made by Jeremiah Collins for the intervenors and by W. Slater Allen for the defendants. Summation for the plaintiffs was conducted by Leo Pfeffer. The court then called for briefs to be submitted by April 6, 1970. On the final day of the trial, an appearance for the plaintiffs was made by Franklin C. Salisbury as amicus curiae. Salisbury was representing "Protestants and Other Americans United for the Separation of Church and State." The court granted Salisbury permission to submit his brief.

On March 20, 1970, the court allowed the temporary restraining order to lapse. This action was not contested by the plaintiffs, who waived their prayer for a preliminary injunction. According to Milton Stanzler, this action was a policy decision of the ACLU lawyers. They were mindful of the climate of opinion in Rhode Island alluded to at the outset of this Article, and they did not wish to penalize those teachers who had made contracts in good faith reliance upon the salary supplement law. Once the restraining order lapsed, Commissioner Robinson eagerly proceeded to grant the initial installment to those nonpublic school teachers who had qualified for payment.[18]

The three-judge federal court delivered its anxiously awaited opinion on June 15, 1970, just prior to the time scheduled for the second installment of the salary supplement. The verdict was unanimous; all three jurists found that the Act was unconstitutional,[19] with Judge Raymond

---

[17] FED. R. CIV. P. 24(a).

[18] Interview with Milton Stanzler (May 2, 1973).

[19] DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd*, 403 U.S. 602 (1971).

Pettine concurring in the result but dissenting in part from the majority view.

At the outset, the question of standing was resolved in favor of the plaintiffs,[20] with reliance placed upon *Flast* v. *Cohen*[21] and *Doremus* v. *Board of Education.*[22] The court next concerned itself with findings of fact by examining "the statutory scheme,"[23] "the nature of the crisis leading to the statute,"[24] and "the parochical school system."[25] The most significant findings from a constitutional perspective were these: (1) the commissioner of education required nonpublic schools to

> submit data concerning enrollments and total expenditures. If this data indicates a per pupil expenditure in excess of the statutory norm, an agent of the Commissioner must examine the books of the school in question in order to determine how much of its spending was attributable to secular education and how much to religious;[26]

(2) Approximately 250 teachers had applied for aid, and "all of these applicants are employed by Roman Catholic schools;"[27]

> (3) [T]he diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction. Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochical school a powerful vehicle for transmitting the Catholic faith to the next generation.[28]

On the basis of these findings, the court proceeded to formulate several conclusions of law. Surprisingly, the court rejected the purpose and primary effect standard of *School District v. Schempp*[29] despite its conclusion concerning the recipients of the supplement and notwithstanding the fact that the plaintiffs placed heavy reliance on this doctrine. The judges rejected the plaintiffs' attempt "to divine the 'true intent' of the legislature by inspecting the activities of the lobbyists,"[30] and asserted that the *Schempp* test contained deficienies.[31]

The court found the first and third findings of fact more persuasive. Because of the nature of parochical schools, the court concluded that the Act provided "substantial support for a religious enterprise."[32] In view of

---

[20] 316 F. Supp. at 114 n.1.
[21] 392 U.S. 83 (1968).
[22] 342 U.S. 429 (1952).
[23] 316 F. Supp. at 114.
[24] *Id.* at 115.
[25] *Id.* at 116.
[26] *Id.* at 115.
[27] *Id.*
[28] *Id.* at 117.
[29] 374 U.S. 203, 222 (1963).
[30] 316 F. Supp. at 119.
[31] *Id.* at 120.
[32] *Id.* at 122.

the supervisory role exercised by the commissioner, the court held that the "act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment."[33] The judges placed heavy emphasis on a test which the Supreme Court had devised only the month before in *Walz v. Tax Commission.*[34] The court in *DiCenso* determined that the *Walz* test of a statute's effect was "whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards."[35] The Rhode Island law, the court stated, authorized a subsidy which must be annually renewed and one which "will inevitably excite bitter controversy."[36] In addition, it created an "ongoing administrative relationship between government and the Catholic schools,"[37] and "may significantly limit the internal freedom"[38] of those schools. Ironically, the *Walz* decision itself had sustained New York City's tax exemption on property used for religious purposes. In *DiCenso,* however, the *Walz* test was employed to invalidate "the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid."[39]

The court gave short shrift to the plaintiffs' free exercise claim, because there was "offered no testimony concerning . . . personal religious beliefs and practices, or lack thereof" and thus the plaintiffs had "failed to introduce the kind of particularized evidence necessary 'to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion.' "[40] Finally, the court considered the equal protection claim of the teacher-intervenors and the free exercise claim of the parent-intervenors. The claim of the former asserted that a Salary Supplement Act restricted by judicial decree to aiding teachers in nonpublic but secular schools would deny equal protection because of discrimination against teachers of secular subjects on an impermissible ground, *i.e.,* religion. The court felt that such a distinction was "commanded by the Establishment Clause." Therefore, "even though religion in general may be a suspect classification, the mandate of the Establishment Clause provides an overriding justification in this case."[41]

The parent-intervenors asserted that they

> [felt] in conscience bound to send their children to parochial schools which teach both secular subjects and religion. If, however, the quality of secular education [fell] too low in parochial schools, the parent-intervenors [contended that they might] well be forced to ignore the dictates of consci-

---

[33] *Id.* (footnote omitted).
[34] 397 U.S. 664 (1970).
[35] 316 F. Supp. at 120.
[36] *Id.* at 120.
[37] *Id.* at 121.
[38] *Id.*
[39] *Id.* at 122.
[40] *Id.* at 118, *quoting* School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (brackets in *DiCenso).*
[41] 316 F. Supp. at 122.

> ence by sending their children to public schools. To avoid this result, intervenors argue[d] that the free exercise benefits which flow from aid to parochial education should prevail over the establishment clause values protected by strict separation . . . .[42]

The court, however, rejected "the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated."[43]

Judge Pettine authored a separate opinion concurring in part and dissenting in part. He agreed with the court's decision to apply the *Walz* test and noted the "excessive entanglements" inherent in the Act, but he denied the majority's contention that the Act's effect was "substantially to support a religious enterpise."[44] He made the formidable contention that "[o]nly proof will establish that subsidization of an educational enterprise is subsidization of a 'religious enterprise,' " and observed that "there is unanimous unrebutted testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching process."[45]

On June 17, 1970, the judgment and order were formally entered: the defendants' motion to dismiss was denied, the Salary Supplement Act was held unconstitutional in that "it violates the First Amendment of the Constitution insofar as it authorized aid to teachers employed by denominational schools," and the defendants and their agents were permanently enjoined from making any payments or disbursements under the Act to teachers employed by denominational schools.

On the same day, W. Slater Allen and Richard P. McMahon filed an application for a stay, alleging that the injunction would create problems in the negotiation of teacher contracts in parochical schools for the 1970-1971 school year and that an appeal to the Supreme Court would be forthcoming. Judge Pettine denied the motion because he felt there would be "a loss to plaintiff taxpayers" of "a substantial sum of money when we realize the uncertainty of a date of final disposition" by the Supreme Court. An order expressing that rationale was promptly entered on June 17.

The defeated defendants lost no time in bringing their cause to the attention of the United States Supreme Court. Edward Bennett Williams filed an appeal for the intervenors on June 19, and Attorney General Herbert F. DeSimone performed a similar task for the defendants on June 25. DeSimone also appointed Charles F. Cottam, a special attorney general, to argue the case before the High Court. Cottam had a longstanding interest in church-state questions.[46]

---

[42] *Id.* at 123 (citation omitted).

[43] *Id.*

[44] *Id.* (Pettine, J., concurring in part and dissenting in part).

[45] *Id.* at 124.

[46] Interview with Herbert F. DiSimone (May 1, 1973).

On June 26, the record on appeal together with a certified copy of the docket entries were mailed to the clerk of the Supreme Court. The appeals were taken pursuant to a statute which provides for a direct appeal to the Supreme Court from a three-judge district court.[47] The appellants then appeared before Supreme Court Justice William Brennan, to request a stay. Justice Brennan denied the request, but was promptly overruled by the full Court.[48] Thus, on July 1, a certified copy of the order granting a stay pendente lite was received from the high tribunal and filed in the Rhode Island district court.

Later in the month, jurisdictional statements were filed with the Supreme Court by the defendants and intervenor-defendants. In a curious move, the ACLU lawyers for DiCenso filed an answer to the jurisdictional statements which also urged the Court to decide the case. According to Milton Stanzler, this action was motivated by the desire of the ACLU to have the important issues raised by these cases finally adjudicated. This concern was shared by the intervenors, and accounted for the failure of the parties to erect procedural roadblocks which would have delayed court action at either the district or Supreme Court level.[49] After examining the statements of the parties, the Supreme Court noted "probable jurisdiction" on November 9, 1970.[50]

This action was the signal to the attorneys to prepare their final briefs for argument before the Suprme Court. The day of presentation came on March 3, 1971. Each side was allocated one-half hour on the Court's busy schedule. Edward Bennett Williams argued the cause for Earley, while Charles F. Cottam argued for Robinson. Leo Pfeffer and Milton Stanzler shared the rostrum in arguing the appellees' cause. Briefs were filed by all of the parties to the action. In addition, because of the significant constitutional questions raised by this case, six amicus curiae briefs were filed. Four urged affirmance *(viz.,* the American Jewish Committee, Protestants and Other Americans United for the Separation of Church and State, the Center for Law and Education at Harvard University, and the Connecticut State Conference of Branches of the NAACP), while two urged reversal *(viz.,* the National Catholic Education Association and the U.S. Department of Justice).[51]

The Court studied the material presented to it, and nearly four months later it rendered its decision, consolidating the appeal in *DiCenso* with a similar Pennsylvania case, *Lemon v. Kurtzman.*[52] A detailed summary of the Court's decision would be somewhat repetitious, for in essence

---

[47] 28 U.S.C. § 1253 (1970).

[48] Robinson v. DiCenso, 399 U.S. 918 (1970).

[49] Interview with Milton Stanzler (May 2, 1973).

[50] Earley v. DiCenso, 400 U.S. 901 (1970).

[51] The briefs of the parties are summarized and the amicus curiae briefs are noted in 29 L. Ed. 2d 1088-90, 1095-97 (1971).

[52] 310 F. Supp. 35 (E.D. Pa. 1969) (three-judge court), *rev'd,* 403 U.S. 602 (1971).

the Court adopted the argument of the three-judge district court. The majority opinion, written by Chief Justice Burger, affirmed the lower court ruling by accepting its finding that the Act "fostered 'excessive entanglement' between government and religion" and "had the impermissible effect of giving 'significant aid to a religious enterprise.' "[53] Justice Burger noted the "comprehensive, discriminating, and continuing state surveillance"[54] required by the Act, and concluded that "[t]hese prophylactic contacts will involve excessive and enduring entanglement between state and church."[55]

The free exercise issue raised by the intervenors was ignored in the opinion of the Court, as were the free exercise claims of the appellees. But Justice Douglas, joined by Justices Black and Marshall, touched upon these and other issues in an impassioned and far-reaching concurring opinion. In essence, Justice Douglas would have sustained every contention in the ACLU's original complaint. The concurring opinion concluded by affirming that "a history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes"[56]—a whole that is permeated with religious values. In Justice Douglas' view, therefore, "the taxpayers' forced contribution to the parochial schools in the present cases violates the First Amendment."[57]

Justice Brennan also filed a separate concurring opinion. Justice Brennan's historically-oriented discourse concluded that "in using sectarian institutions to further goals in secular education, [the Salary Supplement Act does] violence to the principle that 'government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.' "[58]

Justice White authored a lone dissent which urged a reversal of the district court decision. He observed, as had Judge Pettine, that "[t]he Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching."[59] Justice White further argued

> Where a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.[60]

---

[53] 403 U.S. at 609, *quoting* 316 F. Supp. at 112.
[54] 403 U.S. at 619.
[55] *Id.*
[56] *Id.* at 641 (Douglas, J., concurring).
[57] *Id.* at 641-42.
[58] *Id.* at 659 (Brennan, J., concurring), *quoting* School Dist. v. Schempp, 374 U.S. 203, 265 (1963).
[59] 403 U.S. at 667 (White, J., dissenting).
[60] *Id.* at 665.

Finally, the dissent contended that the Act did not violate the first amendment since indirect benefit to religion from government aid to sectarian schools in the performance of separable secular functions does not convert such aid into an impermissable establishment of religion.[61] This position, however, was unavailing. The Court immediately ordered the lower court judgment affirmed and sent notice of this decision to the clerk of the United States District Court for the District of Rhode Island.

Meanwhile, back in Rhode Island, payment of the June, 1971 salary supplement was causing some dispute. Commissioner Robinson was determined that the money should be disbursed. Therefore, on June 15, when the Supreme Court opinion was imminent, he ordered the supplement vouchers processed. He hoped to have the checks in the mail prior to the High Court's ruling so that in any event the teachers would be paid.[62] Charles Hill, the codefendant state controller, balked at this move and refused to disburse the funds. When the Supreme Court's decision was announced on June 28, the new attorney general, Richard Israel, decided that the Court's opinion was sufficient reason to cancel the June supplement. This action put to rest one phase of Rhode Island's aid to private education controversy, but the proponents of such aid have only left the field to return another day.[63]

---

[61] *Id.* at 664.

[62] Interview with Dr. William P. Robinson (May 2, 1973). Milton Stanzler informed the authors that the Rhode Island ACLU lawyers made a "policy decision" not to bring a suit to recover the three supplement payments which had been disbursed in February and June of 1970, and in February 1971. He felt that this was a "wise decision" in view of the climate of opinion in Rhode Island and also in view of the fact that the Pennsylvania plaintiffs in Lemon v. Kurtzman, 403 U.S. 602 (1971), were rebuffed by the Supreme Court in an attempt to recover state funds which had been paid prior to the time when the act challenged by the litigants in that case was declared unconstitutional. Lemon v. Kurtzman, 411 U.S. 192 (1973).

[63] For discussion of the Court's holding in *DiCenso* and *Kurtzman* and some subsequent developments, see Taylor, *Nine Rulings: Three Wins, Three Losses, and Three Remands on Government Aid to Church-Related Institutions*, 17 CATH. LAW. 182 (1971); Note, *Constitutional Barriers to Public Assistance for Parochial Schools*, 17 CATH. LAW. 189 (1971); Note, *"Save our Schools"—A Challenge Beyond the Courts*, 18 CATH. LAW. 174 (1972).