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ESEA TITLE I LITIGATION—UPDATE

CHARLES H. WILSON, ESQUIRE

Since the *PEARL* case¹ was filed in 1976, a cloud has hovered over Title I of the Elementary and Secondary Education Act (ESEA). Although the progress of a number of pending title I cases has been slow, there should be some elucidation in the very near future. Presently, the term "title I" is somewhat of a misnomer. In 1981, Title I of ESEA was re-enacted as Chapter One of the Education Consolidation and Improvement Act of 1981 which in turn became part of Subtitle D of Title V of the Omnibus Budget Reconciliation Act of 1981.² That is a real mouthful if you are trying to find the shorthand reference. For purposes of this presentation, the program will continue to be referred to as the title I program.

This presentation will consist of a brief summary of the status of the pending title I cases and a brief prognosis of where they may be heading. At last year's meeting five cases were listed and discussed.³ Those cases again will serve as the foundation for the title I discussion. The first case, which was pending in San Francisco, is no longer in existence. The plaintiff, United Americans for Public Schools, took a voluntary dismissal after the Justice Department filed against the plaintiffs, both the organization and the individual taxpayers, some very onerous discovery requests. It is believed, however, that the plaintiff will watch carefully the development of the other cases and may refile at a later date.

The second case, *Barnes v. Bell*, is pending in Louisville, Kentucky. That case attacks directly Louisville's title I program for nonpublic school students, but is essentially on hold at this time because lead counsel in the case, Lee Boothby of Americans United, is somewhat preoccupied with his role in the *Wamble* case. Until the *Wamble* case is tried and

¹ National Coalition for Pub. Educ. & Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed sub nom.* National Coalition for Pub. Educ. & Religious Liberty v. Hufstедler, 449 U.S. 808 (1980) [hereinafter cited as *PEARL*].

² Act of Aug. 13, 1981, Pub. L. No. 97-35, § 551, 95 Stat. 463 (codified in various sections of 20 U.S.C.).

³ See Wilson, *ESEA Title I Litigation—A National View*, 27 *CATH. LAW.* 231, 233-38 (1982).

resolved, it is doubtful that this case will move forward at all.

The next case, *Felton v. Bell*, is pending in the Eastern District of New York. At this time last year the stay entered in the case was still in effect.⁴ A stay had issued soon after the complaint was filed pending the outcome of *PEARL* and as of last year's meeting, more than a year after the district court decision in *PEARL*, no action had been taken by the plaintiffs to lift the stay.⁵ It was suggested to the Justice Department that affirmative action be taken to have the stay dissolved, followed by the filing of a motion for summary judgment based upon the *PEARL* record. It was clear from the complaint in *Felton* that the plaintiffs were attacking the New York City title I program, the very program that was at issue in *PEARL*. The federal bureaucracy dragged its heels on that strategy, and so Leo Pfeffer moved to dissolve the stay and then entered into a stipulation that the case be submitted on the *PEARL* record. The stipulation was agreed to and cross-motions for summary judgment were filed. There is some indication that the judge will simply decide the case on the papers.

The *Felton* case appears to be ideal because it resurrects the *PEARL* record, which is perhaps the best record that will ever be developed in a title I case, and presents the opportunity for expeditious consideration.⁶ If the Supreme Court will hear a title I case, it will most likely be *Felton* which has and will have the best record.

That case, however, will also be a test of what has been worked out with the Justice Department as basic strategy in title I, and that strategy is to keep the title I issue away from the Supreme Court. The Supreme Court probably will not want to decide the constitutionality of title I, and that result is most likely if in the case before the Court—apparently *Felton*—the court of appeals held title I constitutional as applied to nonpublic school students. The reason is that the only recourse to the Supreme Court would be a petition for certiorari by Leo Pfeffer; the Court could deny certiorari with no precedential impact. This action, hopefully, will signal that the Court, rather than deciding the broad constitutional implications of title I, will leave the determination of particular programs to the lower courts. If this strategy backfires and either the district court or the Second Circuit finds title I as applied to nonpublic school children in New York City unconstitutional, then the right to take title I up to the Supreme Court by appeal still exists, and the Court will be forced to reach the merits of the issue.

The fourth case, *Stark v. Bell*, is pending in Minnesota. The *Stark* case is unique in one respect. In *PEARL* and in *Felton*, there is only one

⁴ See *id.* at 234.

⁵ *Id.*

⁶ *Id.* at 235-36.

entity's title I program at issue. In the San Francisco case, it was unclear whether it would be just the San Francisco program under attack or others. Of course, in Missouri, in the *Wamble* case, the issue is presented in the context of a title I bypass. In Minnesota, the plaintiff has indicated that he intends to challenge at least ten different public school district title I programs. In the final analysis, there could be somewhere between ten and sixteen mini-trials, because it will be argued that each program has to be evaluated on its own merits. The trial of the case, needless to say, will be rather cumbersome. Fortunately, for the most part the plaintiff is focusing on small school districts, with the exception of Minneapolis and St. Paul, so the burden of the trial may not be as great as it could otherwise be.

Whether the Minnesota case will have any long-term significance is doubtful at this time because the *Wamble* case probably will reach the Eighth Circuit first. The *Wamble* case indeed is the most significant of the title I cases. It was filed in April of 1977 and remains untried. It would be nice if the case somehow disappeared, but unfortunately it is inexorably moving toward trial. Last year at this time, the case was hopelessly bogged down over negotiations for stipulations of fact.⁷ It seemed that the case would be bogged down indefinitely.

The case does, however, carry a 1977 filing date, and three new judges were appointed to the Western District of Missouri in September 1981. Judge Wright, who then had the case, unloaded it to Judge Stevens, one of the new judges. When Judge Stevens saw the 1977 date, and was facing a rather empty docket, he stated at the first status conference in November that he intended to put the case on the fast track and indeed he has.

In terms of title I litigation, this trial will be unprecedented in scope. The plaintiff wants to offer twenty-six deposition transcripts and the testimony of twenty-five live witnesses. There will be seventeen additional witnesses on the defendant's side. Also, a large number of documents have been designated by the plaintiff as trial exhibits. The plaintiff claims, in no uncertain terms, that he will prove that the Catholic Church is hierarchical.

One of the real difficulties in the case is that Judge Stevens, acting on a motion for a partial judgment on the pleadings based on a standing issue, ruled that the plaintiff has standing not only to challenge the constitutionality of the title I bypass as it is now being operated in Missouri, but also to contest whether the United States Commissioner of Education made the right decision in implementing the bypass. The ruling that the plaintiff can challenge the decision to invoke the bypass makes it almost

⁷ See *id.* at 233-34.

essential to relitigate *Barrera v. Wheeler*.⁶ This is due to the fact that the Commissioner based his decision to bypass in Missouri on a factual finding that nonpublic schools in that state were not receiving services comparable to the services provided to public school students. That was the very issue in *Wheeler*. It is now necessary to develop evidence, presented in *Wheeler*, that in the 1970-1971 school year, the Kansas City public school district spent an average of \$240 per public school child but an average of only \$10 for nonpublic schoolchildren.

The problems in the *Wamble* case, from the beginning, have been enormous. Coping with the great number of exhibits and many thousands of pages of deposition testimony, in addition to the various objections that have accompanied such discovery, has been no easy task. Some of the comments made by Judge Stevens at various sessions with him make the outcome of the case quite unpredictable.

That in brief is the status of title I litigation. It is fair to predict that by the fall of 1983, there will be, at least, district court decisions in the *Felton* and *Wamble* cases, and possibly a decision in Minnesota. Those cases will then be progressing up the appellate ladder to some sort of confrontation in the Supreme Court.

⁶ 475 F.2d 1338, 1355-56 (8th Cir. 1973) (holding that title I programs for Kansas City parochial schools were not comparable to those in public schools and remanding for the establishment of guidelines for the proper implementation of title I programs), *aff'd*, 417 U.S. 402 (1974), *modified*, 422 U.S. 1004 (1975).