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SCHOOL AID: CONSTITUTIONAL ISSUES AFTER *AGUILAR* *v. FELTON*

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It is widely recognized that the Supreme Court's opinions interpreting the Establishment Clause as it applies to our nation's schools are among the murkiest of the Court's rulings. Indeed, the Court itself once admitted that "[it] can only dimly perceive the lines of demarcation" among its opinions on this subject.¹ Yet despite its own perception of the closeness of the questions involved, the Supreme Court reached out last summer in the *Felton* decision² and struck a serious blow to a Federal program that had been successfully delivering remedial services to children at both public and private schools for the last twenty years.

In *Felton*, the Supreme Court decided that because of the need to supervise one teacher in what the Court called a "pervasively sectarian environment," the provision of Chapter 1 services on the premises of religiously affiliated private schools amounted to constitutionally impermissible "excessive entanglement" between church and state. I believe that in so doing, the Supreme Court misinterpreted the intent of the Founders, and, thus quite unnecessarily disrupted the delivery of remedial services to educationally disadvantaged students in religiously affiliated schools.

Last August, Secretary Bennett took issue with the *Felton* decision, arguing that the Court's reasoning failed to apprehend the central role of religion in American life. He vowed to "nullify the damage done" by working with local authorities to develop other means of providing services to educationally disadvantaged children. Despite the Secretary's clear concern for the education of all children served under Chapter 1, as

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¹ *Mueller v. Allen*, 463 U.S. 388, 393 (1983).

² *Aguilar v. Felton*, 473 U.S. 402 (1985).

well as his insistence that the Court's ruling be obeyed—and he made that clear—the Secretary was widely accused in the editorial pages across the country of trying to sabotage the Court's ruling and favor religious schools at the expense of public schools. Others, of course, came forward to defend the Secretary and the idea that, while taking steps to ensure that services are delivered in a manner consistent with the court's ruling, we should also work to ensure that educational services for the disadvantaged can continue uninterrupted. The hostility evident from some quarters reflects an apparent disregard of the statutory requirement that Chapter 1 serve students in public and private schools alike, a mandate that the Supreme Court left untouched.

The importance of the equitable service requirement in the Chapter 1 law cannot be understated. As many of you know, for many years after World War II, legislation providing Federal aid to education was stymied, blocked by debate over the question of whether aid should benefit students at public and private schools alike. Only in the mid-1960's during the Great Society did public and private school interests finally reach a compromise on this issue, and thus clear the way for the enactment of substantial Federal aid programs. Under that compromise, premised on the recognition that private schools are an integral part of our system of general education, private school students were to be entitled to "equitable service" under Chapter 1 and other major educational programs. In short, the Federal government was to provide aid to private school pupils but not to the institutions. The equitable services requirement has not provided for a continuing flow of services to public and private school children for approximately two decades, and the department of Education is fully committed to its faithful execution in the future.

Within the past year, the task of achieving the equitable participation of private school children has been profoundly complicated by the *Felton* decision. To respond to the problems we anticipated after *Felton*, the Secretary issued a series of questions and answers in August of 1985, addressing what we believe would be major implementation issues. Further guidance on additional major issues followed in September 1985 in a letter from the Secretary to the Chief State School Officers.

In brief, we stressed that the Chapter 1 equitable participation requirement was not changed by *Felton*, observed that services could be provided at neutral sites during regular school hours, and emphasized that the responsibility for planning and implementing the Chapter 1 program for private school children remained clearly with the state and local education agencies, in consultation with representatives of private school children. We also stated that the *Felton* decision should not be presumed to apply to programs other than Chapter 1.

Secretary Bennett in his August letter advised Chief State School Officers that the Department would support local and state agencies in liti-

gation where such agencies had good ground to seek delay in implementing the Supreme Court's decision. We have followed this approach, and in all the decided cases except one, the state and local education agencies have succeeded in obtaining court orders permitting additional time, typically through the end of this school year.

These cases, however, have not fully solved or eliminated the nationwide problems of implementing *Felton*, as you know. Many children still are not being served, and others are being served through methods that are inconvenient or that drain time that could otherwise be devoted to instruction. Questions have been raised regarding parking vans on the curb side and the precise location of a mobile facility or van vis-a-vis the private school which the children in question attend. Clearly there are no ready or unassailable answers to these questions.

In the next school year many local education agencies will continue to face difficult problems of implementation. Unlike this year, we expect that state and local education agencies will find it difficult to convince courts that there are good grounds for any further extension of implementation time. In its recent decision upholding the validity of the one-year stay of the *Felton* decision issued by Judge Neaher for New York City, the Second Circuit Court of Appeals indicated that it expected the New York City system to have an alternative plan in operation by the beginning of the 1986-1987 school year. It seems evident that problems will intensify for those districts that have still not found feasible alternatives.

Obviously, there is a great deal of work ahead for all of us—the Department, the state education agencies, the local education agencies, and the representatives of private school children—in achieving compliance with the equitable services requirement. While we have some accomplishments to show for our efforts during the past year in furnishing Chapter 1 services, in other areas our work is just beginning. All of us must continue to find alternatives for serving private school children effectively.

The Department takes seriously its responsibility to disseminate necessary information on effective services to state and local officials. We will continue to provide guidance as we did in August and September of last year, and are planning to issue additional guidance to the Chief State School Officers within the next month or so. We will also continue to provide technical assistance where appropriate, and our forthcoming additional guidance will seek to address certain issues of particular difficulty, such as the use of computers, and the location of portable buildings and vans.

But the real work of implementation must continue to be at the state and local level. The Federal government cannot and will not dictate methods that can work at each and every location. That naturally is a decision to be made at the state and local level, where state and local

officials and representatives of private school children have the best sense of how local needs and conditions can be addressed. While allowing school officials at the state and local level to work out these problems, however, it is important that we all recognize that we are dealing with disadvantaged children whose rightful claim to these remedial programs must be zealously protected.

To this end, the Department has taken definitive steps to ensure that equitable services will be maintained in the wake of *Felton* by reminding each state of the continued legal responsibility it has to serve private school children, by sending follow-up letters to particular state agencies where particular problems persist, and by sending teams to affected localities to determine whether there is a need for services to be provided to private school children by a federal contractor (in a so-called bypass arrangement) or whether other appropriate action is warranted. If local solutions are not found, we will take whatever steps are necessary to ensure that children continue to receive the educational services to which the law entitles them.

Whatever action the Department takes, however, there remains an undeniable tension between the Supreme Court's ruling in *Felton* and the Chapter 1 statutory requirement that equitable services be provided to private school students. In this post-*Felton* setting we must guard carefully against the risk that such students could become second-class recipients under Chapter 1.

One answer we at the Department have recommended to Congress is a new delivery system for Chapter 1 by way of a voucher. Through this legislative proposal, The Equity and Choice Act of 1985 or TEACH, the individual parents of each Chapter 1 child would be entitled to request a voucher in lieu of existing Chapter 1 services, redeemable for compensatory or regular education or both at the school of their choice. TEACH is the Department's answer to Justice Powell, who cast the deciding vote in *Felton*. Justice Powell suggested in his concurring opinion that he might look more favorably on "a program of evenhanded financial assistance" to public and private school children if it could be "administered without governmental supervision" in the private school—that governmental supervision that the Court found offensive in the *Felton* decision.

We believe that our voucher proposal is just such a proposal, as financial assistance would be provided in the form of a voucher issued on a neutral basis to parents of all eligible children. Funds would only reach a particular school through the individual decisions of the parents to expend their voucher funds at a given school. Such a mechanism, operating through the independent choices of private citizens, is based on the very principle upheld by the Supreme Court in 1983 in the *Mueller* decision,

the Minnesota tuition tax deduction case,³ as well as this last term in the *Witters* case.⁴ Based on these precedents we are convinced, as is the Department of Justice and the Congressional Research Service, that the Supreme Court would find our TEACH bill constitutional.

By involving parents in their children's education, and by fostering a healthy competition among schools, TEACH will contribute to academic achievement by the disadvantaged. Equally important, TEACH would return Chapter 1 to its original intent, ensuring that government aid is available to the educationally disadvantaged children who need remedial services, regardless of the schools they attend.

³ *Mueller v. Allen*, 463 U.S. 388 (1983).

⁴ *Witters v. Washington Dep't of Services for the Blind*, 106 S. Ct. 748 (1986).