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School Aid: Constitutional Issues After Aguilar v. Felton

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

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Immediately after the United States Supreme Court's decision on July 1, 1985, in *Aguilar v. Felton*,[1] state and local education authorities faced the practical obstacles engendered by that decision. School districts across the nation attempted to formulate and implement plans for providing educational services for the 1985-86 school year, under both federal and state educational programs, at locations other than parochial school buildings. Several state or local education officials filed lawsuits seeking judicial guidance or clarification of their obligations under federal law, and in accord the *Felton* decision, to provide educational services to parochial school students at so-called "neutral sites" during the upcoming school year.

Some state education departments or school districts sought judicial approval of a delay in implementing federally-funded educational services at "neutral sites" because of practical problems in locating sites and arranging transportation for the students.[2] Those education authorities sought court orders that would permit them to continue to provide services to parochial school classrooms until they could implement alternative arrangements. With only one exception, the courts granted the requests for a delay in implementing the "neutral site" requirement in order to allow school authorities a reasonable amount of time to implement new plans without depriving students of the benefits of the educa-

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* Hughes Hubbard & Reed.

[1] Aguilar v. Felton, 473 U.S. 402 (1985).

[2] *See, e.g.*, Anderson v. Bennett, No. 85 Civ. 8632 (CLB) (S.D.N.Y. Nov. 4, 1985) (temporary restraining order granted); Felton v. Bennett, No. 78 CV 1750 (ERN) (E.D.N.Y. Sept. 26, 1985) (judgment stayed); Cooperman v. Bennett, No. 85-4926 (AET) (D.N.J. Oct. 25, 1985) (granting temporary relief); Pennsylvania v. Department of Educ., No. CV-95-1762 (D. Pa. Feb. 5, 1986) (granting relief for 1985-86 school year).

tional programs.[3]

In *Aguilar v. Felton*, on remand to the district court, Judge Neaher entered judgment in accordance with the Supreme Court's decision, but stayed the effect of the judgment for one year—until the start of the 1986-87 school year—conditioned upon the filing of periodic reports on the progress in developing a plan for the 1986-87 school year.[4] On March 26, 1986, the United States Court of Appeals for the Second Circuit upheld Judge Neaher's decision to allow a one-year implementation delay.[5] The Court of Appeals made clear, however, that it premised its affirmation of the delay on the understanding, that by the beginning of the 1986-87 school year, no educational services would be provided in parochial school classrooms in New York.[6]

It now seems quite clear that in any school district that is unable, because of practical problems, to implement "neutral site" services for the 1986-87 school year, parochial school students will be deprived of educational services. There is, of course, the possibility that if a particular school district encounters unusual problems or new obstacles to implementing "neutral site" services, a court might grant a further delay rather than penalize the children by permitting services to be terminated.

Many school districts implemented "neutral site" plans during the 1985-86 school year. The implementation of the Supreme Court's *Felton* decision raised additional consitutional issues. There is no need to hypothesize about what new claims might be the next to be litigated. In early September 1985, Americans United for Separation of Church and State filed suit against the Secretary of Education and the United States Department of Education in the District of Columbia.[7] At the same time, a group of taxpayers, ministers, and others filed suit in Kansas City, Missouri, also against the Secretary and the Department.[8] Both cases challenge the administration of Chapter 1 remedial education programs and both cases raise similar issues.[9]

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[3] *See supra* note 2. The sole exception to a request for a court approved delay in implementing the "neutral site" requirement occurred in Wamble v. Bennett, No. 77-0254-CV-W-8 (W.D. Mo. Aug. 6, 1985) (denying stay and ordering immediate implementation).

[4] Felton v. Bennett, No. 78 CV 1750 (ERN) (E.D.N.Y. Sept. 26, 1985).

[5] Felton v. Bennett, 787 F.2d 35 (2d Cir. 1986).

[6] *Id.*

[7] Americans United for Separation of Church and State v. Bennett, C.A. No. 85-2806 (D.D.C.) (filed Sept. 3, 1985).

[8] Pulido v. Bennett, No. 85-1096-CV-W-8 (W.D. Mo.) (filed Sept. 3, 1985). The plaintiffs include a grandmother who purports to represent the interests of her grandchildren, who attend public schools in Kansas City.

[9] Chapter I is part of the Education and Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* Chapter I provides federal funds to state and local education agencies for supplementary remedial education and other education programs.

To understand the Missouri case, *Pulido v. Bennett*, a little background is necessary. Beginning in 1976 and running roughly through 1981, the Department of Education determined that certain Missouri school districts were unable to provide Chapter 1 educational services to the parochial school students that were comparable to the services that public school students received.[10] Missouri school districts provided Chapter 1 services to the public school students during the regular day at the students' regular public school. The school districts believed, however, that under Missouri law they could not provide services to parochial students in their regular schools or during the regular school day. Missouri school districts, therefore, provided services to parochial school students only after hours and only at public schools, and they did not provide to the children any transportation either to or from the public school where the remedial classes were held.[11] Under that plan, the parochial school student participation rate had fallen almost to zero. The Department of Education determined that this so limited the opportunity for parochial school students to participate that, if the program was going to be at all effective, some alternative had to be found.[12] The government invoked the "bypass" provision in Chapter 1. Under the "bypass," the government hired an independent contractor in Missouri who provides the services directly to the parochial school students in the "bypassed" school districts.

In an earlier case in Missouri, *Wamble v. Bell*,[13] plaintiffs, who were taxpayers and parents of students in public schools, challenged the validity of the bypass decision and also challenged the constitutionality of providing services in parochial school classrooms. The District Court in Missouri, in 1984, upheld the validity of the bypass but struck down as unconstitutional the provision of Chapter 1 services in parochial school classrooms.[14]

That decision was stayed until the Supreme Court decided the *Agui-*

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[10] Chapter 1 requires that public school districts provide "equitable" educational services to children attending private schools. *See* 20 U.S.C. § 3806 (1982).

[11] The manner in which Missouri school districts provide Chapter 1 services to parochial school students evolved over the years. At one time, the district provided services at parochial schools, but only after regular school hours. The districts formerly provided some transportation for parochial school students. The plan described in the text represents the administrative plan that non-bypassed Missouri school districts have followed for at least five years and the plan that the districts would implement today.

[12] Following an investigation, if the Secretary of Education finds that a school district is unwilling or unable to provide equitable services to private school students, the Secretary must arrange for those services. *See* 20 U.S.C. § 3806(b). In the two states that presently have "bypassed" school districts (Missouri and Virginia), an independent contractor provides the services to parochial school students.

[13] 598 F. Supp. 1356 (W.D. Mo. 1984).

[14] *Id.*

lar v. Felton case. After the Supreme Court's decision, the court in the *Wamble* case ordered immediate implementation of "neutral site" services.[15] By October 1985, parochial school students in the majority of bypassed school districts were receiving services. The contractor had located "neutral sites," including public libraries, rented apartments, community centers, and houses. In some districts—particularly in the rural districts where there simply was no other place to have the services—the contractor leased mobile units, which were sent to the parochial schools and were parked near the schools in order to provide services to parochial school students safely and efficiently. Most of the mobile units that were used in Missouri were shared between two or more different locations within a school district, and, if possible, between districts so that the contractor could get the most efficient use possible from the mobile unit.

One of the primary challenges in the Missouri *Pulido* case, which is also raised in the District of Columbia case, is the "neutrality" of the mobile unit sites. In most districts these mobile units are parked on the public street relatively close to the school. When it is time for the Chapter 1 classes, the children leave their normal classes, put on their coats and hats, go outside, and go into the mobile unit. The children receive instruction from independent, publicly-paid teachers for about an hour, three times a week. At the conclusion of Chapter 1 class, the children return to the school for their regular classes.

The *Pulido* plaintiffs have alleged that the closer the mobile unit is to the parochial school, the more unconstitutional it becomes to use mobile units. Under the plaintiffs' theory, if you parked a mile away, it would be constitutional. A half a mile also would be good. Two blocks might be okay. If the unit is within a block of the school it might be too close—presumably too close to the religious atmosphere surrounding the school. And if the unit is parked right on the street in front of the school so it will be convenient to the children, apparently the mobile unit becomes so pervasively religious that it is unconstitutional for the unit to be parked there.

Providing Chapter 1 services for parochial school students in some of the school districts in Missouri presents a slightly different problem. In certain localities, there is no public parking permitted on any of the streets near the schools. The only place that a mobile unit can be located that would be safe for the students is on the parking lot of the school itself. As you can imagine, under plaintiffs' theory, if parking a mobile unit a block away or on the street outside the door of the school would imbue the mobile unit with a religious atmosphere, then certainly being on the same parking lot as the school is bound to do that.

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[15] *See supra* note 3.

The main legal battle in this area, I think, is going to be over the meaning of the Supreme Court's decision in *Wolman v. Walter*.[16] In *Wolman*, the court held that remedial education classes at "a neutral site off the premises" of the parochial school are constitutional.[17] The *Wolman* case *did not* hold that services in a mobile unit parked on the school parking lot would be impermissible. The question is, what makes a site neutral? The *Wolman* case suggests that the site can be "neither physically nor educationally identified with the functions of the nonpublic school."[18] The Court expressly stated, however, that "so long as these types of services are offered at truly religiously neutral locations," constitutional problems do not arise.[19]

In the Missouri *Pulido* case, we have taken a hard look at the characteristics of parochial schools themselves that led the Supreme Court to hold that publicly-funded educational services could not be held in the parochial school classrooms. It bears repeating that that is all that the Supreme Court held in either the *Aguilar v. Felton* case or in the *Grand Rapids* case.[20] The Court did not address the constitutionality of providing educational services in a mobile unit on a parking lot or outside the building or at any other location. The neutrality question that has been raised in *Pulido* and in the District of Columbia action simply has not been decided by the Supreme Court.

The cases that have struck down remedial classes in parochial schools have focused primarily on the following factors: that regular private school teachers used the same buildings, classrooms, and hallways; that the publicly-funded classes were held in the same classrooms as the students' regular classes; and that there was a religious atmosphere within the school itself. Those are, therefore, the factors that might indicate a "physical or educational" identification between the publicly-funded classes and the religiously-affiliated school.

It is clear that in a mobile unit—whether the mobile unit is parked a block away, right outside the school door, or on the parking lot—there is no physical or educational identification with the parochial school. In addition, there are no religious symbols or indicia of religion in the mobile units that would create a "religiously pervasive atmosphere."

In the *Grand Rapids* case, the Supreme Court found that providing publicly-funded educational services in parochial school buildings created a danger that the students would identify the publicly-funded classes with the parochial school. Certainly students today are going to be aware

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[16] Wolman v. Walter, 433 U.S. 229 (1977).
[17] 433 U.S. at 248.
[18] 433 U.S. at 246-47.
[19] *Id.* at 247.
[20] Grand Rapids School District v. Ball, 473 U.S. 373 (1985).

that they must leave their regular school building to attend publicly-funded classes. They must leave their regular classes. They must, during the winter, put on their coats and walk to nearby locations or to mobile units or be transported by bus to their publicly-funded classes. These students are certainly going to know that there is something very, very different about the Chapter 1 classes. Therefore, the problems that the Supreme Court believed existed in *Felton* and *Grand Rapids* simply do not exist today.

The second major issue that has been raised in both the *Pulido* case and the District of Columbia action is how the additional costs that school districts must incur as a result of the *Felton* decision will be allocated. The additional costs include expenditures for mobile units, leases for other classroom space, and any expenses that may be necessary to transport students to and from their classes. The Department of Education issued guidelines in August 1985 that provide that these additional costs should be deducted from the school district or state's total allocation prior to any division of funds between public and private school students.[21] This has come to be known as the Off-The-Top Allocation Formula.

The plaintiffs in the *Pulido* case and in the District of Columbia action raise two claims concerning the allocation formula but both claims are based on the same argument. Plaintiffs argue that these additional costs should be allocated solely to the parochial school students—that none of the expenses should be paid from funds that would otherwise be available for public school students. Plaintiffs' argument is that the parochial school students are the only ones who are benefited by the additional expenditures and, therefore, that under the Off-the-Top Allocation Formula more money is being spent on private school students than on the public school students. Thus, the plaintiffs claim first that the allocation formula violates Chapter 1 itself and, second, that the allocation formula favors private school students over public school students and, therefore, is unconstitutional under the First Amendment.

Under the formula, all funds that are to be expended for actual instruction or instructional materials would be divided equitably between the public and the parochial school students. This formula fulfills the primary aim of Chapter 1—to provide equitable and comparable direct educational benefits to the students. Chapter 1 requires that "expenditures" for public and private school students "shall be equal."[22] The formula constitutes a reasonable interpretation of Chapter 1 in light of the new

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[21] "Guidelines on Aguilar v. Felton and Chapter 1 of The Educational Consolidation And Improvement Act" (ECIA — Questions And Answers) U.S. Department of Education (August 1985).

[22] *See* 20 U.S.C. § 3806(a) (1982).

administrative constraints imposed by *Aguilar v. Felton.*

There also is no basis for a claim that the allocation formula unconstitutionally favors parochial school students. The availability of Chapter 1 funds to public school districts is expressly conditioned upon their guarantee that private school students will receive comparable, equitable educational services. The additional expenditures for space and transportation for private school students accrue to the benefit of all students in the program. Only by expending funds for administrative services that will ensure that parochial school students will receive comparable and equitable instructional services can public school districts continue to receive federal funds for instructional services to public school students. Thus, the allocation of expenses made necessary by the *Felton* decision to both public and private school students is equitable because all students ultimately are benefited as a result to those expenditures.

Even if the allocation formula is viewed as disproportionately benefitting parochial school students, the Supreme Court has held that the proportionality of the benefit is not the keynote of the constitutional question. In *Mueller v. Allen*, the Supreme Court upheld a Minnesota statute that provided a state tax deduction for tuition payments.[23] It was clear in that case that the vast majority of the people who would benefit from the tax deduction would be parents who sent their children to parochial schools. The Court held that the alleged disproportionate benefit did not render the statute unconstitutional because the benefit applied across the board to tuition paid for both public and private school tuition. Moreover, the Court concluded that any equal effect the tax deduction might have could be viewed as a return for the benefits that accrue to the state because parents send their children to private, rather than public, schools. The reasoning of the Court in *Mueller* can be applied directly to the cost allocation issues that are raised in *Pulido* and in the District of Columbia action.

A third claim that is common to both the District of Columbia and the Missouri actions is the claim that parochial school administrators exercise a "veto power" over how the Chapter 1 services will be provided to parochial school students. Plaintiffs allege that parochial school administrators demand and receive "Cadillac" treatment for parochial school students and, presumably, that the public school students get economy-class treatment.

The argument is derived from the requirement in the Chapter 1 regulations that there must be consultation between the private school administrators and the public school districts. Plaintiffs apparently assume that during the consultation process parochial school administrators "dic-

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[23] 463 U.S. 388 (1983).

tate" the manner in which Chapter 1 services must be provided to parochial school students. Chapter 1, however, vests final decision-making authority in the school districts and the Supreme Court already has held, in *Wheeler v. Barrera*, that Chapter 1 does not give parochial school administrators a "veto power."[24] The Supreme Court's decision in *Aguilar v. Felton* did not cause any change in the Chapter 1 consultation requirement that would mandate a change in that result.

The fourth issue that is common to both the District of Columbia and the Missouri actions is whether the expenditure of public funds for classroom locations that are used to provide educational services *exclusively* to parochial school students violates the Constitution. The battleground on that issue is also, I believe, going to be over the interpretation of *Wolman v. Walter*. There, the Supreme Court held that if occasionally there is a location used exclusively for parochial school students, it would not offend the Constitution because the Constitution does not require impractical results.[25] We hope that the principle will be extended in light of the practical consequences of the Court's decision in *Aguilar v. Felton*.

The Chapter 1 program is not the only federal program in litigation today. In December 1985, a lawsuit was filed in New Orleans, Louisiana—*Helms v. Clausen*—that has challenged the implementation of the federal Chapter 2 block grant program.[26] Under Chapter 2, school districts can use the federal funds for a variety of educational programs. The Louisiana *Helms* case raises constitutional challenges to the use of federal funds to provide educational supplies and equipment for the use of parochial school children on the premises of the parochial schools. Plaintiffs' claim is that use of such equipment and materials on parochial school premises "advances religion" and is, therefore, unconstitutional.

The Supreme Court's decision in *Mueller v. Allen*, upholding tuition tax deductions, and the Supreme Court's recent decision in *Witters v. Washington Department of Services for the Blind*, will be helpful in defending the programs funded under Chapter 2.[27] The Chapter 2 programs are neutral. They are administered for the benefit of both public and parochial school students. It is the independent choice of the students' parents to send their children to parochial schools that dictates whether the educational benefits derived from Chapter 2 programs will be received by the students in a privately-owned or a publicly-owned building. The First

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[24] 417 U.S. 402 (1973).

[25] *Wolman*, 433 U.S. at 247 n.14.

[26] Helms v. Clausen, No. 85-5533 (E.D. La.) (filed December 2, 1985). The complaint in *Helms* also challenges six Louisiana education programs that benefit parochial school students or their parents.

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

Amendment should not prohibit the delivery of neutral, secular educational benefits to any child.