ORIGINAL

In the

Supreme Court of the United States

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSES FLORENCE FIAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BIANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. HUMNER AND CYNTHIA SWANSON,

APPELIANTS,

V.

EDWARD V. REGAN, AS COMPTROLLER OF THE STATE OF NEW YORK, AND GORDON AMBACH, AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

APPELLEES,

AND

HORACE MANN-BARNARD SCHOOL, IA SALLE ACADEMY, LONG ISIAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL AND YESHIVAH RAMBAM,

INTERVENING PARTIES-APPELLEES.

No. 78-1369

Washington, D. C.
November 27, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. HUMNER AND CYNTHIA SWANSON, Appellants,	
v.	No. 78-1369
EDWARD V. REGAN, As Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York, Appellees,	
and	
HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM, Intervening Parties-Appellees.	

Tuesday, November 27, 1979

Washington, D. C.

The above-entitled matter came on for argument at 11:14 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

BEFORE (Cont'd):

HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

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APPEARANCES:

LEO PFEFFER, ESQ., 15 East 84th Street, New York, New York 10028; on behalf of the appellants.

MRS. SHIRELEY ADELSON SIEGEL, ESQ., Solicitor General, State of New York, The Capitol, Albany, New York 12224; on behalf of the appellees.

RICHARD E. NOLAN, ESQ., 1 Chase Manhattan Plaza, New York, New York 10005; on behalf of the intervening parties-appellees.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1369, Committee for Public Education against Regan.

Mr. Pfeffer, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. PFEFFER: Thank you, Mr. Chief Justice, may it please the Court:

This case presents another chapter, but I'm afraid, not the last chapter, in the continuing effort, now more than a decade old, in efforts by the legislature of the State of New York to appropriate moneys raised through taxation of all citizens, irrespective of their religion, to finance schools closed to many for no reason other than their religion.

QUESTION: Well, does this statute not cover--

MR. PFEFFER: Pardon?

QUESTION: Does this statute not cover schools that are not religiously sponsored?

MR. PFEFFER: This statute covers private schools that are not religiously sponsored, but I have no idea why one of the private schools which are not religious, Horace Mann, has joined in this suit as intervenor.

We do not challenge the constitutionality of this law; this was decided by this Court previously. But

insofar as non-religious schools are concerned, there's no constitutional barrier to the type of statutes here involved.

The challenge here is exclusively to schools which exclude, and claim the right to exclude under the free exercise clause, persons who are not of their religion to which the school is dedicated.

The question--specifically, the question presented in this case is the constitutionality under the establishment clause of a state statute providing reimbursement to religious schools for the cause of mandated record-keeping and testing.

I think there is the prior history of this statute is significant to the determination of the constitutionality of the present statute. The prior statute provided for financing by pupil allotment the cost of tests prepared by church schools, which might be used for religious instruction, and which lacked auditing provisions.

The statute was held unconstitutional by this Court in Levitt v. Committee for Public Education and Religious Liberty. Then a new statute, providing payment for teachers' services, and conducting State-prepared tests, and in pupil attendance reporting, was enacted.

This was to be on an actual cost, rather than a per pupil allotment. The law was held unconstitutional by the district court in 1976. On appeal, this Court vacated

the judgment, and remanded the case for reconsideration in the light of its concurrent decision in Wolman against Walter.

On remand, the district court held by a vote of 2-1 that while the original decision was correct on the basis of then-existing law, the law from Lemon against Kurtzman through Meek against Pittenger, Wolman, and I quote to you, relaxed some of Meek's constitutional strictures against state aid to sectarian schools, and it revived the more flexible concept that aid to a sectarian'school's educational activity is permissible if it can be shown with a high degree of certainty that the aid will only have a secular value of legitimate interest to the State, and does not present any appreciable risk of being used to aid in the transmission of religious views, end of quotation.

In its original decision, the Court had held that the statute had a principal and primary effect which advanced religion. And therefore the Court did not find it necessary to pass on the question of whether it's unconstitutionally fostered excessive entanglement with religion.

On remand, the majority of the district court held that the statute passed muster here, too.

It is our contention that Wolman does not mandate either a more flexible concept in respect to the establishment clause, nor determination upholding the constitutionality of the new statute.

Specifically as to the latter, we urge that Wolman is clearly distinguishable from the facts, and therefore does not mandate a holding of constitutionality.

As to the more flexible interpretation of the establishment clause, we urge that the decisions of this Court as to Wolman manifest no intention to overrule sub silento what has been held in all relevant cases, in 1971 through Meek and thereafter.

Wolman, we submit, is clearly distinguishable. There the Court expressly noted that the Ohio statute there in issue did not authorize any payment to non-public school personnel, nor did the non-public school personnel participate in the drafting or scoring of the tests.

The Court said in Wolman, and I should like to quote it, "These tests are used to measure the progress of students in secular subjects. Non-public school personnel are not involved in either the drafting or the scoring of the tests. The statute does not authorize any payment to non-public school personnel for the costs of administering the tests."

And what I consider a very significant footnote, footnote 7, the Court said, and again I quote, "No national aid is involved in Ohio. The tests themselves are provided. And further, it does not,"--the statute,--"does not reimburse schools for costs incurred in tests. No money flows to the non-public school or parent."

And the rest of the quote is in my brief.

In the present case, religious schools are involved in the scoring of the tests. Payment for the services is made, not to an outside secular testing corporation, nor even to the religious school's teaching personnel, but to the religious school itself, which we suggest, represents an even more flagrant violation to the establishment clause. Nor as in Wolman is the grading done by an outside secular corporation, but by the personnel of the religious school itself.

Testing, I suggest, is universally recognized by educators as being part of the teaching process.

QUESTION: Who pays for the testing in the public schools?

MR. PFEFFER: The taxpayers who control the public schools.

The thesis which I believe all the decisions of this Court is predicated upon is that if an institution is supported by taxes paid by all, irrespective of their religion, the money so raised cannot be used to finance educational institutions--I don't go beyond that--educational institutions which are closed to some of the taxpayers for no reason other than religion.

QUESTION: Do you think testing is more or less neutral than textbooks, or--

MR. PFEFFER: I think that this Court indicated

in Wolman that it was not happy with the decision in respect to textbooks, but it felt bound by the fact that in 1968 the majority of this Court found the loaning of textbooks to be constitutional.

But--

QUESTION: How about transportation?

MR. PFEFFER: Let me finish with textbooks first, and I'll come to transportation. But the Court made it quite clear, by its decision in that case, that it was not going to go one inch beyond what it was mandated to do under the basis of stare decisis, by the textbook case.

In respect to transportation, I think a better case--although I personally do not agree with the decision, nor did five justices who dissented--transportion I think can be justified--

QUESTION: How can five justices dissent?

MR. PFEFFER: Four justices; four justices dissented, sorry; it was a 5-4 decision.

That in the Everson case, the bus transportation case, I think a reasonable case can made for the argument that this is like medical and dental lunches, a welfare rather than an educational expenditure.

And in respect to welfare, health, and so on, exclusion of pupils in parochial schools would probably violate the equal protection clause; might--might violate it.

Nor as in Wolman is the grading done by outside secular corporations, but the personnel of the religious school itself.

Testing is universally recognized by educators as being part of the teaching process.

QUESTION: Would you think it was constitutional if the tests were sent in to the State Board of Education, let them do all the--

MR. PFEFFER: No, I do not think so.

QUESTION: Then it isn't very important where they're graded, is it?

MR. PFEFFER: Is it not very important whether--? Well, from my viewpoint, it is not. But it has at least some defensibility. I think why it's not significant, important, is because it is a educational service.

I think the case is more grievous where this educational testing is done by religious teachers, and you cannot even, even in the statute here which provides that essay questions are marked, are graded initially--initially by the parochial school personnel, you cannot divorce the personal religious predilections of the tester from the grading of the paper. It just--I don't think a person committed to religion can divide himself into two parts and close his eyes to answers which violate what he believes to be

God's word.

In respect to record-keeping, I come to this now, recall the Court's attention to Walz v. Tax Commission, where it upheld tax exemption for churches on the grounds that non-exemption would have required the government to audit and examine the operations and records of churches, and thus entangle it in their religious affairs.

The Court said, obviously a direct money subsidy would be a relationship pregnant with involvement, and as with most governmental grant programs, could encompass sustained, detailed administrative relationships for enforcement of statutory or administrative standards.

We call this Court's attention to Lemon v. Kurtzman, and Earley v. DiCenso. There, the Court struck down statutes providing financial aid to church schools to compensate them for so-called non-ideological services. The full quotation is on page 15 of my brief. I respectfully call the Court's attention to the italicized sentences, which I should like to read briefly.

There, in that case, the Court said: The program requires the government to examine the school's records, in order to determine how much of the total expenditure is attributable to secular education and how much to religious activity. The present statute requires that.

Then, later on, the Court said: In particular, the

government's post audit power to inspect and evaluate the church-related school's financial records, and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

May I suggest to the Court that if a school hands in a record saying, we spend X hours for taking attendance, and no more, and the amount there indicated for taking attendance is disproportionate to other, public schools, time spent in those schools for record-keeping, there would be an obligation upon the state to inspect and examine how come you spent three times as much time on attendance taking than outside schools?

That very question, and the obligation of the religious schools to answer that, entangles states in religion; and I think it's constitutionally impermissible.

QUESTION: Mr. Pfeffer, supposing a state adopted a program whereby it said that any school which had a system of lights for its stadium would be reimbursed for athletic events conducted in the stadium, but not for any educational event conducted in the stadium. And it was drawn to the state's attention that a particular parochial--this was state--this was public schools and parochial schools. And it was drawn to the state's attention that a particular parochial school was sending in bills that were twice as high as a public school, and the answer given by the school is,

we conduct twice as many athletic events?

MR. PFEFFER: I don't quite know whether the racial aspect of your question is significant. If it is, then I'd say that the tests in respect to entanglement just doesn't apply to race. On the contrary, the courts are--governments are very entangled in seeking to remedy history of past discrimination with respect to race.

QUESTION: Well, we're not talking about race here. I thought it was religion.

MR. PFEFFER: Yes, indeed. I would say that any kind of testing, any kind of supervision, any kind of determination as to expenditures which are religious, as from those which are secular, constitute impermissible entanglement.

QUESTION: Okay. Well, then answer my question as to whether a state program and provides any school, parochial or public, which has a stadium that is lighted at night will be reimbursed by the state for any athletic event conducted in the stadium, but not for any scholastic events conducted. And a particular parochial school sends in a bill to the state that's twice as high as any public aschool.

And there answer, when the state questions them as you say they must, is, just that we play twice as many football games as the public schools.

MR. PFEFFER: I could answer that by suggesting that you could justify even--I would not--but you could

justify on the basis of the decisions of this Court, the expenditure of state funds for purposes related to the health of the pupils. And if you could make an arguable case--if you could make an arguable case, that football is so related--I do not agree with it--but if you could make an arguable case that football is so related to the healthiness of the students, I think the Court has ruled in respect to gymnasiums you may not, but in respect--football is so related to the health of the students that it is not part of the educational process; perhaps.

Personally, I would not accept that argument; but the Court might very well.

QUESTION: You emphasized the entangelement aspect a few minutes ago, Mr. Pfeffer. Now, the states--all of the states, I think, reserve the right to inspect and call for reports on the qualifications of the teachers in private schools and the curriculum and the other conduct to see that it meets minimum state standards; is that not true?

MR. PFEFFER: It does--well, it does not require it to. I think--

QUESTION: Well, but in fact, the states all do that, do they not? They don't just assume that every private school is teaching all the things they should teach?

MR. PFEFFER: My answer to that is--I think the answer is no. Suppose a parent, for non-religious reasons,

is disgusted with our whole school system, public, private, parochial, non-parochial, and says, we can teach the child better ourselves at home. I think that parent has a constitutional right to do so. But the state also has a constitutional right under its police power to impose such tests upon that child to determine whether that child has, in effect, been given the equivalent of a school education, and the parent has therefore complied with the statutory obligation to see to it that a child receives a basic primary education.

QUESTION: States do that with respect to all the pupils in all the religious schools, do they not?

MR. PFEFFER: But they don't finance it.

QUESTION: No, no, but they do come into the schools and test and require them to make reports.

Now, that's quite a bit of entanglement, isn't it?

MR. PFEFFER: Well, the--

QUESTION: They audit. They audit.

MR. PFEFFER: Only if--well, if there is no alternative, if the state comes in and determines the amount to be paid to that school on the basis of how many school children are present and how many are not present, whether how many are excused for lawful absense and how many not excused, I think that constitutes an entitlement which, while--which is forbidden by the establishment clause.

In the broadest sense the other critical issue

now before the Court is, we suggest, as a majority held whether--rather the majority held this Court has relaxed some of the Meeks constitutional strictures against state aid to parochial schools; and if it has, were the relaxations of sufficient magnitude to justify the decision in this case. And it's to this issue that I will devote the balance of my initial presentation.

We suggest that the district court was in error in assuming that this Court has retreated from its prior--takes this position in respect to aid to parochial schools. The error of this assumption is manifested in the Court's disposition of three cases which came to it after Wolman.

The first of these was New York v. Cathedral Academy, decided in the same term as Wolman, but after Wolman. In that case, the Court said that if the challenged statutes authorized payments for the identical services, that ought to be reimbursed under the law held unconstitutional in Levitt. It was invalid for the same reasons that the previous law was held invalid.

If on the other hand, it empowered the New York Court of Claims to make an independent audit on the basis of which it was to authorize reimbursement for clearly--for the sake of the services, such a detailed inquiry would itself impel impermissible entanglement.

The very inquiry, the very going in there to check

constitutes entanglement. That's what the Court said in Cathedral Academy; it's not less true here. The Court there said, the prospect of church and state litigating about what does or does not have a religious meaning touches the very core of the constitutional guarantee against religious establishment. And it cannot be dismissed by saying that it will happen only once.

The second indication that the Court in Wolman did not intend to water down or retreat from the principles announced in Meek v. Pittenger, is indicated from its popinion this year in NLRB v. Catholic Bishop of Chicago.

There the Court said, and I quote again, only recently we again noted the importance of the teacher's function in a church school, whether the subject is remedial reading, advanced reading, or simply reading. A teacher remains a teacher, and the danger that religious factors will become entwined with secular instruction persists. And cites Meek v. Pittenger for that proposition.

It is, we respectfully submit, not--most unusual for the Court to base it s determination on a decision, which as the court below held, it had so recently compromised.

Finally, we should also like to call the Court's position a bare six months ago of the case of Byrne v. Public Funds for Public Schools of New Jersey. There the Court summarily affirmed a Court of Appeals decision invalidating a

provision in the New Jersey income tax law granting tax benefits to parents who pay tuition for children attending religious schools. That decision held that under this Court's 1973 in Committee for Public Education and Religious Liberty v. Nyquist, the challenged New Jersey law could not stand.

The affirmance in Byrne, we suggest, cannot be easily reconciled with the district court's assumption in the present case, that this Court has retreated from all that it has held, and it has said through the many cases from Levitt to the presen t time.

May I conclude with this--conclude with this. These cases are based on the implicit categorical imperative that it is morally wrong, and constitutionally impermissible, to compel all persons, regardless of their religion, to pay taxes used to finance the operations of schools from which some of them are excluded solely because of their religion.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Pfeffer.

Mrs. Siegel.

ORAL ARGUMENT OF MRS. SHIRLEY ADELSON SIEGEL, ESQ.,
ON BEHALF OF THE STATE APPELLEES.

MRS. SIEGEL: Mr. Chief Justice, and may it please the Court:

The state law that is before you today is simply incidental to an historic and very long-standing state function

and responsibility to see that attendance is taken in the schools at the elementary and secondary school level throughout the state, and to see that certain minimum standards of educational achievement are met by administering state-prepared, state-mandated tests at certain levels.

The public schools which abide by these identical requirements, are compensated through the rather generous--it's currently running $3.6 billion a year--state aid to the local school districts, and the non-public schools are compensated under this Act.

Now, this Court, as my--

QUESTION: When you say "compensated," that non public schools are compensated, are you referring to the--that the non-public school costs of the examination and the attendance record is paid for by the--

MRS. SIEGEL: By this Act which is before you today.

Now, the prior act, which had a similar purpose, which was held to be a proper secular purpose by the Court which it decided the Levitt case, was invalidated because of the fact that that act has included reimbursement for teacher-prepared tests which were deemed to be such a part of the overall, integrated teaching process which was part of a religious mission of many of these schools that it permeated and, in effect, poisoned the well for the entire statute, and since they were lump sum payments being made, based on the

number of pupils in each school under that act, it is impossible for the Court to disentangle the amount, and to determine just how much of it would go for proper secular purposes.

And I would like to read thefinal paragraph of the Court there, which was the basis for the statute which was then promptly adopted by the state and is before you today: Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the district court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services.

That is a legislative, not a judicial function. And so with the adoption of this new statute, the appropriations dropped by from $28 million to $8 million a year, where they're now constant.

Now--

QUESTION: Mrs. Siegel?

MRS. SIEGEL: Yes.

QUESTION: Is it true that the private schools which obtain the reimbursement in New York State exclude people because of religion?

MRS. SIEGEL: The intervenor schools that are involved in this proceeding have in their answers to

interrogatories indicated that they do not exclude students on the basis of religion; however, under New York law, the schools do have the privilege of filing a form, which is in the record, and which indicates that they want to avail themselves of the privilege which the law gives religiously affiliated schools of limiting their student bodies to children of a certain faith.

QUESTION: I had understood Mr. Pfeffer to say categorically that they simply eliminated them on the--excluded them on the basis of religion.

MRS. SIEGEL: While the schools, many of them, have filed such forms, it is my understanding--and Mr. Nolan will be able to address himself to that specifically, since he represents the intervennor independent schools here today, that these particular schools have answered interrogatories that they do not. They do not discriminate on the basis of students or faculty. And in fact such allegations in the complaint were flatly denied by the intervenor-defendant.

Now, the main thrust of the challenge to the new statute is that it does not give substantial direct aid to the sectarian enterprise as a whole. Yet this Court has rejected the argument in several cases that just the freeing up of private funds to make some money available for sectarian purposes would not invalidate a statute which had its own proper secular purpose, and which was not otherwise an

entangelement, or did not have the primary effect of advancing religion.

The--actually under this new statute, by far the lion's share of the money is going to the keeping of attendance records; 86.5 percent last year, which seems to be typical. And this is largely going for the salaries--an allocated portion of the gross salary of the personnel in the school that take attendance.

The dissent has--and also, my learned adversary--has belittled the state's interest in attendance-keeping, stating that after all, taking pupil attendance is also essential to the school's sectarian function. But this is not a function of the state which is to be belittled.

Truancy is very much of a court matter. The attendance records are presumptive evidence in court proceedings. They're of great concern to parents who are pulled before the court in child neglect proceedings. The truancy officers are employed by the public school district, and they haul into court the children in the non-public schools the same as if they were in the public schools. It makes no difference. And the state board of education itself scrutinizes with great interest the date that comes from all of the schools, public or non-public, for trends as to dropouts, illegal absences, transfers, and so on.

QUESTION: Do the truant officers come into these

private schools, church schools--

MRS. SIEGEL: Yes--

QUESTION: --and check the records?

MRS. SIEGEL: Yes, they do. These records are official records which must be retained for quite a few years. And the truancy officers may be requested by the non-public school to come in from the public school district, or they may because of the court's direction or acting on other complaints, come directly into the school.

QUESTION: Is there any claim that that's part of the entanglement here?

MRS. SIEGEL: That has not been claimed in this action. I don't know whether my adversary would claim that. But nothing's been said about it.

Now, of course, the fact that there's an incidental benefit to the private school in that it would like to have pupil attendance records anyway is an incidental benefit which certainly should not detract from the secular purpose of attendance-keeping which is such a fundamental child welfare service.

The incidental benefits in the Sunday closing laws and in the busing case, and ever since--and in other decisions of this Court have been held to be there. I mean, it may be an incentive to parents to send their children to parochial schools, or it may certainly confer some benefit on the

school, but it is not in and of itself a reason for invalidating a statute, just because they might have some incidental benefit from it.

The attendance records are so much like child welfare records that one tends really to think it's reasonable to include them in the same category as busing or school lunches or providing lights for athletic fields, services which are so totally secular and non-ideological in character, and here, very much part of a welfare system.

And we recall that in the Everson case, when busing was upheld, the analogy there was made to the service of having a policeman available to the schools, and streets and sidewalks and so on. And keeping attendance and providing the welfare services that go with it is really in that category.

Now, in the Wolman case--and I do not think that the question before the Court today turns on whether in Wolman it has retreated from Meek. To us, it's all quite consistent. And we find that the case that we're presenting to you falls neatly within the parameters that have been set within these rather definite adjudications, which have been very helpful guidelines to the legislature.

In Wolman, the matter of secular, non-ideological tests was squarely before the Court, paid for by the state. And it was held that this was perfectly acceptable; there was no primary effect to advance treligion. The school had

had no control over the tests, just as here.

The logical basis for making any distinction between contributions in kind and in cash to the school would seem to falter if you have, as here, a situation where it is possible to trace the dollars with such precision. It is indeed so ministerial and such nonjudgmental kind of audit that has to be made, once--in fact, an exhibit in this record shows a typical teacher's time record showing one-quarter hour for taking attendance. There are normal ranges that are well known to the state education department as to how long it should take to take attendance. If someone exceeds that range, they may then look to see whether this is a particularly large school; there may be other factors. Or they may pick up a phone. The answer to the interrogatories by one of the intervenor-defendants indicates that there had been a phone call.

And in fact, I noted with interest that as to that intervenor-defendant, the amount of money they had received was substantially less than they had requested. And I think it was because they probably had included the time of their own attendance officer, which is not something for which the state reimburses.

The state reimburses only for the attendance keeping. Now, the state reimbursement here is for a very special service, aside fromthis over 86 percent of this money which

goes for the attendance keeping, child welfare service, there is an annual statistics report on pupil enrollment, facilities that are available, the number of handicapped children, and so on, and that is the same information that comes in from public schools throughout the state. It is immediately computerized and made available and used for somany various purposes that it's really--it's hard to identify.

But it is the basic profile of the schools throughout the state. The balance of the money goes for administering--administering is a very good word, because they're really administrative tasks almost entirely. The state-prepared and state-required tests. And these can very briefly be described to you.

First, there are the reading and math tests which are totally objective, and which are given to all third grade and sixth grade students throughout the state, whether they're in public or non-public schools.

This--it happens that these tests developed out of the Federal Act Title I of the Elementary and Secondary Education Act of 1965, and the results of the test, which are given to the state, target the schools where there are low-achieving pupils, who will then be made available--made eligible for the resources under the Federal Act.

They are scored by the teachers, and the rating

guides are given so that the teachers don't even have to make any independent judgment as to whether two and two is four, because the answers are all set down for them.

The next group of tests for which reimbursement is provided are basic competency tests, which are now being required. In June of this year for the first time, all high school graduates throughout the state, in order to get their diplomas, have to pass a math and reading test, and that is something that is required of these schools as well, and--the giving of such a tests, which is marked--has no essay questions at all, marked at the schools, is reimbursed.

And finally, in the more--in the example to which I believe Mr. Pfeffer referred, are the Regents Examinations. These, again, are prepared by the state, and they are marked initially by the teachers of the schools. These are examinations which are given for college-bound students; not all secondary school students take these tests.

The satisfactory completion of the state-designed courses of study which lead to the Regents Examination, and together with the taking of those courses and so on, may make a student eligible for a Regents diploma, which is a special diploma, considered meaningful by our state university, for example, for admission purposes; and a historic tradition that goes way back.

Now, it's since 1865 that these Regents

Examinations have been given statewide to secondary school students who were eligible, and without any distinction between public and nonpublic schools.

Since 1904--

QUESTION: Is there a cost figure for that particular test reflected in the record?

MRS. SIEGEL: The amount of money, according to the answers of the defendant-intervenors here, it would seem that perhaps 8-9 percent of the money that they've been receiving from the state under this Act is for their activity in connection with the Regents Examination.

The--preparing for the examinations, they are given in 20 different subjects. They are all wholly non--wholly objective, except that there are some essay questions in English and in Social Studies.

The questions are graded below, as I say, since 1904, and reviewed in Albany. They now review just a 5 percent sample of all of the questions, but whether they come from a nonpublic school or a public school makes no difference; the same professional unit reviews these. And for the essay questions, elaborate rating guides are provided, giving many sample answers, and indicating how they should be handled. And in fact, the head of the unit that does sthis says they really have no idea when they're responding to the questions, when they're marking them,

reviewing them, whether the questions have been prepared by a nonpublic or public school student. They have not detected any difference.

In any event, this certainly would not be a primary effect.

Now, the question that's been raised here about diverting some of the money to religious uses, because perhaps there wwould be inaccurate records has been answered in part by my saying that it's well known in the state education department just how much time should be espent on taking attendance, and they can multiply.

In the case of the tests, they have computer printouts which indicate just at what schools which tests have been given, to which they advert in making their audit. And they also have parameters by which they're guided. For example, in the case of the Regents Examinations, which are a three-hour exam, they have been allowing about four hours for the preparing and even the grading of the Regents Exam.

If these parameters seem to you rather tight, I might mention that the state comptroller's office had had a hand in approving them; and in fact, every application which has been audited and approved for payment by the state education department also must go to the state comptroller's office for a pre-audit before the payment is made.

The conclusion of our argument is that there certainly is no breach here in the neutrality that the state is to maintain. It has historically required teh taking of attendance of giving of Regents Examinations, and certain other standardized tests. And it obviously is in need of the essential census data that it receives every year.

All of this is very readily auditable, and we believe that we have carefully framed a statute in response to the injunctions of this Court in the directions that it gave involving the Mandated Services Act, which is known as Levitt I, and consequently the decision below is correct.

QUESTION: I take it the district court seems to have believed, in reversing its original decision, that this Court kind of relaxed the rules, or changed the criteria somewhat, in Wolman, as against Meek v. Pittenger.

You haven't discussed that. That point was relied upon a good deal by--

MRS. SIEGEL: I just passed over it, because it seems to us that our position could and should have been sustained under Meek. The clarification of the Court's position in Wolman has been helpful. The Court, in Wolman, has in so many words expressly sanctioned the giving of standardized tests and the providing of scoring services.

QUESTION: They were not involved in Meek, were they?

MRS. SIEGEL: In Meek?

QUESTION: Or were they?

MRS. SIEGEL: What were involved were the giving of instructional materials that were used as part of a teaching course.

QUESTION: Right.

MRS. SIEGEL: As a supplement to the course.

QUESTION: Right.

MRS. SIEGEL: And therefore, they were part of the teaching process in the very real sense of the word.

And also, in Meek, there were auxilliary services, which involved putting remedial teachers, who were public employees, right into the schools. And it was felt that because of the pervasive religious environment of those schools that it would require a great deal of surveillance to make sure that they weren't infected by the environment. And it was impossible to disentangle this fromthe rest.

Now, this was all made clear in Wolman, and I don't find that that was really inconsistent with Meek, myself. And in our case, we just don't come near to abridging any of the adjudications that were made in either of those.

QUESTION: So you don't embrace all of the reasoning, or at least, all the language, of the district court?

MRS. SIEGEL: It's a matter of the language. We think the reasoning is fine, but I don't--

QUESTION: But you thought--you submit that it should have reasoned that way the first time.

MRS. SIEGEL: Yes, should have reasoned that way the first time, and also, that to the extent that the issue has been clarified by Wolman, that's quite correct. But it does not seem to us that that was an inconsistent ruling; did not really hold differently.

QUESTION: I suppose every time we decide one of these church-state cases, some group of people think it's a retreat, and others think it's an advance.

MRS. SIEGEL: Well, I'm telling you that I think it was a helpful clarification of a position of the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: I don't think we'll ask you to fragment your argument. We'll let you go on at 1:00 o'clock, Mr. Nolan.

(Whereupon, at 11:58 o'clock, a.m., the luncheon recess was taken.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Nolan.

ORAL ARGUMENT OF RICHARD E. NOLAN, ESQ.,

ON BEHALF OF INTERVENING PARTIES-APPELLEES

MR. NOLAN: Mr. Chief Justice, and may it please the Court:

I argue here on behalf of the intervenor schools, four of which are religiously affiliated.

I'd like to say one thing in the beginning, with respect to the statement that Mr. Pfeffer made to the effect that these schools discriminate in admissions against persons not of their religious faiths.

The four religiously affiliated schools have each executed answers to plaintiffs' interrogatories, answer #5, denying that they imposed religious restrictions or preferences on admissions.

I think that that is borne out at least as to the Roman Catholic schools, by the fact that in Manhattan, in the elementary schools conducted by the Archdiocese of New York in Manhattan, 16-1/2 percent of the children in those schools are non-Catholic.

And there are various other statistics for other areas. But I think that at least the schools in New York take great pride in the fact that, far from discriminating

against non-Catholics inadmissions, they have consciously kept open schools in inner city core areas, where the population of Catholics has declined. They have kept those schools open, and they have taken care, in an educational sense, of significant numbers of non-Catholics. And I think that is--

QUESTION: Has that fact been found or not found in the record?

MR. NOLAN: There's nothing in the record, Your Honor, with respect to that. There are the answers to admissions. But I checked yesterday as to what the percentages were--

QUESTION: Well, how about in the opinions or the findings in this case?

MR. NOLAN: I don't believe so, no, sir. But there is no evidence--

QUESTION: So how should we judge it? That they do discriminate, or that they don't?

MR. NOLAN: There is no evidence to support any claim that they do discriminate.

QUESTION: I take it then--

MR. NOLAN: And there is affirmative evidence with respect to the four religiously affiliated schools, in answers to interrogatories, in which they each deny that they

discriminate on the basis of religion in terms of the--

QUESTION: Was this argument presented below?

MR. NOLAN: No, sir.

QUESTION: Well, if this case has gone to trial, I take it a trier of fact would have been at liberty to disbelieve the statements made.

MR. NOLAN: That is right.

QUESTION: But it didn't go to trial?

MR. NOLAN: It did not. It went off in the context almost of a summary judgment.

QUESTION: But in this case at any time has tit been argued that because--because these schools--one of the reasons why this money may not be given to these schools is that they discriminate?

MR. NOLAN: Not my understanding, Your Honor.

QUESTION: Has that claim ever been made in this case?

MR. NOLAN: No, no; I do not believe so.

QUESTION: If it had, and the court didn't decide, you would think the court had said: Well, even if they discriminate--

MR. NOLAN: That point was never raised, to my knowledge, either in the first or second phases of this case.

QUESTION: And if you went to trial--

MR. NOLAN: If we went to trial--

QUESTION: --whose burden would it be to show exclusion of--

MR. NOLAN: I would think it would be the plaintiffs' burden,, but I think we would put in statistical evidence with respect to the number of non-Catholic children in the various Catholic, Jewish, Lutheran and other schools that are involved in the program under review.

Getting back to this program, and I don't want to go over again what Mrs. Siegel has said, but I think it is worthwhile talking a little bit about just what this program is.

First of all, it involves attendance-keeping and reporting. This is required by the State of New York. This is not something the schools do on a voluntary basis, or they very well might. But it is required to insure compliance with the compulsory education law of New York.

The people who keep these records, or compile these records--and this is based on the stipulation of fact which is a part of the appendix--the people who compile these records are typically secretaries in the main office or the front office of the school.

They are not people who have anything to do with the education or the instructional function. They are simply counting heads on a daily basis to be able to make the reports

that are required by the State of New York.

And I fail to see any ideological content in that type of activity. I may say that, as the district court found, that the great bulk--the lion's share, I think they said--of the money that is paid, 85, 90 percent, somewhere through there, is for the maintenance of attendance records, preparation of attendance reports.

QUESTION: What percentage?

MR. NOLAN: 85-95 I think was the phrase used in the district court opinion. But it's the great bulk, the lion's share, as Judge Mansfield said.

QUESTION: Are these records identical to those required from the public schools?

MR. NOLAN: As I understand it, they are, Your Honor; they are the same forms that are used. The parochial schools are required--and it may also be that the public schools are also required--to submit various reports based on those records; and also to submit the so-called BEDS report which goes in once a year, the Basic Educational Data System report, which shows on a yearly basis people's faculty, courses given, and other information concerning the schools. And I think that is done both for the public and the nonpublic schools.

QUESTION: Mr. Nolan, why is Horace Mann-Barnard School here at all, when the plaintiffs, through Mr. Pfeffer,

concede the validity of the application of the state law to a school--to that school and schools like it?

MR. NOLAN: Horace Mann-Barnard School was initially joined because of the attack on the statute. Horace Mann is a fairly large school with a stake in the financial side of this.

QUESTION: It is non--non-religious?

MR. NOLAN: It is nondenominational. And I think that--

QUESTION: Concededly so, isn't it?

MR. NOLAN: Yes, yes. And I think that Mr. Pfeffer, for the first time in the proceedings, oh, before the Court on the second phase of this case, agreed that he really sought no relief against Horace Mann.

But basically what I am here talking about--

QUESTION: They're just here as a historic vestige?

MR. NOLAN: Historic vestige. What I'm here talking about are the religiously affiliated schools, which to some degree conform, and to some degree do not conform, according to the answers to interrogatories, with the profile that has been used by this Court in the past.

But getting back to what this statute does, apart from attendance, it provides for various testing--standardized, state-prepared tests, which are prepared by the Department of Education for the State of New York to be made available

to public and nonpublic schools--made available to nonpublic schools. They're the same tests that are made available and used in the public schools.

These basically involve several types of tests. The Regents Scholarship Examinations, which are given to persons seeking New York State Regents Examinations, at the end of high school. These are prepared by and graded by the personnel of the New York State DEducation Department.

The only thing that the schools do--the nonpublic schools do--would be to receive the tests, under very secure circumstances, sealed, kept under lock and key; distribute those tests at the place of testing; pick them out; send the tests back to Albany; and I suppose, keep order in the classroom.

We also have the Pupil Evaluation Program, the PEP, and that is a test that is given, I think in third, and perhaps in sixth and ninth grades, to measure competence in reading and mathematics, and it basically--and in fact it's completely an objective, multiple choice type test.

It is given, again, to children in nonpublic and public schools. It is graded in the nonpublic schools either by machine or by hand by the personnel of the school, but basically what you're talking about is simply a teacher putting an overlay--and I'm referring now to Exhibit No. 11 to the stipulation of fact, which is one of the New York State tests

in reading for grade nine, simply put the overlay over and see which places the child has marked properly. There's no discretion at all involved in this.

Then you have the Regents Examination, which are the end-of-course examinations that are given in a number of secular subjects in the public schools and in the private schools. And these arethe ultimate measures, if you will, of educational competence in secular subjects in New York.

QUESTION: Is that an optional test?

MR. NOLAN: I believe all students take it, but you can only get a Regents degree if you have passed the Regents examination. But I believe it is required for all children. But this is, again, to a very large extent, as found by the district court, an objective, multiple choice examination type of test, where there is no discretion in the grading process.

There are a few, as found by the district court, a very few, essay questions on various topics relevant to the particular examination. Those are graded by the school personnel. But the state provides, along with the examinations, the state provides rating guidelines, specific rating guidelines, as to how these people are to do it. And in addition, the schools are required to send both the passing and failing papers to Albany, where they are checked by state personnel on a random basis.

So again, there is minimal--minimal opportunity for any involvement. There certainly--at that stage in the game, these tests have nothing to do with the instructional phase of education.

The only thing that I can think of would be the possibility that some child might try to curry favor with a teacher by using a religiously oriented answer. But that is indoctrination, if you will, coming back the other way. It is not indoctrination of the child.

I think that this statute is, in all respects, constitutional under Wolman, as I think it is is modified by Meek. Even if it is not modified by Meek, I think it is constitutional under Meek.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Nolan.

Mr. Pfeffer?

REBUTTAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. PFEFFER: One of the questions put by Mr. Justice Rehnquist is--deals with whether these schools--and it was also asked by Mr. Nolan--whether the schools which have intervened in this case do discriminate in their admissions policy in respect to religion.

We didn't sue these intervenors. They voluntarily intervened, and therefore, those who intervened, I would assume were intervened because they reflected the best

possible picture. And I think that's really the issue. I think that avoids the issue.

It's a basic--

QUESTION: They're the only litigants that we have before the Court in that aspect of the case.

MR. PFEFFER: Yes. The--I must say that evidence is irrelevant, for the reason which I will state in a moment.

QUESTION: Why don't you state it right now?

MR. PFEFFER: I'm stating it right now. I mean right now.

The constitutional issue in this case is not whether these schools or other schools do or do not discriminate on the basis of religion. The constitutional issue in this case is predicated on the fact that they have a right, a constitutional right, to exclude on the basis of religion. Whether or not--

QUESTION: But wasn't how you phrased your argument on your original submission, during your direct. You stated it--discrimination--as a fact.

MR. PFEFFER: If I did that, I apologize. My argument is that they have a constitutionally protected right, under Pierce v. Society of Sisters, and others, to exclude on the basis of religion.

Whether they exercised that right or not, is notd in the factual--of this case. They should not constitutionally

be allowed to receive taxes at all, irrespective of religion, if they have a constitutional right to exclude. This is the foundation of our case.

QUESTION: You say that whether these schools exclude on the basis of religion or not, these payments are unconstitutional?

MR. PFEFFER: Yes, because they have a right to exclude; that's what I'm saying. Because they have the right to exclude on the basis of their religion, then I say you cannot tax all people to pay for the maintenance of a school which can exclude you if they want.

QUESTION: So it isn't because these schools are religiously connected that you--

MR. PFEFFER: Oh, yes; it is because they're religiously--

QUESTION: Well, what about a private school that isn't controlled by any religion--

MR. PFEFFER: There's no constitutional--

QUESTION: --that just decided that it doesn't like Methodists. And they--and here's a private school that just excludes Methodists.

MR. PFEFFER: Well, Methodists is an exclusion on the basis of religion.

QUESTION: Well, Pierce was decided long before the First Amendment was held applicable to the states. It was

on the constitutional Fourteenth Amendment right, you have a right to send your child to a private school.

MR. PFEFFER: No question about it. And as a matter of fact, Pierce involved a secular school as well as a religious one.

QUESTION: Yes.

MR. PFEFFER: There's no question about it. But the issue in Pierce, and I don't think that any member of this Court would say that--or should say--that a school which is constitutionally permitted to exclude persons because of their religion--

QUESTION: Well, what about Horace Mann in this case. Horace Mann has the constitutional right to exclude on the basis of religion if it wants to.

MR. PFEFFER: If they have a constitutional right? Well--

QUESTION: Well, doesn't it?

MR. PFEFFER: Yes. But if they do that--

QUESTION: Well, then, I don't understand why you don't say that--

MR. PFEFFER: Well, if Horace Mann receives money, it has a constitutional right to exclude on the basis of religion. But it has no riconstitutional right to receive public funds if it does exclude on the basis of religion.

QUESTION: Well, you've changed your position.

MR. PFEFFER: No, I do not think--

QUESTION: You've changed your position completely. Which is all right. That's the way lawyers go.

MR. PFEFFER: Well, I don't believe my position--

QUESTION: You've vacillated all over the lot.

MR. PFEFFER: Oh, I don't think so. I'll repeat what I said at the beginning. I'll repeat it. It's been our position all along that if you have a constitutional right to exclude because of religion, you cannot constitutionally use funds raised by compulsive taxation of all irrespective of their religion.

This is the categorical imperative which I believe the First Amendment stands upon.

Now--I suggest, too, that independent of that, surveillance which is forbidden in respect to religion is necessary--state surveillance--is necessary to its--if public funds are used for that school, whether it's record-keeping, whether it's instruction, if you use public funds, then the public, the state, has a right to see that those funds are used in accordance with the rules of the state.

The very involvement, entanglement, of the state to check whether--the law in this Court has dsaid so; I'm not inventing this--to check whether or not the law's complied with, that very surveillance constitutes impermissible entanglement, which forbids the use of public funds in that

case.

That's what this Court has said time and time again.

MR. CHIEF JUSTICE BURGER: Your time is up.

MR. PFEFFER: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:18 o'clock, p.m., the case in the above-entitled matter was submitted.)