
CONSTITUTION CLUBS®

**LEVITT**
**v.**
**COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY**
**SUPREME COURT OF THE UNITED STATES**
**413 U.S. 472**
**June 25, 1973**
**[8 - 1]**

**OPINION:** BURGER...We are asked to decide whether Chapter 138 of New York State's Laws of 1970 under which the State reimburses private schools throughout the State for certain costs of **testing and recordkeeping**, violates the Establishment Clause of the First Amendment. A three-judge District Court, with one judge dissenting, held the Act unconstitutional. We noted probable jurisdiction.

I

In April 1970, the New York Legislature appropriated $28,000,000 for the purpose of reimbursing nonpublic schools throughout the State 'for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.'

As indicated by the portion of the statute quoted above, the State has in essence sought to reimburse private schools for performing various 'services' which the State 'mandates.' Of these mandated services, by far the most expensive for nonpublic schools is the 'administration,

grading and the compiling and reporting of the results of tests and examinations.' Such 'tests and examinations' appear to be of two kinds: (a) state-prepared examinations, such as the 'Regents examinations' and the 'Pupil Evaluation Program Tests' and (b) traditional teacher-prepared tests, which are drafted by the nonpublic school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law. The overwhelming majority of testing in nonpublic, as well as public, schools is of the latter variety.

Church-sponsored as well as secular nonpublic schools are eligible to receive payments under the Act. The District Court made findings that the Commissioner of Education had 'construed and applied' the Act 'to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.'

A school seeking aid under the Act is required to submit an application to the Commissioner of Education, who may direct the applicant to file 'such additional reports' as he deems necessary to make a determination of eligibility. Qualifying schools receive an annual payment of $27 for each pupil in average daily attendance in grades one through six and $45 for each pupil in average daily attendance in grades seven through 12. Payments are made in two installments: Between January 15 and March 15 of the school year, one-half of the 'estimated total apportionment' is paid directly to the school; the balance is paid between April 15 and June 15. The Commissioner is empowered to make 'later payments for the purpose of adjusting and correcting apportionments.'

Section 8 of the Act states: 'Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.' However, the Act contains no provision authorizing state audits of School financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses. In appellant Nyquist's answers to appellees' interrogatories, which the parties stipulated could be 'taken as accepted facts for the purposes of this case,' the Commissioner stated that 'qualifying schools are not required to submit reports accounting for the moneys received and how they are expended.'

II

Appellees are New York taxpayers and an unincorporated association. They filed this suit in the United States District Court claiming that Chapter 138 abridges the Establishment Clause of the First Amendment. An injunction was sought enjoining appellants Levitt and Nyquist, the State Comptroller and Commissioner of Education, respectively, from enforcing the Act. State Senator Earl W. Brydges and certain Catholic and Jewish parochial schools qualified to receive aid under the Act were permitted to intervene as parties defendant.

A three-judge District Court was convened...After a hearing on the merits, a majority of the District Court permanently enjoined appellants from enforcement of the Act. The District Court

concluded that this case was controlled by our decision in Lemon v. Kurtzman[1] and held the Act unconstitutional under the Establishment Clause.

In reaching its decision, the District Court rejected appellants' argument that the Act is constitutional because payments are made only for services that are 'secular, neutral, or nonideological' in character. The court stated: 'By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process.'

Likewise, the court dismissed as 'fanciful' the contention that a State may reimburse church-related schools for costs incurred in performing any service 'mandated' by state law.

III

In Committee for Public Education and Religious Liberty v. Nyquist[2], the Court has today struck down a provision of New York law authorizing 'direct money grants from the State to 'qualifying nonpublic schools to be used for the 'maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." The infirmity of the statute in Nyquist lay in its undifferentiated treatment of the maintenance and repair of facilities devoted to religious and secular functions of recipient sectarian schools. Since 'no attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes,' the Court held that the statute has the primary effect of advancing religion and is, therefore, violative of the Establishment Clause.

**The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in Nyquist. As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.**

We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' Lemon v. Kurtzman. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. Since the State has failed to do so here, we are left with no choice under Nyquist but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because **the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.**

[1] Case 1A-R-042 on this website.
[2] Case 1A-R-047 on this website.

In the District Court and in this Court appellants insisted that payments under Chapter 138 do not aid the religious mission of church-related schools but merely provide partial reimbursement for totally nonsectarian activities performed at the behest of the State. Appellants, in other words, contend that this case is controlled by our decisions in Everson v. Board of Education[3] and Board of Education v. Allen[4]. In Everson we held that New Jersey could reimburse parents of parochial school children for expenses incurred in transporting the children on buses to their schools. And in Allen we upheld a New York statute requiring local school boards to lend secular textbooks 'to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law.'

In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are 'an integral part of the teaching process.' And, 'in terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' Lemon v. Kurtzman.

To the extent that appellants argue that the State should be permitted to pay for any activity 'mandated' by state law or regulation, we must reject the contention. State or local law might, for example, 'mandate' minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools. The essential inquiry in each case, as expressed in our prior decisions, is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. Committee for Public Education and Religious Liberty v. Nyquist; Kurtzman. That inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do.

We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. 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.

Accordingly, the judgment of the District Court is affirmed...

**CONCURRENCE:** DOUGLAS/BRENNAN/MARSHALL…We are of the view that affirmance is compelled by our decision today in Committee for Public Education and Religious Liberty v. Nyquist and Sloan v. Lemon[5].

**DISSENT:** WHITE dissents.

[3] Case 1A-R-022 on this website.
[4] Case 1A-R-037 on this website.
[5] Case 1A-R-049 on this website.