10-1972

Levitt v. Committee for Public Education

Lewis F. Powell Jr.

Await discussion. As matter of policy, I see no const. ~~[illegible]~~ principle infringed by this type of assistance. But prior decisions of this Court may be controlling

N.Y. statute authorizes payments to non public schools for expenses incurred in complying with state law as to (1) testing of students and (2) maintenance of attendance & health records.

3 J Ct. (majority) held statute unconst. — relying on Lemon v Kurtzman 403 U.S. 602

Read. (I have now reread Kurtzman and it is both persuasive and in close precedent)

L Alt - ~~[illegible]~~ approve

Preliminary Memo

No. 72-269
LEVITT & NYQUIST
v.
COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

Appeal from SD NY (Three-Judge Court) (Lasker and Hays; Palmieri dissenting)

Timely

1. SUMMARY: Appellees, New York taxpayers and an unincorporated association whose members are New York citizens opposed to use of public funds for the support of sectarian or religious schools, sued the New York Commissioner of Education and the State Comprtoller challenging the constitutionality of and seeking to enjoin payments under Chapter 138 of New York State's Laws of 1970. The statute authorizes payments to nonpublic schools for expenses incurred in complying with requirements of state law including (1) the testing of pupils and the (2) maintenance of attendance and health records. A

three-judge court of the SD NY (Lasker and Hays; Palmieri dissenting) declared the statute unconstitutional and enjoined payments under the statute. Appellants contend that the statute does not violate the Establishment Clause.

2. FACTS:

A. The Statutory Scheme -- New York State has set minimum standards of educational quality for public and nonpublic schools through various sections of the Education Law. For instance, various subjects must be taught at public and nonpublic schools and educational offerings at nonpublic schools must be equivalent to that of the public schools in the pupil's district of residence. The State Commissioner of Education is charged with supervision of all schools and institutions which are subject to the Education Law. For the purpose of controlling and supervising the educational quality of the state education system, various tests are used by the Education Department. In addition, various reports are required from all schools in order to insure that minimum educational standards are maintained throughout all the schools in the State, public and nonpublic.

Chapter 138 of the New York Laws of 1970 (p. 4 of Brief of Appellants Levitt and Nyquist) provides for reimbursement to nonpublic schools for expenses incurred in keeping records and administering tests required by state law to be kept and administered in order to

supervise minimum educational standards. Section 2 of the statute reads, in pertinent part:

> § 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below out of funds appropriated therefor, 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. . . .

The statute contains a stipulation that "[n]othing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction" (§ 8) and a requirement that any school receiving money under the statute will be subject to the prohibitions on discrimination contained in the Education Law (§ 9). The Act is construed and applied by appellants to include as permissible beneficiaries schools which impose religious restrictions on admission, require attendance at religious activities, require obedience by students to religious doctrines, impose religious restrictions on faculty appointments, and impose religious restrictions on matters taught.

B. The Litigation -- The plaintiffs-appellees are New York taxpayers and an unincorporated association having as its goal the prevention of payment of public funds to sectarian or religious

schools. The defendants-appellants are Levitt, Comptroller of the State of New York, who is responsible for the payment of funds under Chapter 138 and Nyquist, Commissioner of Education of the State of New York, who is responsible for administering the Education Law. Appellees sought a declaration that Chapter 138 is unconstitutional and an injunction prohibiting payments to sectarian schools under the statute. Intervenors-appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School are Catholic schools; intervenors-appellants Bais Yaakov Academy for Girls and Yeshivah Rambam are Jewish schools; intervenor-appellant Brydges is the majority leader and President Pro Tem of the New York State Senate. A Three-Judge District Court was convened pursuant to 28 U.S.C. 2281, 2284.

3. OPINION BELOW:

a. Majority -- Judge Lasker, joined by Judge Hays, held the statute unconstitutional and enjoined payments to sectarian schools under the statute. The majority first addressed the argument that the payments under the statute are merely actual reimbursements for expenses of state-mandated services. If "teacher examinations" and "entrance examinations" are included as state-mandated services, the payments made under the statute only reimburse a small portion of the required testing and recordkeeping. However, if these items

are excluded, as Nyquist's answers to interrogatories indicated that they might properly be because they are not state-mandated, the sectarian schools are paid considerably more than the money which they expend for state-mandated services. The beneficiary schools are required neither to account for nor return to the State any amounts received by them in excess of their actual expenditures for state-mandated services. "This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives."

Refusing to base its decision on the constitutionality of the statute on this factual question, the majority, reviewing this Court's decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Burger, joined by Harlan, Stewart, Blackmun; Douglas, joined by Black, concurring; Brennan separate opinion; White separate opinion; Marshall not participating), analogized the statute in the present case to the Pennsylvania statute providing reimbursement for teachers' salaries, textbooks, and instructional materials. The only differences between the Pennsylvania and New York statutes, the Court stated, were the fact that the Pennsylvania statute provided reimbursement for teaching, while the New York statute provides reimbursement for testing, and the fact that the Pennsylvania schools were required to account to the State, while the New York schools are not. "The nature of the aid

provided here is precisely the same as the state aid provided by Pennsylvania in Lemon -- that is, financial assistance paid directly to the church-related school." The lack of an accounting requirement in the New York statute does not save the scheme from the possibility of "excessive entanglement" condemned in Lemon. "It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the State is not paying for more than it is receiving." Even if this prognisis does not come true, the lack of a system of audit or control will leave the schools free to use the overpayments for religious purposes. Either route -- a system of audits or no system of audits -- will run the State directly into the First Amendment. Nor does the fact that the present case involve reimbursement for testing, while Lemon involved teaching, solve the dilemma. "Bus transportation, school lunches, public health services, and secular text books . . . are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or teachers."

Not entirely clear to me.

The fact that the services for which reimbursement is received are state-mandated does not rescue the statute. "It is true, of course, that administration of tests, recording attendance of students, and

compiling health records are required by the state, but so is teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school." Finally, "it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation."

It should also be noted that the court rejected abstention because the statute is "unambiguous on its face" and because, under New York law, the taxpayers do not have standing to litigate the state constitutional question in state courts.

b. Dissent -- Judge Palmieri dissented because "[t]he statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law." He would defer to the legislative judgment that "this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint." He sees this reimbursement as being for "'secular neutral, or nonideological services, facilities, or materials'" and does not find "entanglement nor involvement between church and state."

4. CONTENTIONS:

A. Appellants Levitt and Nyquist -- The statute provides for reimbursement to nonpublic schools for state-mandated expenditure

on recordkeeping and testing. The services are nonsectarian and nonideological. Lemon erected three tests for evaluating a claim in this area.

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive governmental entanglement with religion." 403 U.S. at 613.

The statute has a secular legislative purpose; it seeks to reimburse nonpublic schools for expenses incurred in complying with state-mandated recordkeeping and testing designed to maintain minimum educational levels in all schools in the State. The aid in the present case is "secular, neutral and non-ideological." The statute "does not involve the State in the actual educational process of the private schools."

B. Appellees -- Appellees rely on the majority opinion below in asking this Court to affirm. They add one argument. By far the greatest part of the money provided by the State is used to pay for tests devised not by the State but by the schools and Diocesan authorities. These tests may be used as a device for teaching religion. Appellees provide examples of such use. (Brief for Appellees at 4-6.)

5. DISCUSSION: The issue is whether this statute must fall on the basis of the criteria articulated in this area from Everson to

Lemon. Appellants argue a secular, legislative purpose to insure minimum educational levels in all schools, an absence of a religious effect, and no excessive entanglement. Appellees argue that the aid in this case advances religious education every bit as much as the aid in Lemon and that the statute will result in excessive entanglement or, if it does not, will result in freedom on the part of the schools to spend excess payment for sectarian purposes.

Barnett

Opinion in Brief of Appellants Levitt and Nyquist and in Brief of Appellant Schools and in Brief of Appellant Brydges

10/16/72

JA

Levitt v. Comm of Pub Education

On its face, the NY statute seems not very harsh. But, it suffers from the same flaw that trapped the Pennsylvania statute in Lemon v. Kurtzman. The statute calls for reimbursement for specific functions performed in the private schools but it has no procedures firmly established to see how the money is actually spent, i.e., there is no formal auditing requirement to make sure that the money is actually spent for testing, record keeping, etc. The State is, constitutionally speaking, damned if it does and damned if it doesn't. If the state statute imposes many administrative requirements to assure the money is spent on the correct items there will be "excessive entanglements." If it has no enforcement procedures then there is no way of knowing whether the money may actually be used for teaching religious courses. I think the present state of the SC law is that state aid may only go to such clearly defined things such as bus transportation, books, lunches, health facilities. It may not go to promote other programs more closely associated with the educational function of the schools.

Unless the Ct is prepared to cut back on its recent opiniions in the gov't-aid-to-private-education cases, this case should be affirmed.

AFFIRM

LAH

Conf. 11/3/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 72-269
72-270
72-271

LEVITT v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

BRYDGES v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

vs.

CATHEDRAL ACADEMY v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

Note

(all three cases to be consolidated)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.				✓										
Powell, J.					✓		✓							
Blackmun, J.				✓										
Marshall, J.							✓							
White, J.				✓										
Stewart, J.				✓										
Brennan, J.				✓										
Douglas, J.							✓							
Burger, Ch. J.				✓										

BENCH MEMO

No. 72-269
72-270
72-271

LEVITT, BRIDGES, CATHEDRAL ACADEMY
v.
COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY

Appeal from the USDC SD N.Y. (Hays, Lasker; Palmieri, dissenting)

Given the fact that the Court decided two important aid to parochial schools last year (Lemon v. Kurtzman and Tilton v. Richardson) and its recognition therein that lines are hard to draw in this area so that "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years," I think it is important to decide whether Mandatory Services aid is more like the teacher salary supplements condemned in Lemon or like the bus fare, textbook, and buildings for universities aid approved by the Court. I think

this case is much like Lemon and ought to be affirmed on that ground.

The first crucial point is that the great percentage of payments to the non-public schools is justified by the costs of everyday testing, involving tests prepared, administered, and graded by the individual teachers or schools involved. In two examples cited by appellee (p. 6), both private schools justified 80% or more of their reimbursible costs under the Act on the basis of such everyday school exams. I think appellee is right in arguing that the process of testing students cannot be separated from the teaching process itself. Regardless of whether children could be adequately taught without any testing (which I doubt), if tests are used they present the problems of inevitable (though unconscious) religious bias just as much as do classroom lectures. The questions quotes by appellee from three parochial school textbooks at pp. 24-25 make this point very forcefully. Separating testing from other teaching activities is rather artificial. One might argue on the same grounds as appellants urge that private schools should be reimbursed for the time a teacher spends permitting her pupils to read state-approved textbooks in class, or for the time the teacher spends reading state-approved lectures.

Another important factor in evaluating the effect of testing is that the challenged aid is going to elementary and secondary schools. The Court relied on the distinction between such schools and college-level education in distinguishing Lemon and Tilton. Here the children being tested at state expense are especially impressionable.

The State is apparently going to exercise no control whatsoever over what individual teachers or schools put into their tests.

The second major difficulty with the challenged Act is that it provides no mechanism for ensuring that schools get only as much money as the expend on the mandatory services. Money is distributed based only on average daily attendance. The cost of testing could surely vary widely for any given average daily attendance. Schools could have different philosophies about the utility and optimum frequency of tests, while still complying with State testing requirements. Even if in fact no schools spend more for mandatory services than it receives from the State, the Act provides for no adjustment in the event testing expenditures should change. Although Sec. 8 of the Act prohibits the use of State funds for religious purposes, there is no way to enforce this provision since the schools are not required to account for the actual costs of testing.

Another problem is that the aid goes apparently even to schools with religiously restrictive admissions and faculty hiring policies. Even Mr. Justice White, the most dissatisfied member of the Court with the result in Lemon, thought that aid to such schools was unconstitutional.

The Act also involves the problem mentioned in Lemon of necessitating a continuing annual appropriation with the

resulting danger of creating divisiveness along religous lines.

The Act as presently enforced does not appear to involve too much entanglement, but this is only because the State has not seen fit thus far to set up machinery to ensure that the aid does not have the effect of aiding or establishing religion.

Appellant's most strongly emphasized argument is that the recording keeping and testing services that are compensible under the Act are services required by State law. Therefore, it is unfair to require the schools to bear such costs themselves. But State law also requires teachers in private schools to teach. If they did not teach, surely they would not be recognized or accredited by the State. Yet Lemon specifically held that teachers' salary supplements are unconstitutional.

In conclusion, I think the New York approach in only a variation in form, but not substance, on the Lemon type of financial aid. Unless the Court is dissatisfied with Lemon itself, this case should be affirmed. Otherwise, this case would surely encourage all manner of attempts to circumvent this Court's prior decisions.

TWR

3-16-73

No. 72-269 LEVITT v. COMMITTEE FOR PUBLIC EDUC. Argued 3/19/73

N.Y. State aid - reimbursement - to private schools. Case is difficult & close. I am in doubt + must read prev decisions again: Lemon, Allen + Tilton

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Mrs Coon

There would be more "entanglement" if State did not require these standard tests

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Tom Reveley: 80% of money is reimbursement for type of tests given all children. Not as much entanglement as in prior cases. Formula for distributing funds is unrelated to costs.

Leo Pfeffer (for Resp.)

Her argument was misunderstood

Chandler Porter

Relies on Allen case

Public & private schools have been under State supervision for more than Century.

See affidavit of Comm. of Ed - 85a

Pfeffer's argument is ignores that this is a reimbursement statute. School will have spent money in advance. It is only a partial reimbursement - a part of costs already expended on items in quantum. Costs studies were made & then established costs higher than amt. paid by State

Private schools are required to perform an "appalling" number of activities & to meet many prescribed standards. They must also keep their records for 50 years.

State has right to require that private schools perform adequately. If they can't be reimbursed, what happens.

Affirm 5 or 6 to 4 or 3

DOUGLAS, J. Affirm

Three judge ct. was right. There is ingenious plan but is too much entanglement.

MARSHALL, J. Affirm

No aid, directly or indirectly, to any sectarian schools.

BRENNAN, J. Affirm

Pearce allows private schools, but it does not prevent state from setting standards (for education & maintenance of buildings).

Establishment clause does not permit any reimbursement.

BLACKMUN, J. Affirm in Part & Reverse in Part

Concerned by financial plight of private schools.

But here the directness of the grant is worrysome.

Testing is part of teaching process. Could reimburse for state prepared tests but not for all testing.

STEWART, J. Affirm

Agrees with Douglas & Brennan.

POWELL, J. Affirm in Part & Reverse in Part

I agree with Harry. I would not think it invalid for a state to make legitimate reimbursements for standardized state prescribed by State or for other state imposed - specifically imposed - costs. But here reimbursement was apparently for all testing - including tests voluntarily made up & given by individual schools & teachers.

WHITE, J. Reverse

Reimbursement here is neutral enough to meet establishment & entanglement cases.

REHNQUIST, J. Reverse

Agrees with Byron.

MEMO: C. J. not yet known

Testing is tied in with maintaining standards required by State. Establishment test would be applicable if State paid for costs not imposed by State. If cost figures are not honest - this is a problem - but we can't decide this.

Schools are all sectarian schools.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

Nos. 72-269, 72-270, 72-271

From: The Chief Justice

Circulated: JUN 14 1973

Recirculated: _____

Levitt)
)
72-269 v.)
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Comm. for Public Education &)
Religious Liberty, et al.)
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Brydges)
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72-270 v.)
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Comm. for Public Education &)
Religious Liberty, et al.)
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Cathedral Academy, et al.)
)
72-271 v.)
)
Comm. for Public Education &)
Religious Liberty, et al.)

On Appeal from the United States District Court for the Southern District of New York

Joined 6/15

THE CHIEF JUSTICE delivered the opinion of the Court.

In this case 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 record keeping, violates the Establishment Clause of the First Amendment. A three-judge District Court, with one judge dissenting, held the Act unconstitutional. Committee for Public Education and Religious Liberty v. Levitt, 342 F. Supp. 439 (SD NY 1972). We noted probable jurisdiction. 409 U.S. 977.

I

In June 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." Chapter 138 of New York State Laws of 1970, §2.

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."[1/]

1/ N.Y. Education Law § 305 charges the Commissioners of Education with the duty of maintaining general supervision over all schools throughout the state and with making sure that each school is "examined and inspected."

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," [2] 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.[3]

2/ The Regents' examinations are described by appellants Levitt and Nyquist as "state-wide tests of subject matter achievement." The pupil evaluation program tests, the so-called PEP Tests," are also administered throughout the state in grades three, six and nine.

3/ The District Court indicated that there was some doubt as to whether teacher-prepared tests are within the scope of the Act. The uncertainty was due to one of Appellant Nyquist's answers to plaintiffs' interrogatories, which stated that "only the Regents Scholarship and January and June Regents Examinations might be regarded as specifically mandated." 342 F. Supp. at 411 (emphasis in original interrogatory). The District Court, however, found it unnecessary to resolve this factual ambiguity, stating: "While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically 'mandated.'" 342 F. Supp. at 439.

In this Court, appellants have insisted that since teacher-prepared examinations are required by state regulation they are included within the services reimbursed under the Act. In support of the former proposition, the appellants cite Section 176.1[b] of the Regulations of the Commissioner of Education, which provides that all nonpublic schools:

also at oral argument

(Footnote 3 continued on next page)

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 restriction on what or how the faculty may teach."

3/ Cont'd.

> "shall conduct in all grades in which instruction is offered a continuing program of individual public testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner."

8 N.Y.C.R.R. 176.1[b].

Appellees do not contest the validity of appellants' construction of the Act, and we accept it for the purposes of this case.

A school seeking aid under the act is required to submit an application to the Commission 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 one through twelve. 4/ 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."

4/ Exactly how the $27 and $45 figures were arrived at is somewhat unclear. Appellant Nyquist, in his answers to plaintiffs' interrogatories in the court below, gave the following explanation:

> That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the said conference was made.

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.[5/] In appellant Nyquist's answers to plaintiffs' 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."

5/ Subsequent to the enactment of Chapter 138, the state conducted several studies to determine whether the per-pupil allotment under the statute exceeded the actual costs to schools in performing the mandated services. The District Court found the results "cloudy":

> If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses.

342 F. Supp. at 441. As noted above, the court did not resolve the question whether payments under the Act were intended to compensate schools for internal testing. See note 3, ante.

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, from enforcing the Act. State Senator Earl W. Brydges and certain Catholic and Jewish parochial schools qualified to receive aid under the Act intervened as parties defendant.

A three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281, 2284. 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 and Earley v. DiCenso, 403 U.S. 602 (1971), 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 non-ideological." Lemon, supra, 403 U.S. at 616. 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." 342 F. Supp. at 444.

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 today's Nyquist decision, the Court has 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.'" P. 5, supra (footnote omitted). 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 "[n]o 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. P. 16, supra.

The staute 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. 6/

6/ We do not doubt that the New York legislature had a "secular legislative purpose" in enacting Chapter 138. See Epperson v. Arkansas, 393 U.S. 97 (1968). The first section of the Act provides that the state has a "primary responsibility" to assure that its youth receive an adequate education; that the state has the "duty and authority" to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the state has a legitimate interest in assisting those schools insofar as they aid the state in fulfilling its responsibility.

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 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 [redacted] 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, supra, at 618. 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. See Lemon v. Kurtzman, supra, at 617, 619. 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 [redacted] aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.

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, 330 US 1 (1947), and Board of Education v. Allen, 392 US 236 (1968). 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." Board of Education v. Allen, supra, at 239.

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." 342 F. Supp. at 444. And, "[i]n 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, supra, at 617.

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. Commissioner for Public Education v. Nyquist, supra, at pp. 14-15; Lemon v. Kurtzman, supra, at 612-13. That inquiry would be irreversibly frustrated if the Religion Clause were to be 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, and we add a word of explanation. By holding that New York is not permitted to reimburse sectarian schools for maintaining a program of internal testing, we do not mean to suggest that the State is constitutionally barred from reimbursing a church-sponsored school for some services it mandates. For example, we see no constitutional bar to a carefully drawn statute under which such schools are reimbursed for administering, collating or grading state-prepared tests on secular subjects & which are Such an activity is essentially neutral in character and falls within the "narrow channel" of permissible secular aid. See Board of Education v. Allen, supra. With state-prepared tests, as with state- →

required by law to be given to pupils in all schools, public & private.

purchased textbooks, the content is readily ascertainable and controllable. In neither case, therefore, is it necessary for the State to erect a pervasive system of surveillance in order to be "certain" that the state-supported activity carries no religious overtones. Moreover, based on its experience in administering the identical tests in the public school system the State would be able to make a reasonably accurate determination of the costs involved. This would reduce the need for the State to be "excessively entangled" in detailed accounting procedures or to conduct audits of the school's records in order to make hair-line distinctions between the "religious" and "secular" expenditures of the school. Compare Lemon v. Kurtzman, supra, at 620-21.

However, 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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1973

RE: No. 72-269 - Levitt v. Comm. for Public Education & Religious Liberty, et al.
No. 72-270 - Brydges v. Comm. for Public Education & Religious Liberty, et al.
No. 72-271 - Cathedral Academy, et al. v. Comm. for Public Education & Religious Liberty, et al.

Dear Chief:

I think your "truncated version" effectively and correctly disposes of these cases. I hope, however, that you will omit the "word of explanation" paragraph at 11-12. This is an area of such sensitivity that I would not want to vouchsafe the generality that "we do not mean to suggest that the state is constitutionally barred from reimbursing a church-sponsored school for some services it mandates." I think that is better left to concrete instances that can be evaluated on their own merits.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1973

Nos. 72-269 - Levitt v. Comm. for Pub. Educa.

Dear Chief,

I agree with the reasoning and conclusion of the "truncated version" you have circulated, except that I too would strongly prefer that the paragraph at pp. 11-12 be eliminated.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 14, 1973

Dear Chief:

I join your opinion in Levitt - 72-269 and the companion cases. I would prefer, however, to strike most of the paragraph starting on page 11. The question of what service a state may "mandate" a religious school to perform might include, for purposes of health, keeping room temperatures at 72° when outside temperatures are at a certain level.

But I doubt if the state constitutionally could take on the heating and sanitary services of a religious school. I'd prefer to let the problem rest, awaiting case by case solutions.

There are bound to be cases coming up - cases of all kinds.

W. O. D.

The Chief Justice

cc: Conference

June 15, 1973

No. 72-269 Levitt v. Comm. for Public Education

Dear Chief:

Please join me in your opinion.

I have noted the comments suggesting deletion of the reference to state prepared tests on pages 11-12 of your draft of June 14, 1973. I would be quite content to see this omitted, although - certainly from my viewpoint - I agree with the substance of the view you express. If you elect to retain the paragraph, I do think it could be clarified if the third and fourth sentences were reframed alone the following lines:

> "Any such program would have to be tested against the standards prescribed by this Court, and we prejudge the permissibility of no particular type of service. But we note that a different case would be presented by a carefully drawn statute under which schools are reimbursed for administering and grading state prepared tests on secular subjects and which are required by law to be given to pupils in all schools, public and private. See Board of Educ. v. Allen, supra."

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1973

Re: Nos. 72-269, 72-270, 72-271 - Levitt v. Comm. for Public Education, etc.

Dear Chief:

I, too, hope you will omit the explanation paragraph on pages 11-12.

Sincerely,

T.M.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1973

Re: No. 72-269 - Levitt v. Comm. for Public Education
No. 72-270 - Anderson v. Comm. for Public Eudcation
No. 72-371 - Cathedral Academy v. Comm. for Public Education

Dear Chief:

Please join me. As an alternative to the part of your opinion which is presently the subject of discussion, I would be perfectly agreeable to Lewis' suggestion.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: No. 72-269 - Levitt v. Comm. for Public Educ.
No. 72-270 - Anderson v. Comm. for Pub. Educ.
No. 72-271 - Cathedral Academy v. Comm. for Public Education

Dear Chief:

Please join me in your circulation of June 14.

Along with Lewis, I am in accord with the substance of the views expressed in the paragraph on pages 11-12 that has occasioned comment. I so expressed myself at conference. I would be content, however, to have the paragraph omitted and to await other cases or, if the Court prefers, to have it retained with the suggestion Lewis has offered.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1973

RE: Nos. 72-269, 270 & 271 - Levitt, Anderson, Cathedral Academy v. Committee for Public Education, etc.

Dear Chief:

Your most recent draft in Levitt is excellent, and I would be happy to join the opinion with one minor qualification. At pages 9-10, you state that "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." The suggestion, of course, is that such "reimbursable secular services" in fact exist. I do not believe that we have ever specifically held tht a sectarian school may itself be reimbursed by a State for any of its "services" -- secular or otherwise. Thus, I would much prefer a change in the above-quoted sentence so as to eliminate this suggestion. With such an alteration, I would be happy to join your opinion. If, however, for some reason, you feel the sentence must be retained, will you please note at the foot of your opinion the following: "Mr. Justice Brennan is of the view that affirmance is compelled by our decision today in Committee for Public Education and Religious Liberty v. Nyquist, ____ U.S. ____ (1973) and Sloan v. Lemon, ____ U.S. ____ (1973)."

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1973

72-269

Dear Chief:

In Levitt and in Norwood are statements or indications that a sectarian school may be reimbursed for its services as respects secular activities by the State.

This is new ground in which I have serious doubts. We have never so held and I would prefer to keep our holdings as narrow as possible. If, however, you keep the opinions in their present form, please note at the end of each:

> Mr. Justice Douglas concurs in the result.

W. O. D.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1973

Re: Nos. 72-269, 72-270 & 72-271 - Levitt v. Committee for Public Education and Religious Liberty

Dear Chief:

Please note at the bottom of your opinion for the Court in this case that Mr. Justice White dissents.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

Re: Nos. 72-269, 270 & 271 - Levitt, Anderson, Cathedral Academy v. Committee for Public Education, etc.
No. 72-77 - Norwood v. Harrison

Dear Bill:

I have your note of June 19 and my "Hobson's Choice" is to gain your vote on the opinions at the expense of losing another.

I will therefore show you as concurring in the judgment or result, whatever is the correct formula.

Regards,

WEB

Mr. Justice Douglas

Copies to the Conference

P.S. This time of the year some cases don't even allow for a "deathbed dissent"!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

Re: Nos. 72-269, 270 & 271 - Levitt, Anderson, Cathedral Academy v. Committee for Public Education, etc.

Dear Bill:

I have your note of June 19 and my "Hobson's Choice" is to gain your vote on the opinion at the expense of losing another.

I will therefore show you as concurring in the judgment or result, whatever is the correct formula.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

P.S. This time of the year some cases don't even allow for a "deathbed dissent"!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1973

Re: Nos. 72-269, 270 and 271 - Levitt, Anderson, Cathedral Academy v. Committee for Public Education, etc.

Dear Chief:

In light of your memorandum of June 20 responding to Bill Brennan's note of June 19, please add my name to his statement at the end of your opinion in these cases.

Sincerely,

T.M.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 20, 1973

Dear Chief:

In No. 72-69 - the Levitt case - and the two companion cases, would you kindly add my name to Bill Brennan's statement which I understand has been added to the end of your opinion.

W. O. D.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1973

Nos. 72-269, 72-270, and 72-271
Levitt v. Comm. for Pub. Educa.

Dear Chief,

This will confirm that I join your opinion for the Court in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
4/2/73								
1st draft 6/14/73	join CJ 6/14/73	maybe 6/14/73	agree 6/14/73	dissents 6/19/73	join WJB 6/20/73	join CJ 6/18/73	join CJ 6/15/73	join CJ 6/18/73
2nd draft 6/19/73	concur in result 6/19/73		join CJ 6/21/73					
2nd draft 6/21/73								
						Decided June 25, 1973		
					No. 72-269	Levitt v. Comm. for Pub. Educ.		