The Church, the State, and the EHA: Educating the Handicapped in Light of the Establishment Clause

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I. INTRODUCTION

All parents have the basic right to guide the educational future of their children.1 Prior to the 1970s, however, it was not unusual for the parents of a handicapped child to find it difficult, if not impossible, to provide their child with a genuine opportunity to learn.2 Despite the Supreme Court's proclamation in 1954 that education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms,"3 handicapped children were routinely excluded from public education or segregated within it. Congress, responding to the increasingly vocal call for equal education, took significant steps in 1970 to remedy the inequities by enacting legislation to help states educate handicapped children, the culmination of which was the Education for All Handicapped Children Act of 1975 ("EHA").4

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2. See S. THOMAS, LEGAL ISSUES IN SPECIAL EDUCATION 1-6 (1985). Thomas reports that as recently as 1968, only 38% of handicapped children were being served by public education. Id. at 3.
3. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). Although Brown involved the question of racial segregation, the principles articulated were later used in a number of cases involving handicapped children. See S. THOMAS, supra note 2, at 4 (discussing the development of case law relating to discrimination against handicapped children in education).

Congress' efforts to include handicapped children in the public schools actually began in 1966, when Title VI was added to the Elementary and Secondary Education Act. Title VI created the Bureau of Education for the Handicapped (later replaced by the Office of Special Education Programs) and offered grants to assist states in educating the handicapped. In 1970, Congress replaced Title VI with the Education of the Handicapped Act ("EHA"). The EHA added grants for equipment and facilities to the existing state grant program, but lacked a permanent entitle-
The EHA, in tandem with Section 504 of the Rehabilitation Act, makes state and local educational authorities responsible for ensuring that handicapped children in their districts receive a “free appropriate public education” (“FAPE”). Where public facilities and services are inadequate to provide a child with a FAPE, the educational agency may be required to place that child in a private educational facility at no cost to the parent. Even when public facilities are adequate to provide a child with a FAPE, some parents choose to place their child in a private institution. In many instances, the private institution selected by parents is a parochial or church sponsored school. While public agencies are not required to fund a unilateral private placement, they do retain a significant responsibility for ensuring that handicapped children in parochial schools receive special education and related services. Public school authorities, therefore, may find them-
selves involved in activities which could be construed as giving state aid to parochial schools, including providing public services on parochial school grounds.

In order to meet constitutional scrutiny, such government aid must have a secular purpose, its primary effect may neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion.\(^1\) If the special education and related services required by the EHA and provided by the local agencies do not meet these standards, then the public authorities, in fulfilling their responsibilities to handicapped children in parochial schools, may well be running the risk of violating the establishment clause.\(^1\)

While the Supreme Court has considered many types of state plans to aid children in parochial schools,\(^1\)\(^3\) it has never specifically addressed the constitutionality of state aid to handicapped children in parochial schools under the EHA. However, the Court’s recent decision in *Aguilar v. Felton*,\(^1\)\(^4\) which involved a federal program structured similarly to the EHA,\(^1\)\(^5\) provides some indication of the types of services which may be permissible under the EHA. The decision also casts serious doubt upon the constitutionality of some on-site programs. The Department of Education

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13. Not all aid to children in parochial schools is constitutionally prohibited. *See infra* note 87 and accompanying text.
15. *Felton* involved Title I of the Elementary and Secondary Education Act of 1965, which authorized funds to be distributed to states to assist educationally deprived children from low income families. Title I, which was codified at 20 U.S.C. § 2740 (1982), has been superseded by Chapter I (containing provisions identical to those at issue in *Felton*), codified at 20 U.S.C. § 3806 (1982).

Both Title I and the EHA are state administered federal programs, and the Department of Education has recognized significant similarities between the two. *See infra* note 122 and accompanying text.
("DOE"), however, has consistently taken the position that Felton has no impact on the implementation of programs under the EHA, stating that it would "be presumptuous for educational authorities to extend the Felton decision beyond the circumstances clearly addressed by that case."16 Whether presumptuous or not, educational authorities have continued to express concern about the permissible scope of their involvement with parochial schools. Some state agencies, purporting to follow the Court's decisions in Felton and its companion case, Grand Rapids School District v. Ball,17 have adopted policies disallowing on-site programs under the EHA.18 Such caution on the part of state and local school officials may be well advised.

II. THE EHA

A. General Provisions

Congress articulated several purposes in Subchapter I of the EHA: to ensure that each handicapped child should receive a "free appropriate public education" ("FAPE"); to provide special education and related services designed to meet the unique needs of handicapped children; to ensure the protection of the rights of handicapped children and their parents; "and to assess and assure the effectiveness of efforts to educate handicapped children."19 To carry out this mandate, states are required to follow a detailed set of procedural guidelines delineated in the EHA and supporting regulations.

To meet the requirements of the EHA, local school systems are first required to identify those children in need of special education.20 Each child must then be evaluated by a multi-disciplinary team through nondiscriminatory testing.21 Following testing, the evaluating team determines whether the child is eligible for special education.22 After the child's eligi-

18. See cases cited infra note 128.
20. Id. at § 1412(2)(c). To qualify as handicapped under the EHA, a child must have been evaluated as being "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need[s] special education and related services." 34 C.F.R. § 300.5 (1970). This regulation incorporates procedural safeguards concerning testing and evaluations contained in regulations § 300.530-.534, discussed infra.
22. 34 C.F.R. § 300.343-.533.
bility is determined, the local agency develops an individualized education program ("IEP") with parental participation.\textsuperscript{23} The IEP must state the child's present level of educational functioning and articulate both long and short term educational goals and objectives.\textsuperscript{24} A placement decision is then made based on the goals and objectives contained in the IEP.\textsuperscript{25} The local agency must review the IEP at least annually,\textsuperscript{26} and the child must be re-evaluated at least every three years.\textsuperscript{27}

Procedural protections for handicapped children include parental involvement in many stages of educational decision-making\textsuperscript{28} and the parents' right to request a due process hearing if at any point during the process they disagree with the local agency.\textsuperscript{29} Any party dissatisfied with the outcome of the administrative hearing may appeal to the state agency for an impartial review.\textsuperscript{30} Further review may be sought through a suit filed in either state or federal court.\textsuperscript{31}

It was not intended, however, that parents shoulder the ultimate burden of assuring the rights of handicapped children under the EHA. To qualify for Part B funds,\textsuperscript{32} state educational authorities must assume the responsibility of effecting a policy that assures a FAPE is being provided by local agencies to all handicapped children.\textsuperscript{33} Each state is charged with the task of devising and implementing its own program to monitor the performance of its public schools in providing special education and related services.\textsuperscript{34}

\textsuperscript{23} 20 U.S.C. § 1401(19); 34 C.F.R. § 300.345.
\textsuperscript{24} 20 U.S.C. § 1401(19); 34 C.F.R. § 300.346.
\textsuperscript{25} 34 C.F.R. § 300.552; see also 34 C.F.R. Pt. 300, App. C, Question 42 at 84 (1988) (IEP objectives must be written before placement).
\textsuperscript{26} 20 U.S.C. §§ 1412(4), 1414(a)(5); 34 C.F.R. § 300.343(d).
\textsuperscript{27} 34 C.F.R. § 300.534.
\textsuperscript{29} Id. at § 1415(b)(2).
\textsuperscript{30} Id. at § 1415(c).
\textsuperscript{31} Id. at § 1415(e)(1).
\textsuperscript{32} Pub. L. No. 94-142 is often referred to as Part B of the Education of the Handicapped Act. Part B funds, therefore, refers to monies provided under the entitlement program added to the Act by Pub. L. 94-142. See Wing Inquiry, 2 EHLR 211:414 (1986).

Funding under the EHA is determined on a state by state basis according to the number of handicapped children served. The number of handicapped children ages three to twenty-one, inclusive, who are receiving special education and related services is multiplied by a figure equaling forty percent of the average national expenditure per pupil in elementary and secondary schools during the second fiscal year preceding the year of computation. The figure determined by the formula represents a ceiling on the amount of funds to which a state is entitled, not the actual amount a state will receive. P. JONES, A PRACTICAL GUIDE TO FEDERAL SPECIAL EDUCATION LAW: UNDERSTANDING AND IMPLEMENTING P.L. 94-142 36-37 (1981); see also 20 U.S.C. § 1411 (entitlements and allocations).
\textsuperscript{33} 20 U.S.C. § 1412(1).
\textsuperscript{34} Id. at § 1413(a)(11).
However, Congress was more specific in articulating the ways in which local agency interaction with private schools should be supervised, and states must follow a more detailed set of guidelines to ensure that private school handicapped children receive the special education and related services to which they are entitled.

**B. Special Provisions Related to Private Schools**

State and local educational agencies retain significant responsibility for children placed in private school settings. In fact, when a public agency places a child in a private school, it remains ultimately responsible for ensuring that the provision of special education and related services conform with the child’s IEP.\(^{35}\) Even for children unilaterally placed in private schools (including parochial schools), the public school system retains significant responsibility for providing special education and related services.\(^{36}\)

1. Private Placement by Public Authority

Under some circumstances, an educational agency may be required to place or refer a child to a private educational facility in order to provide a FAPE.\(^{37}\) When this occurs, the public agency retains responsibility for providing that child with special education and related services in conformity with the child’s IEP.\(^{38}\) Furthermore, the public agency is responsible for ensuring that the IEP meets the same standards that would be required were the child placed in a public school.\(^{39}\) Thus, for example, the local agency must monitor compliance with requirements for developing the IEP, such as parental participation and appropriate development of IEP goals and objectives.\(^{40}\) This holds true even if the child is placed outside the district, or even outside the state.\(^{41}\)

The placing agency must also provide the private education at no cost to the parents,\(^{42}\) and ensure that the child placed shall have all the rights of a child who is directly served by the public agency.\(^{43}\) Consistent with these

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35. 34 C.F.R. § 300.401(a)(1).
36. Id. at § 300.451.
38. 34 C.F.R. § 300.401(a)(1).
39. Id.
40. Id. (incorporating by reference regulations 34 C.F.R. § 300.340-.349).
41. Werner Inquiry, 2 EHLR 211:289 (1982); see infra note 46 for a discussion of educational authorities' responsibility for handicapped children placed unilaterally outside the home state of residence.
42. 34 C.F.R. § 300.401(a)(2).
43. Id. at § 300.401(b). The private placement must meet the standards that apply to state and local educational agencies. Id. at § 300.401(a)(3).
obligations to privately placed students, the state agency is obligated to monitor local agency compliance with these requirements through such techniques as written reports, on-site visits, and parental questionnaires.44

2. Unilateral Private Placement

Even if the local educational agency has an available FAPE, but the parents choose to place their child in a private placement, public educational authorities retain significant obligations toward that child under the EHA. Clearly, while the public agency need not pay for the general education of the child at the private placement,45 both the state and local agencies remain responsible for providing the child with special education and related services.46 Local agencies are instructed specifically to "provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."47 The provision of special education and related services, of course, incorporates substantive and procedural requirements including evaluation, eligibility, and IEPs.48 The state agency, in turn, has the obligation to ensure compliance with these requirements.49

3. Services Required for Private School Placements

The Education Department General Administrative Regulations ("EDGAR") articulates additional specific responsibilities of educational agencies for the delivery of special education and related services to children placed in private programs.50 The thrust of the EDGAR provisions, which

44. Id. at § 300.402(a). When a child is placed in or referred to a private school by a public agency, the state educational authority must also provide those institutions with copies of applicable state standards, and allow them an opportunity to participate in the development of those standards which apply to them. Id. at § 300.402(b)-(c).
45. Id. at § 300.402(a).
46. This holds true even when the parents make a unilateral placement outside the state. The home residence of the child retains primary responsibility for special education and related services, and school funds from the local agency of residence may be expended for that child. See Pagano Inquiry, 2 EHLR 211:454 (1987); Wing Inquiry, 2 EHLR 211:414 (1986). Earlier Office of Special Education Programs opinions also indicate that the local agency in the state of placement must design its special education programs so as to allow out of state children placed in the district to participate in the local programs if they so desire. See Beiker Inquiry, 2 EHLR 211:388 (1985); Bliton Inquiry, 2 EHLR 211:97 (1979).
47. 34 C.F.R. § 300.452(a). Note that the regulations define "private school handicapped children" as those children placed by someone other than the public agency. Id. at § 300.450.
48. See supra notes 20-27 and accompanying text.
49. 34 C.F.R. § 300.451(a).
50. Id. at § 76.651-.662 (1987). The EDGAR regulations apply to all recipients of funds under federal education programs, and thus apply to both state and unilateral private placements under the EHA. Id. at § 76.650.
are incorporated by reference in the EHA regulations,\textsuperscript{51} is to ensure that children in public and private schools benefit equally from state-administered federal programs.\textsuperscript{52}

Under EDGAR, public agencies must consult with private schools on matters including which children will receive benefits, how the children's needs will be identified, what benefits will be provided, and how the provision of services will be evaluated.\textsuperscript{53} For specific children, the public agencies must provide a genuine opportunity for students to participate in special education programs.\textsuperscript{54} For example, if the educational program takes place away from the private school, the public agencies must provide transportation both to and from the private school.\textsuperscript{55} The programs must be provided in a manner consistent with the number of eligible private school students and their needs.\textsuperscript{56}

The public agencies must provide comparable benefits to private school children, including quality, scope, and opportunity for participation.\textsuperscript{57} EDGAR requires the same benefits to be made available to private school children as public school children where the children have the same needs and are in the same grade, age, or attendance area.\textsuperscript{58} Mere inconvenience or cost does not excuse the public agencies from these responsibilities. For example, public agencies have been ordered to provide toileting and writing assistance to children placed in private schools.\textsuperscript{59}

The public agencies may not spend less on the special education and related services of private school children than on public school children simply because they are not in the public school. EDGAR requires the public agency to expend the same average amount on private and public school children if the average cost of meeting their needs is the same.\textsuperscript{60} If

\begin{itemize}
\item \textsuperscript{51} 34 C.F.R. § 300.451(b).
\item \textsuperscript{52} See Wing Inquiry, 2 EHLR 211:414 (1986).
\item \textsuperscript{53} 34 C.F.R. § 76.652(a)(1)-(5).
\item \textsuperscript{54} Id. at § 76.651(a)(1).
\item \textsuperscript{55} E.g., Wheatland Unified School Dist., 1986-87 EHLR DEC. 508:310 (SEA Cal. 1987); Lakeside Union School, 1985-86 EHLR DEC. 507:125 (SEA Cal.. 1985). But see infra notes 130-31 and accompanying text.
\item \textsuperscript{56} 34 C.F.R. § 76.651(a)(2).
\item \textsuperscript{57} Id. at § 76.654(a).
\item \textsuperscript{58} Id. at § 76.654(b).
\item \textsuperscript{59} Matter of the Board of Educ., 1984-85 EHLR DEC. 506:309 (SEA N.Y. 1984). To the extent that a child placed in a private school requires exclusively special education and related services, the public school may be relieved of any obligation to provide education and related services if it has an appropriate program in the public school. Work v. McKenzie, 661 F. Supp. 225, 229 (D.D.C. 1987).
\item \textsuperscript{60} 34 C.F.R. § 76.655(a).
\end{itemize}
the average cost is different, a different amount must be spent. In other words, the benefits provided should be based on the child's individual needs, not on the placement of the child.

The regulations allow the public agency to hire employees of the private school to provide the required services, if the services are provided outside the employees' normal work day, and the services are performed by employees under public supervision and control. Further, the services may be provided at the private school site.

Note that many of the EDGAR provisions discussed above, as well as some EHA requirements, necessitate various degrees and forms of public agency contact with private schools, and specifically sanction on-site programs and the use of parochial school personnel. Such contacts may pose separation of church and state problems for public agencies when applied to handicapped children in parochial schools.

III. SEPARATION OF CHURCH AND STATE

The public agency's obligation to serve handicapped children in parochial schools under the EHA and EDGAR may often conflict with the Constitution's establishment clause. Although the Supreme Court has not had occasion to address the possible conflicts between the EHA and the establishment clause, it has analyzed many other cases involving state aid to parochial schools. The Court's approach to "parochiaid" cases has evolved over the past forty years from the neutrality rule of Everson v. Board of Education to the trifurcated test of Lemon v. Kurtzman, which has been applied by the Court since 1971 and which was the basis for the Court's decisions in Grand Rapids School District v. Ball and Aguilar v. Felton. At each step, the Court has refined and re-defined the parameters of permissible state aid to parochial schools. The evolution of the Court's parochiaid decisions warrants brief examination, as it provides a conceptual framework by which to analyze the implications of the Ball and Felton decisions.

61. Id. at § 76.655(b).
62. Id. at § 76.660.
63. Id. at § 76.659.
64. See text of clause supra note 12.
65. This term has been used by some authors to refer to state aid to parochial schools. See, e.g., Comment, Shared Time Instruction in Parochial Schools: Stretching the Establishment Clause to its Outer Limits, 89 DICK. L. REV. 175, 175 (1984).
A. Neutrality: Everson v. Board of Education

The Supreme Court had addressed the issue of state aid to, and regulation of, parochial schools prior to 1947,70 but it had not encountered a challenge to such state action on first amendment grounds until Everson v. Board of Education.71 Everson involved a New Jersey statute authorizing the reimbursement of parents of public and Catholic school children for bus fares used to transport the children to and from school. The statute was challenged on first amendment grounds by taxpayers who argued that the reimbursements amounted to illegal state support of church schools.72

Justice Black, writing for the majority, began his treatment of the issue by indulging in a lengthy historical analysis of the establishment clause in an attempt to discern its original purpose.73 After invoking the writings of Madison and Jefferson as further proof of the intent behind the clause,74 the Court advanced the following definition:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the af-

70. See, e.g., Cochran v. Board of Educ., 281 U.S. 370, 374 (1930) (unsuccessful due process challenge to a Louisiana statute authorizing the loan of secular textbooks to all school children, including those in parochial schools); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parents have the right to send their children to a parochial school); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (state legislatures have a limited right to regulate private schools in the public interest under the police power).
72. The statute was also unsuccessfully challenged on due process grounds. See id. at 5-6.
73. See id. at 8-14. The Everson Court has been criticized by advocates of state aid to religious schools for its capsulated historical justification for its holding, despite the fact that this particular program was upheld. See, e.g., G. Bradley, supra note 12, at 2-3; R. Cord, supra note 12, at 17. The Everson Court, however, was not the first to entertain such historical reflection in an establishment clause opinion. See, e.g., Reynolds v. United States, 98 U.S. 145 (1878).
74. The Court quotes Thomas Jefferson's “Virginia Bill for Religious Liberty” (1786) and James Madison's “Memorial and Remonstrance Against Religious Assessment” (1785). Everson, 330 U.S. at 12-13. Although these documents concerned the disestablishment of Virginia's state-sponsored church, not the first amendment, the Court explained that the writings were equally applicable to the first amendment because of their authors' leading roles in the drafting of that amendment. Id. at 12 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)). But see G. Bradley, supra note 12, at 3 (calling the Court's analogy an unexplained "historical convergence").
fairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and State."  

Later in the opinion, these guidelines were distilled into a single, overriding concept: neutrality. The Court stated that the establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Using the neutrality rule, the Court concluded that since the fares of children attending parochial schools were paid directly to parents as part of a general program to help all parents transport their children safely to and from school, regardless of religion, the program did not breach the wall between church and state. To hold otherwise, the Court intimated, might prohibit the state from applying general state law benefits to all citizens without regard to their religious convictions.  

It is important to note that had the neutrality approach of Everson survived to the present day, there would be fewer questions about the validity of state aid to handicapped children in parochial schools under the EHA. The EHA requires states to provide special education and related services to all children, whether in public, private, or parochial schools. Under Everson, therefore, withholding EHA benefits from handicapped children in parochial schools could be construed as denying the child's rights based on the religious convictions of his parents. Since Everson, however, the question presented by parochial cases has not been whether public benefits should be provided to children in parochial schools, but how those benefits may be delivered so as not to violate the separation of church and state. This altered focus prompted the Court to begin to develop workable criteria for determining the validity of laws under the establishment clause, the culmination of which was the three-part test of Lemon v. Kurtzman.

75. Everson, 330 U.S. 15-16 (citing Reynolds, 98 U.S. at 164) (citation omitted).
76. Id. at 18. This type of "effect neutral" approach had been used by the Court decades before to defeat a due process challenge to a textbook loan program in Cochran, 281 U.S. 370. Defending the program's assistance to parochial school children, the Cochran Court stated that the statute's "interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." Id. at 375.
77. Everson, 330 U.S. at 18. Despite its neutrality, it is likely that this program would fail the effects prong of the Lemon test if considered today. See infra notes 80-89 and accompanying text.
78. Id. at 16.
79. 403 U.S. 602 (1971). For a discussion of the cases relied on by the Lemon Court, see infra note 84.
B. Lemon v. Kurtzman: Neutrality Revisited

Lemon v. Kurtzman involved establishment clause challenges to programs enacted by Rhode Island and Pennsylvania. The Rhode Island statute authorized salary supplements for teachers of secular subjects in non-public schools. In application, the act's sole beneficiaries were 250 teachers in Catholic schools. Similarly, the Pennsylvania act reimbursed private schools for teacher salaries, texts, and instructional materials in secular subjects, and the majority of schools which received funds were parochial schools.

The Court's analysis began with a passing nod to Everson, noting that Justice Black had considered the subject matter of that case on the edge of "forbidden territory" under the establishment clause. Acknowledging that analysis was made even more difficult by the opaque language of the clause, the Court proceeded to look to past decisions for guidance and found that three criteria must be met for a state parochial program to be constitutional. The legislation must have a secular purpose, must not have the principal or primary effect of advancing or inhibiting religion, and must not cause an excessive entanglement between government and religion.

80. Id. at 606-07.
81. Id. at 608.
82. Id. at 609-10.
83. Id. at 612.
84. Id. at 612-13.

The Court cited Board of Educ. v. Allen, 392 U.S. 236 (1968) as the source of the secular purpose and effect neutral prongs of its test. Allen involved a textbook loan program for all students in grades seven to twelve, whether in public or private school. The Allen Court adopted a test first announced in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id., 374 U.S. at 222. The Court upheld the program in Allen, noting that the Schempp Court's citation to Everson, which involved a direct aid program similar to the one challenged in Allen, made the otherwise difficult Schempp test unusually easy to apply. Allen, 392 U.S. at 243; see Everson, 330 U.S. 1. But see Norwood v. Harrison, 413 U.S. 455 (1973) (statute which made free textbooks available to students in both public and private schools, regardless of the school's policy on discrimination, held unconstitutional; discussion of inapplicability of Everson and Allen).

The Court pulled the third prong of the Lemon test from Walz v. Tax Comm'n, 397 U.S. 664 (1970), a case addressing property tax exemptions for religious organizations. After determining that the tax exemptions had a neutral legislative purpose, neither advancing nor inhibiting religion, the Walz Court stated that the inquiry could not end there, that there must be a finding "that the end result — the effect — is not an excessive government entanglement with religion." Id. at 674.

Since Lemon, the Court has cautioned that the three-pronged test was meant to serve as a framework for constitutional inquiry, not as a limit to it. See Meek v. Pittenger, 421 U.S. 349, 358-59 (1975).
The Court invalidated both statutes, finding that the programs would foster "excessive and enduring entanglement between state and church." The Court explained that the textbooks provided to students in that case could be monitored for religious content, thus ensuring that state money was not spent to advance religion. The state could not, however, monitor parochial schools to guarantee that classes taught by state subsidized teachers were devoid of impermissible religious content without "comprehensive, discriminating, and continuing state surveillance." Such surveillance, said the Court, would result in excessive church-state entanglement. The Court also found that the Pennsylvania program provided funds directly to church schools, another defect which would inevitably result in excessive entanglement through the necessary administration and surveillance which accompany such arrangements.

After Lemon, the Court proceeded to apply the three-part test to numerous programs providing state aid to parochial schools. While always quick to note that not all programs which confer incidental or indirect benefits on religious institutions are prohibited, the Court rejected numerous aid plans for having the primary effect of advancing religion. For example, the Court struck down statutes authorizing direct money reimbursements to parochial schools for state-mandated expenditures, such as testing and

85. Lemon, 403 U.S. at 625. The Court specified three criteria to be used when determining whether government entanglement with religion is excessive: (1) the purposes and character of the organizations benefitted; (2) the nature of aid provided by the state; (3) the resulting church-state relationship. Id. at 615. Another important consideration for the Court is the way in which aid is delivered; direct subsidies seem more likely to violate the clause in the Court's eyes. Id. at 621.

86. 392 U.S. 236; see also supra note 84.

87. 403 U.S. at 621. Although the Pennsylvania program also included textbooks for children, the funds were furnished to the parochial school for the purchase of the texts. In Allen, the texts were purchased by the state and loaned directly to the children.

88. Id. at 619.

89. Id. at 621. However, direct funding alone does not automatically render a statute unconstitutional. Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658 (1980).

90. In application, the Lemon test has become a two-part test. The first prong of the test is quite easy to meet, since the Court accepts without question legislative pronouncements of secular purpose and has never invalidated a statute for lack of a secular legislative purpose. See, e.g., Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (accepting secular purpose of statute authorizing tax deductions for parents who send children to private and parochial schools on its face); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973) ("We do not question the propriety, and fully secular content, of New York's interest ....").

91. See, e.g., Meek, 421 U.S. at 359; Nyquist, 413 U.S. at 771.

92. Levitt v. Committee for Pub. Educ., 413 U.S. 472, 481 (1973). The New York statute at issue in Levitt provided funds for both standardized testing and internally prepared tests. The Court found that most of the testing funded was of the latter type, and it was these tests with
maintenance and repair of school facilities,\textsuperscript{93} because the statutes did not ensure that the funds would not be used to advance religious interests, such as testing religious themes or repairing buildings used for religious purposes. Similarly, statutes authorizing the purchase or loan of instructional materials and equipment for use in parochial schools were held unconstitutional.\textsuperscript{94} The Court found that the integration of religious and secular education in parochial schools was so great that, despite the secular nature of the equipment, aid to the educational function of these schools had the primary effect of advancing religion.\textsuperscript{95}

The Court found violations of the excessive entanglement prong of its test as well, and also identified the crucial element of "a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."\textsuperscript{96} Thus, the provision of remedial and accelerated instruction and guidance counseling on parochial school grounds was found to cause excessive entanglement between government and religion, because the state would be required to monitor teachers and counselors to ensure religious neutrality.\textsuperscript{97} The Court

which the Court took issue, noting that "no means are available, to assure that internally prepared tests are free of religious instruction." \textit{Id.} at 480. Statutes authorizing reimbursement of parochial schools for state-mandated standardized testing, the content of which was determined by public school personnel, have been upheld by the Court. \textit{See Regan}, 444 U.S. 646 (upholding the New York statute enacted in response to \textit{Levitt}); \textit{Wolman v. Walter}, 433 U.S. 229 (1977).

\textsuperscript{93.} \textit{Nyquist}, 413 U.S. 756. For a fuller discussion of \textit{Nyquist}, see infra notes 139-41 and accompanying text.

\textsuperscript{94.} \textit{See Wolman}, 433 U.S. at 229; \textit{Meek}, 421 U.S. at 349. While the program invalidated in \textit{Meek} authorized the loan of materials and equipment directly to the parochial schools, the \textit{Wolman} statute presented a different twist. The secular materials and equipment in \textit{Wolman} were loaned to pupils or their parents on request and were merely stored on nonpublic school premises, an arrangement similar to many book lending programs. The Court, however, refused to distinguish \textit{Wolman} from \textit{Meek} on this ground, stating that "[d]espite the technical change in legal bailee, the program in substance is the same" as the one in \textit{Meek}, and thus still inevitably supports the religious endeavors of the school. \textit{Wolman}, 433 U.S. at 250 (citing \textit{Nyquist}, 413 U.S. 756) for the proposition that aid to parochial schools cannot be made constitutional simply by indirect delivery).

\textsuperscript{95.} \textit{Wolman}, 433 U.S. at 248-49; \textit{Meek}, 421 U.S. at 366.

\textsuperscript{96.} \textit{Roemer v. Maryland Pub. Works Bd.}, 426 U.S. 736, 765 (1976). \textit{Roemer} was the last in a trilogy of cases addressed by the Court in the 1970s dealing with state aid programs to religiously affiliated colleges and universities. The Court consistently held that the institutions of higher learning, unlike religiously affiliated elementary and secondary schools, were not pervasively sectarian, and thus supervision was not required to insure secularity of state funds. \textit{Id.} at 765-66; \textit{see Hunt v. McNair}, 413 U.S. 734 (1973); \textit{Tilton v. Richardson}, 403 U.S. 672 (1971).

\textsuperscript{97.} \textit{Meek}, 421 U.S. at 370-72. The \textit{Meek} Court also invalidated a provision relating to speech and hearing services, but did so only because it was not severable from the other portions of the act. \textit{Id.} at 371 n.21; \textit{see Wolman}, 433 U.S. at 242-43 (discussing the \textit{Meek} Court's actions with regard to speech and hearing services).
held that speech, hearing, and psychological diagnostic services, however, would not create excessive entanglement.\footnote{98. Wolman, 433 U.S. at 244. The Wolman Court also upheld the provision of therapeutic services performed on non-public school grounds. Id. at 247-48.} The services' lack of educational content removed the risk of impermissible fostering of religious views, thereby alleviating the need for the surveillance which causes entanglement.\footnote{99. Id. at 244.}

Through the myriad of parochiaid decisions, a common defect emerged in many of the plans rejected as violative of the establishment clause: a lack of state control. State programs failed the effects test when the state could not guarantee the secularity of state aid, thus creating the impermissible effect of advancing religion if the aid was used for sectarian purposes. The excessive entanglement test was violated if a program required monitoring to ensure that state aid was used only for secular education, unless the nature of the aid provided by the state removed the risk of advancing religion. Yet the clause was not violated by general aid programs where benefits flowed directly from the state to the student, with little or no sectarian input or control, even if indirect benefits were conferred upon parochial schools.

For this reason, programs under the EHA do not seem to be affected by the Court's decisions in the wake of \textit{Lemon}. State and local educational agencies make special education and related services available directly to the handicapped student, not to the parochial school as a whole. Any benefit conferred on the parochial school, therefore, is strictly incidental to the fulfillment of the rights of the handicapped child. Thus, the state can theoretically guarantee the secularity of state aid provided to handicapped children under the EHA, because the state itself expended the funds for the provision of such aid. Monitoring of the type which would create excessive entanglement is unnecessary.

The Court's decisions in \textit{Grand Rapids School District v. Ball}\footnote{100. 473 U.S. 373.} and \textit{Aguilar v. Felton},\footnote{101. 473 U.S. 402.} however, make it clear that increased state control over aid programs which affect parochial schools is often not enough to prevent a violation of the establishment clause. Indeed, \textit{Ball} and \textit{Felton} show that increased state control over on-site programs at parochial schools can pose additional effects tests and entanglement problems, some of which cannot be evaded by the EHA.
C. Ball and Felton: Expansion of Effects and Entanglements

In *Grand Rapids School District v. Ball*, the Court considered a first amendment challenge to Grand Rapids' Shared Time and Community Education programs. The programs were designed to enrich the core curriculum of nonpublic schools (most of which were religious schools) by providing supplementary classes at public expense. The classes were conducted by state-paid teachers in rooms located in and leased from the private schools. Each room leased by the school system was required to be free of religious symbols, and during supplementary class periods, a sign announcing that the room was a public school classroom was posted on the door.

The Court was unimpressed with Grand Rapids' efforts to protect its public classes from the religious influence of the sectarian schools, and found the programs violative of the establishment clause in three ways. First, since the teaching took place in the parochial school, the pervasive sectarian atmosphere might influence state paid teachers to subtly indoctrinate the students at public expense. Second, the symbolic union of the state and parochial schools might convey a message to the students or to the public at large of state support for religion. Finally, the programs had the effect of subsidizing parochial schools by taking over their responsibility for teaching many secular subjects, thus freeing resources that could be used for religious purposes.

In *Aguilar v. Felton*, decided the same day as *Ball*, the Court addressed New York's implementation of Title I of the Elementary and Secondary Education Act of 1965. Under the Title I program, states used federal funds to assist schools in providing special education services for educationally deprived children from low-income families by implementing

102. 473 U.S. 373.
103. *Id.* at 375. The Shared Time teachers were full-time public employees, while the Community Education teachers were part-time public employees who had full-time jobs at the private school, and commenced teaching for the state at the end of the regular school day. *Id.* at 376.
104. The signs read in part "THE ACTIVITY IN THIS ROOM IS CONTROLLED SOLELY BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT." *Id.* at 378 n.2.
105. *Id.* at 385, 397.
107. By the time *Felton* was decided, Title I, which had been codified at 20 U.S.C. § 2701, had been replaced by Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801. The Court noted that the "provisions concerning the participation of children in private schools under Chapter I are virtually identical to those in Title I." *Felton*, 473 U.S. at 404 n.1. Since the Court chose to refer to the program as Title I, for convenience sake the program will be referred to in this Article by the same name.
programs developed by local educational agencies and approved by state agencies. A majority of the children assisted by the New York programs attended parochial schools. In practice, the Court found the New York program very similar to the ones challenged in \textit{Ball}: Classes were taught by public school teachers during the regular school day, on parochial school premises in clearly designated classrooms devoid of religious symbols. In addition, however, New York had instituted a system for monitoring Title I classes in parochial schools in an effort to keep them free of religious content.

Despite the possibility that New York's surveillance system might prevent Title I classes from being used to indoctrinate students at state expense, thus alleviating one concern presented in \textit{Ball}, the Court held the program unconstitutional because the surveillance itself created an excessive entanglement of church and state. The Court explained that the "nature of the interaction of church and state in the administration" of Title I created the fatal elements of entanglement. First, the aid was "provided in a pervasively sectarian environment," making it impossible to separate and subsidize only secular functions. Second, since the aid provided was in the form of teacher support, a system of ongoing inspections was necessary to guarantee instructional secularity.

Clearly, the concepts articulated by the Court in \textit{Ball} and \textit{Felton} leave states in a difficult dilemma with regard to aid to parochial school children involving on-site programs. State-paid or state-provided teachers in parochial schools seem to be an insurmountable stumbling block. The potential for religious indoctrination of students by public teachers is ever-present because of the pervasive sectarian atmosphere of parochial schools, yet the state is forbidden to attempt to control its teachers through surveillance because such efforts would foster entanglement. Additionally, states must avoid two new effects: appearances and indirect subsidies. To avoid the appearances effect, the program must not create the appearance of church-state unity because of the danger of conveying a message of state support for religion to students or the public. Of greater significance, however, is

110. \textit{Id.} at 409.
111. \textit{Id.}
112. \textit{Id.} at 412; see \textit{supra} note 96 and accompanying text.
113. \textit{Id.}
114. The Court had previously addressed the problems presented by aid in the form of teachers in \textit{Meek}, 421 U.S. 349 and \textit{Lemon}, 403 U.S. 602. However, the Court struck down these programs under the entanglement prong of its test, and did not directly address the effects problems inherent in its analysis until \textit{Ball}.
the indirect subsidies effect. Previously, states were required to ensure only that public aid was not being wrongfully diverted to sectarian purposes, thus directly subsidizing religious activity. Now states must also examine the extent and nature of the aid to ensure that it has not relieved the parochial school of educational duties that it would have otherwise funded itself, thus freeing parochial school money for religious purposes.

IV. Felton and the EHA

A. The DOE Position on Felton

Despite the fact that the provision of special education and related services under the EHA often involves on-site teacher instruction, the United States Department of Education ("DOE") has advised state educational authorities that the above limitations do not apply to the EHA. The DOE has "taken the position that [the Felton] decision does not apply to other Federal programs. Therefore, there is currently no Federal prohibition on on-site services under the EHA . . . for handicapped children." The DOE has affirmed this view as recently as March, 1988.

When one examines the reasoning behind the DOE's blanket statements of non-application, the defects in such a stance become clear. The DOE position was first announced in a letter from then Secretary of Education, William Bennett, to each Chief State School Officer. Secretary Bennett prefaced his analysis by noting that the Supreme Court itself had recognized the difficulty inherent in applying establishment clause decisions to "other cases presenting different facts and circumstances." Therefore, it would be "presumptuous," he reasoned, to extend Felton "beyond the circumstances clearly addressed by that case." As an example of such a presumptuous extension, Secretary Bennett noted that Felton could not be used to prohibit the placement of Chapter 2 materials and equipment in parochial schools, since it did not address Chapter 2 materials and equipment. But he then drew an important distinction, stating that "[i]n the case of instructional services provided on private school premises under Chapter 2, State and local officials should carefully review these instructional services in light of the Felton decision to determine whether they are so similar to

116. Exon Inquiry, 2 EHLR 213:125 (1988) ("[T]he Felton case has no bearing on this problem whatsoever since the [DOE] has not taken the position that the prohibition against on-premises services is applicable to programs under the [EHA].").
117. See Bennett Letter, supra note 16.
118. Id. at 373.
119. Id.
those at issue in Felton as to require modification.”120 Secretary Bennett then attempted to apply this distinction to the EHA, stating:

Likewise, the Felton decision need not have the effect of prohibiting on-premises services to private school children in all other Federal programs. With respect to programs under . . . the Education of the Handicapped Act, for example, a prohibition of on-premises instructional services may make it impossible to provide the instructional services required [by the EHA]. The special problems and statutory schemes for these programs were not before the Supreme Court when it decided Felton.121

This reasoning implies that instructional services under the EHA are so different from those at issue in Felton as to make the case inapplicable. Yet the uniqueness of instruction under the EHA did not prevent it from being “essentially the same” for purposes of delivery to parochial schools as instruction under Title I in the eyes of the DOE.122

Part of the DOE’s analysis of Felton is correct: The decision prohibits on-site instructional services in the Title I program, and in any other program, such as Chapter 2, containing instructional services similar to those at issue in Felton. It does not apply to non-instructional services not addressed by the Court that do not present the threats of indirect subsidization, indoctrination, symbolic union, or entanglement. The DOE’s error occurs in the application of this interpretation to instructional services

120. Id. (emphasis added).
121. Id.
122. After Felton, the Department of Education announced that “the Felton decision is clear in prohibiting the provision of instructional services under [Title I] within private religious school buildings.” Bennett Letter, supra note 16. In 1979, however, state directors of special education received a letter from the DOE concerning the application of the EHA to children unilaterally placed in parochial or private schools. Informal Letter to State Directors of Special Education (Aug. 24, 1979) reprinted as DAS Bulletin #39, 2 EHLR 203:07 (1979). The letter contained a review of key requirements for the implementation of the EHA, one of which stated:

Methods/Settings for Services. The requirements for serving private school handicapped children under Part B are essentially the same as the requirements for serving private school educationally deprived children under Title I of the ESEA. Thus, if a State’s Title I services are provided through a variety of arrangements (e.g., dual enrollment, mobile educational services, and services on private school premises) it would be legally permissible to use the same arrangements under Part B [of the EHA].

Id.

The same response had also been issued in March of that year in reply to an inquiry from the Pennsylvania Catholic Conference. See Aschenbrenner Inquiry, 2 EHLR 211:10, 111 (1979).

State educational authorities, therefore, may have been seeing the logical reverse of the DOE’s own parallel, that if on-site services are impermissible under Title I, they are impermissible under the EHA since the two are “essentially the same” for the purposes of delivery. However, these past comparisons were either ignored or overlooked by the DOE when it formulated the current policy on Felton and the EHA.
under the EHA, which fails to recognize the different types of services and instruction provided by the EHA. By reapplying *Ball* and *Felton* to the EHA with these differences in mind, a clearer, more logical picture of the implications of these decisions emerges.

**B. Possible Effects of *Felton* on the EHA**

Obviously a major concern with banning on-site instructional services is that it might make it impossible to provide the special education required by the EHA to parochial school children. Such concerns, however, are perhaps overstated. Certain on-site programs are likely to be valid while others are clearly prohibited.

Some unique aspects of the EHA stand outside the realm of *Felton*. For example, handicapped children are entitled to both special education and related services. Related services, defined as "such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education," are tailored to each handicapped child's special needs, and often entail little substantive content. Such highly individualized programs that can only be provided on the parochial school site are much less likely to involve effects and entanglement problems, since they are less instructional in nature and have little educational content which could be used to transmit ideological views to the child. Thus, where a child requires toileting and writing assistance, for example, there is a good chance that the on-site provision would be upheld.

While it is true that not all services received by handicapped children under the EHA are instructional in nature, many types of handicaps, such as learning disabilities, might necessitate supplemental classes similar in form to those at issue in *Felton*. For this type of special education, the dangers pinpointed by the Court in *Ball* and *Felton* might still be present. The substantive content of such classes provides the opportunity for inadvertent student indoctrination by public school teachers, which in turn triggers the need for the type of surveillance which creates entanglement. Depending on the method and extent of implementation, such classes could present the appearance of symbolic church-state union and have the effect of indirect subsidization as well.

123. *See* Bennett Letter, *supra* note 16.
Some support for this assertion may be found in the Court's willingness to uphold general welfare services for children in parochial schools. *See* Wolman v. Walter, 433 U.S. 229, 242-43 (1977); *cf.* Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).
126. *See* supra note 122 and accompanying text.
Depending on the method and extent of delivery, on-site instructional services under the EHA could be perceived as a link between church and state in the eyes of students and the public. Such aid might indirectly subsidize the religious functions of the parochial school if the school would normally have made provision for special education and related services as part of tuition, or class size could be reduced. Finally, teachers providing special education are just as likely to inadvertently incorporate religious teaching in their instruction, and handicapped children are just as susceptible to influence by such indoctrination. Consequently, monitoring would be required to guarantee the secularity of state aid, resulting in entanglement problems.

Since it is difficult to imagine that the Court would ignore these dangers, simply because the children involved are “handicapped” under the EHA and not “educationally disadvantaged” under Title I, the reasonable assumption made by state educators is that such general instructional classes may not be provided on parochial school grounds under the EHA. Indeed, many school districts have already made this assumption and adopted policies against providing on-site services at parochial schools.

C. Options Available for Provision of Services

The difficult position the school district finds itself in is that its decision to discontinue on-site services at parochial schools does not negate that district’s obligation to provide special education programs for children in those schools. There are, however, available options.

Direct off-site service is an obvious option. If a child requires the type of special education and related services which may not be provided on parochial school grounds, the district is obligated to provide transportation to the public site so that the student may participate.

127. Indeed, some handicapped children might be more susceptible.
129. See 34 C.F.R. § 76.654(a); see also supra notes 52-59 and accompanying text. Note that the Court has upheld the provision of therapeutic services, guidance, and remedial classes for parochial school children on public school grounds. Wolman, 433 U.S. at 244-45 n.123.
has recently stated the "general rule that services will only be offered at the public school site and that the... schools are not responsible for providing transportation to any private school child who is handicapped is inconsistent with the Federal regulations."131 The local public school retains considerable flexibility in identifying the appropriate site.132

Felton also appears to allow limited on-site services. On-site instructional programs should be limited in number. Where a school system has only a few children in private educational placements, monitoring of on-site programs could avoid establishment clause problems. It is conceivable that a particular school system has one or two children so placed, and therefore the Supreme Court's concern that a school system, monitoring itself, creates excessive entanglement is not justified.

Further, on-site programs limited in scope should survive attack. To the extent the program does not confer educational benefit, but is a service which allows the education to take place, it seems likely to be permitted. Providing trained aides to change a catheter, or to assist a child in toileting have little educational content and hence, little possibility of running contrary to Felton's concerns. To the extent the assistance could involve educational content, however, it is likely to be impermissible. For example, a cued speech interpreter for a deaf student should not be provided, since the person would be interpreting material with educational content133 as well as interpreting classes with specific religious content.

On-site programs, however, involving traditional as well as non-traditional educational content (such as education in self-help and survival skills)134 should be prohibited in all but a few instances. Whether a child is being tutored in reading, or is being trained to make change, or even to help feed him or herself, the risk of establishment problems exist. Only two groups of students, therefore, in addition to those merely receiving on-site related services (as opposed to educational programming) should be served on-site by the public schools. First, on-site services should be provided for

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132. See Wieder, 72 N.Y.2d 174, 527 N.E.2d 767, 531 N.Y.S.2d 889. A community of Hasidic Jews sought provision of special educational services within the Hasidic schools or at a neutral site. The public school sought a ruling that the EHA and New York law required provision of special education only in public schools. The court held that there was neither a constitutional right to have the services performed at the private school or a neutral site, nor was the public school limited to providing services at a public school site. Id.
133. "Cueing involves the use of handshapes with the ongoing speech to clarify the spoken language. Cueing is not intended to be a substitute for spoken language, as is sign language." Chattahoochee County Bd. of Educ. v. Tremaine S., 1986-1987 EHLR DEC. 508:295 (SEA Ga. 1987).
134. See, e.g., Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983).
children whose cognitive ability is such that their education cannot entail concepts such as church and state. Risks of the teacher imparting inappropriate content are minimal and the small number of children who require any minimal monitoring should avoid entanglement problems.\textsuperscript{135} Second, children who are at risk from travel involved in leaving the parochial school should be served on-site.

Again, given the small number of such children, the ease of monitoring, and the inherent risks attendant to the transportation of the child, little entanglement should exist in these two instances.\textsuperscript{136} In fact, the number of such children the public system would be required to educate is made even smaller by the fact that many children with severe cognitive deficiencies require total special education, rather than a few classes or some form of related service. For these students, the issue is probably moot. To the extent that a child placed in a private school requires exclusively special education and related services, the public school is probably relieved of any obligation to provide special education and related services if it has an appropriate program in the public school.\textsuperscript{137}

Finally, as an option for providing special education, it seems likely that the public school could meet its burden by providing direct payment to the parents for services, rather than providing the money or services to the parochial school. To the extent, for example, that the child is required to have a tutor to enable the child to receive educational benefit, the public school could provide the parents with the funds to hire the tutor themselves. Such an approach seems consistent with the United States Supreme Court’s position in \textit{Mueller v. Allen},\textsuperscript{138} where the Court upheld a state tax deduction for costs of tuition and related expenses at a parochial school. Any entanglement problems resulting from supervision might be minimal. In fact, in \textit{Mueller}, the tax provision also provided for state review of text books used in the parochial school.

The Supreme Court’s decision in \textit{Committee for Public Education v. Nyquist},\textsuperscript{139} however, makes it difficult to state categorically that \textit{Mueller} would allow a system of direct payment to parents. \textit{Nyquist} involved tui-
ation reimbursement grants to parents of parochial school children. The Court held that, had the funds been given directly to the religious schools, the establishment clause would have been violated because there would be no guarantee that state aid would be used for secular purposes. The fact that the aid was given directly to the parents did not make the statute constitutional since the effect, financial support of sectarian schools, remained the same. \[140\] *Nyquist*, however, was distinguished in *Mueller* by Justice Rehnquist because aid was conferred on parochial schools only as a result of parental decision, not state action. The decision has been called "isolated" by one commentator. \[141\]

V. CONCLUSION

Notwithstanding the United States Department of Education's position to the contrary, *Felton* raises significant problems for public educational agencies. For children who simply cannot be served anywhere except on-site at the parochial school, *Felton* should provide little difficulty. For the vast majority of children, however, *Felton* should prohibit on-site programming under the EHA, just as it does under Chapter I. With creative planning, however, school systems, working with parents, should be able to meet the educational needs of children who have elected parochial school education.

\[140\] Id. at 780-81. The same result was reached in Sloan v. Lemon, 413 U.S. 825 (1973) (another tuition reimbursement scheme).

\[141\] See, e.g., R. Alley, The Supreme Court on Church and State 142 (1988).