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Samuel Rabinove

Does "Dual Enrollment" Violate the First Amendment?

SAMUEL RABINOVE*

Three decisions rendered by the U.S. Supreme Court on June 25, 1973,[1] coupled with two of June 28, 1971,[2] represent a dramatic development in the annals of religious freedom in America. The import of these decisions, considered as a whole, quite clearly is that the Court majority will not countenance any massive governmental assistance to sectarian elementary and secondary schools, whether direct or indirect, whatever shape or form such assistance might assume. On the basis of these five rulings it is a fair surmise that this Court construes the Establishment Clause of the first amendment to mean that it is not the business of government to subsidize schools whose chief reason for being is to propagate a particular faith.

Yet there remains one device, which indirectly affords help to sectarian schools, that may nevertheless be able to pass constitutional muster. Called "shared time" or "dual enrollment," this procedure enables religious school pupils to pursue secular studies such as mathematics, physical sciences, industrial arts and physical education in public schools, while simultaneously studying those subjects which include denominational content in their own denominational schools. "Dual enrollment," of course, to the limited extent that it has been utilized, relieves religious schools of the financial burden of teaching certain secular courses. While there are persuasive social policy arguments to be made in favor of "dual enrollment," as well as in opposition to it, the basic purpose of this essay is to assess its constitutionality under the first amendment, rather than its merits.

By way of background, "dual enrollment" programs are currently in force, at least to some extent, in a number of states, including Illinois, Connecticut, Pennsylvania, Michigan, Ohio and Wisconsin. Although some of these programs have been operative for years, judicial rulings pertaining

* American Jewish Committee, 156 Third Avenue, New York, New York 10028.

[1] Levitt v. Committee for Public Education and Religious Liberty, 93 S.Ct. 2814 (1973); Sloan v. Lemon, 93 S.Ct. 2982 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 93 S.Ct. 2955 (1973).

[2] Lemon v. Kurtzman, Earley v. DiCenso, 403 U.S. 602 (1971).

thereto are notable for their rarity.[3] There have, however, been issued several opinions by state attorneys general and other officials, reflecting divergent viewpoints, as to the validity of "dual enrollment" in terms of the applicable constitutional provisions in their respective states. The Attorney General of Ohio, for example, has ruled:

> It is believed that a board of education can properly permit a resident child of school age to attend only particular classes in a school.... The fact that he is also enrolled in another school... and is attending classes therein during a part of the school day, does not, in itself, appear to disqualify the child from enrolling in a public school for a particular course of instruction; and it is not believed that such dual enrollment would be unlawful even if one school attended is maintained by a church....[4]

But assuming that state constitutional hurdles are not insurmountable, what of the first amendment? Justice Douglas, writing for the majority in the 6–3 decision of the Supreme Court in *Zorach* v. *Clauson,*[5] which sustained the constitutionality of a program in New York providing that pupils could be excused from public school on a limited basis to receive religious instruction away from public school premises (so-called "released time"), declared:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.[6]

"Dual enrollment" may be seen as a variant of "released time," with a major expansion, of course, of the religious instruction component.

Just as it is clear that parents are entitled to enroll their children in public schools on a full time basis if they so desire, it is equally clear that parents have the right to enroll their children in religious schools on a full time basis.[7] Since this is the case, it would appear that "dual enrollment" (involving, as it does, part time use of public school facilities by children who have the right to full time use), *on its face,* bears no constitutional infirmities. Moreover, it may be argued that not merely is "dual enrollment" permissible under the first amendment, but that it is in fact a matter of constitutional right. In *Sherbert* v. *Verner*[8] the Supreme Court held in a 7–2 decision[9] that a state's denial of unemployment compensation

[3] Admission of parochial school students to a public school manual training program was upheld in Pennsylvania. Commonwealth ex. rel. v. School Dist. of Altoona, 241 Pa. St. 224 (1913).

[4] Letter from the Attorney General of Ohio to the Superintendent of Public Instruction, May 14, 1962.

[5] 343 U.S. 306 (1952).

[6] *Id.* at 314.

[7] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[8] 374 U.S. 398 (1963).

[9] One of the dissenters was Justice White.

benefits to a Seventh Day Adventist because her religious convictions precluded her from taking a job requiring work on Saturdays restricted her free exercise of religion. A fortiori it may be contended that a state cannot deny access to a public school on a part time basis to a parent, whose religious convictions compel her to enroll her child in a parochial school to receive sectarian instruction, without violating her right to free exercise of religion.

In the quintet of recent Supreme Court decisions cited above in the first paragraph, there does not appear to be any language which decisively would rule out "dual enrollment" programs as such. Applying the three basic criteria articulated by the Court,[10] if a state offers parents of religious school pupils the option of enrolling their children in public schools on a part time basis to receive secular knowledge in a secular setting, it may well be deemed to have "a clearly secular legislative purpose" in so doing. To the limited extent that "dual enrollment" may serve to "advance" religion by enabling religious schools to concentrate their resources on religious instruction, it may be argued that such a consequence, far from being a "primary effect" of this type of program, is rather an incidental effect of the state's effort to accomplish its legitimate secular purpose.

If "dual enrollment" were to run afoul of the Establishment Clause, it is the third part of the Court's test, that a law "must avoid excessive government entanglement with religion," which would probably be its nemesis. It should be stressed that the key word here is "excessive;" it is not *all* "entanglement" which is proscribed. Presumably, a cooperative relationship between the state and religious authorities, which goes no further than the necessities which normally obtain under a "released time" system, would not invalidate a "dual enrollment" program either.

For such a program to avoid "excessive entanglement," it would seem that the children in question would have to be treated no differently than any other children in the public school, nor could any preference be accorded the religious school authorities in making the requisite arrangements. Among other things this would mean that the "dual enrollment" children would have to be under the exclusive jurisdiction of public school authorities while on public school premises, that they must be freely intermingled with the regular public school pupils in all activities in which they participate, that all instruction must be given solely by public school personnel on public school premises and that there must be no interference by religious authorities with the administrative decisions normally

[10] "For the now well defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must have a primary effect that neither advances nor inhibits religion, ... and third, must avoid excessive government entanglement with religion. ..." Committee for Public Education and Religious Liberty v. Nyquist. 93 S.Ct. 2955, 2965 (1973).

made by public school authorities with reference to study materials, curricula, homework or other matters. In sum, for a "dual enrollment" program to be upheld it would seem that it would have to be implemented in such fashion that it does not become a de facto church/state merger or partnership in which government is materially aiding religion.

In this connection, it should be noted that programs of various types have been undertaken by public and parochial school authorities which masquerade as "shared time" or "dual enrollment," but which are not really that at all. Rather they are audacious attempts to divert public resources to religious schools by using the instrument of "dual enrollment" as a smokescreen. One such attempt, which was thwarted recently, was made in New Hampshire. A statute enacted in that state in 1969 authorizes "dual enrollment" programs for public and nonpublic schools. Pursuant to guidelines for this law, issued by the New Hampshire Department of Education, a school district entered into a facilities leasing agreement with several Roman Catholic elementary schools which provided these schools with public school teachers, non-sectarian textbooks and other services. Although ostensibly this was a "dual enrollment" situation, the only children involved were parochial school children. A taxpayers' suit was brought in U.S. District Court to challenge the constitutionality of this arrangement. In May 1, 1973, a three-judge court held that the lease and "dual enrollment" agreement between a parochial school and the school district violated the first and fourteenth amendments by fostering an excessive entanglement with religion.[11] The court said:

> New Hampshire is in theory aiding "public schools." But creating mini-public schools within the bosom of parochial schools is merely a legalistic way of channelling direct financial aid to the latter on a broad front. A pupil attending the "Arlington Street Annex School" could have no doubt that his real school was Holy Infant. The School District's rental payments under the lease are, in fact, a direct financial subsidy to Holy Infant. While the District, in theory, receives a benefit (the leased premises), it holds them solely in order to confer further benefits upon Holy Infant. The lease payments amount to a pure gratuity which can be used by the parochial school for its own religious purposes.[12]

The court also made it a point to note that it was not ruling on the constitutionality of a program in which parochial school students would enroll part time in a normal public school.

[11] Americans United v. Paire, 359 F. Supp. 505 (D.N.H. 1973).
[12] *Id.* at 511.