The State of Education in Lakewood: Can Students in the Religious Community Access Education?

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Lakewood, New Jersey, is the fastest growing large town in the country. Of the 21,567 children registered in Lakewood schools, 75% attend private schools, saving the state almost $300 million. This leaves the burden of education upon Lakewood families, about 34% of which are below the poverty level.¹ Ninety-nine percent of township students in private schools attend yeshivas.² Yeshivas for boys generally do not provide a diploma and little or no secular education in high school, while schools for girls provide diplomas and a relatively more rigorous curriculum. Recent Supreme Court decisions regarding state funded vouchers, the charter movement, and alternate methods of delivering education, will potentially improve access to education for Lakewood students and help to alleviate the financial burden upon their parents and community.

Lakewood is unique in a way that few outsiders understand

The population of Lakewood according to the 2000 census was 60,350 whereas in 2010 the number increased to 92,843, a 54% increase over the decade. This growth is expected to continue, reaching 200,000 by 2030.³ Most of this increase is natural. The

¹ See http://www.factfinder.census.gov/servlet/STTable?-geo_id=06000US3402938550&-qr_name=ACS_2006_EST_G00_S1702&-ds_name=ACS_2006_EST_G00_
² As of October 15, 2009, there are 16,045 children living in Lakewood registered as attending private schools, of which 15,870 attend 63 different yeshivas. Numbers for private school students were obtained from the Lakewood School Board in compliance an Open Public Records Act request.
³ “Lakewood’s population is anticipated to increase by another 50,000 between 2010 and 2020 and yet another 80,000 between 2020 and 2030, for a total increase over the next two decades of 130,000
birthrate of 1,539 in 1995 increased to 3,746 in 2009 or 52.5 births per 1000. To put this number in perspective, in 2007, there were 4,092 births, or 17.1 per 1000, to mothers residing in Jersey City, and 4,832, or 13.4 per 1,000 in Newark. The impact of school improvement in Lakewood on the future of New Jersey is comparable to the efforts in Newark that has recently gained so much attention of the press. The constitutional issues and the facts that demanding justice for this multitude scale the educational problems of Newark or any place in our nation today.

Lakewood is the center of Talmudic learning in America, home to Beth Medrash Gevoah (The Yeshiva), the largest yeshiva in the world. The Yeshiva attracts young men from all over the world whom generally marry, settle, and rear large families in town. This makes for a very close-knit community with strong internal institutions. Members of the community insulate themselves from negative influences of the outside culture. Rabbinic courts, rather than courts of law, are used. Homes do not have television. Strict separation between the genders is maintained in community affairs and institutions. Boys and girls do not meet until they court for marriage. Profanity, slander and violence are rare. Only one child from the community attends the public high school, while the rest attend the many yeshivas. All children except the one, well over 16,000 attend these private religious schools, out of town yeshivas or no school at all due to a significant number of children who have dropped out of yeshiva.

The achievement of yeshiva boys in secular subjects (English) is substantially curtailed after the sixth grade, the age of which they begin intensive study of the Talmud


and are no longer taught English by women teachers. Although seventh and eighth graders have some English, the men teachers do not have the same training as the women. Yeshiva girls get a high school diploma and most attend teacher seminary for a year after high school. Boys usually do not get a high school diploma and do not attend teacher seminary. In some boys’ high schools, English is purportedly taught, but it is often treated with indifference.

The yeshiva school day starts at 7:30 am for prayers and lasts until about 5:00 for elementary school students and high school girls, and until 9:00pm for high school boys. All schools that teach English, do so in the afternoon; boys’ elementary schools start English about 2:30 and boys’ high schools, with few exceptions, at 4:00 or 5:00, an hour too late in the school day for a successful program. Some boys’ high schools dedicate only one hour to English, some two hours or more. Boys desiring a high school diploma after finishing twelfth grade have to take the General Educational Development (GED) assessment. This is extremely difficult, not because they cannot pass, but because of scheduling. Yeshiva students are skilled from years of rigorous Talmudic study in the thought processes needed for higher order learning, such as synthesis, analysis, and evaluation. The problem is that the Lakewood School Board does not provide a GED testing site. The closest site, in Monmouth County, is not set up to accommodate the yeshiva schedule, which boys continue in for many years after high school. Girls, on the other hand, get a fairly normal high school education, and also have higher order skills, as they too undergo a rigorous religious curriculum.

One of the only schools that issues a diploma for boys has English at 3:00-6:00. The Yeshiva has a policy, generally unenforced, of no English for boys after eighth
grade inside an area surrounding Lakewood (tachum). The above-mentioned school with the three-hour English program, in compliance with the Yeshiva policy, is located about twenty minutes outside of town. Students are bused from Lakewood every day to school and back home. They learn Algebra I, Geometry, biology, language arts, and social studies, but do not learn Algebra II, chemistry or physics. No homework is allowed and the subject matter is very light. Other schools with English have opened inside the tachum, most having weaker programs. No teachers are certified and most are unfamiliar with the core curricular standards.

Compulsory education in New Jersey

New Jersey compulsory education law requires that parents provide that their “child regularly attends the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.” N.J. Stat. Ann. §18A:38-25 (LEXIS through 2011). In State v. Massa, 95 N.J. Super 382 (Cty. Ct. 1967), the statute was interpreted to not require interaction with other children, upholding homeschooling, “requiring only equivalent academic instruction.” Id. at 390. In State v. Vaughn, 44 N.J. 142, (N.J. 1967), the New Jersey Supreme Court explained that if a child is not attending public school, the burden is on parents to bring evidence “from which it could be found that a child attends a day school in which equivalent instruction is given, or that the child is receiving equivalent instruction elsewhere than at school.” Id. at 147. The New Jersey Department of Education explains this as “evidence showing that they are relying on one of the two statutory
exceptions (day school or equivalent instruction elsewhere than at school).” Apparently
the department drops the “in which equivalent instruction is given” from the evidentiary
requirement of attendance in a day school. This is clear because the department
website maintains that the “law does not require or authorize the local board of
education to review and approve the curriculum or program of a child educated
elsewhere than at [public] school.” This has been the longstanding policy in New
Jersey. Notwithstanding this restricted interpretation of the New Jersey compulsory
education law, yeshiva parents are likely to be exempt from providing for English under
the United States Constitution.

Lakewood parents have the Yoder right of no English

A person has the substantive liberty “to marry, establish a home and bring up
children, to worship God according to the dictates of his own conscience . . .” Meyer v.
Neb., 262 U.S. 390, 399 (1923). Teaching children religion, and the maintenance of a
curriculum to serve that interest, is a fundamental parental right. Pierce v. Society of

5 http://www.state.nj.us/education/genfo/faq/faq_homeschool.htm
6 Id.
7 The Meyer Court compared the state proscribing the teaching of the German language in
private schools to Plato’s Guardians. Mr. Justice Holmes consistent with his other substantive
due process dissents viewed compulsory instruction in English within the competency of the
State. “The test is ‘whether, considering the end in view, the statute passes the bounds of reason
and assumes the character of a merely arbitrary fiat.’” Bartels v. Iowa, 262 U.S. 404, 412 (1923,
Holmes, J. dissenting, citations omitted). Holmes admitted, that the First Amendment right of
“free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view
of the scope that has been given to the word ‘liberty’ as there used . . . .” Gitlow v. New York,
268 U.S. 652, 672 (1925, Holmes, J., dissenting). The Court combined the Pierce First
Amendment right with the Meyer substantive right of parenting, “when the interests of
parenthood are combined with a free exercise claim . . . more than merely a ‘reasonable relation
to some purpose within the competency of the State’ is required.” Wisconsin v Yoder, 406 U.S.
205 (1972). Query- Would Holmes agree in Yoder?
Sisters, 268 U.S. 510, (1925), established the right of parents to send their children to private religious schools. Parental rights reached a pinnacle in Wisconsin v Yoder, 406 U.S. 205 (1972). Yoder restrained the state from forcing children in the Amish community to attend school after eighth grade. Compulsory education producing a population proficient in the skills and duties of citizenship is certainly in the interest of the state and well within its competency, but not as profound as the interest of the parent in passing religion to his or her child. The state could not force an Amish parent to educate his or her child, perhaps, even if the child wanted to go to school against the wishes of his parents. The State interest of educated citizenry, and even a child’s expressed interest in the State curriculum, might not overrule the religious interests of his or her parents, as it would “call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court’s past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom . . .” Id. at 231, 232.\(^8\)

Members of very few religious groups can assert the Yoder exemption from compulsory education laws. In Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987), parents of students in a private religious school objected to the necessity of certified teachers in their religious school, which unlike New Jersey, was required in Iowa, and the “equivalent instruction” part of the compulsory education law, which unlike in New Jersey, was enforced in Iowa. Unlike Yoder, several members of this religious

\(^8\) Mr. Justice Douglas dissented to clarify “if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.” Id. at 242 Mr. Justice Brennan and Mr. Justice Stewart agreed in their concurrences that if such was the case, parents might not prevail.
group sent their children to public schools. They owned radios and televisions. The federal circuit denied their exemption. This religious group was unlike whole Amish communities that lived in “distinct geographical areas of the state.” Id. at 496. The Amish were different because of their “very unique circumstances and their centuries-old insulated, isolated lifestyle.” Id. at 497. Nothing in the religious beliefs and goals of the Fellowship group differed from the goals of the state in secular education.

Several attributes of the Lakewood community, by contrast, are dispositive toward a constitutional right of parents to not teach English after eighth grade, or at least to minimize it. Lakewood is a close-knit distinct geographic community. The community eschews public school and discourages high school English “not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.” Yoder, 406 U.S at 216.

Lakewood yeshiva parents who believe in “only Torah,” follow a tradition spanning millennia rather than centuries. Amish parents “object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.” Id. at 210-11. The Yoder parents “believed that by sending their children to [public] high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.” Id. at 209. The Yoder community, on the other hand, “provide[d] what has been characterized by the undisputed testimony of expert educators as an ‘ideal’ vocational education for their children in the adolescent years.”
Lakewood parents objecting to English after eighth grade do so as part of a communitywide project. Public schools would expose their children to the pressures of premarital relations, dating, profanity, children who watch movies and television, Internet, ethnic prejudice, and non-kosher food. Few parents will risk these harms to their child and subsequent community condemnation. Indeed, community activists will try to get the child out of public school and into a yeshiva. Also, Lakewood parents do not cease providing for education of their children after eighth grade, but maintain them in study of Torah as long as possible, developing their intellectual, practical, and social skills for life in the community and on the outside.

The rock and a hard place

Some parents want their children to access educational opportunity. These parents are caught between the prerogative of the community to reject English education and the right of the child to receive an education. Although *Yoder* was decided on the right of parents, that right was derived from the religious practices of a community as a whole. Without the tradition and collective support, *Yoder* probably would have come out differently. Thus, parents who want educational opportunity for their children are caught between the proverbial rock and hard place, the rock being the constitutional “right” of the community, and the hard place, being the impossibility and undesirability of sending their children to the public schools. These parents are on their own providing education to their children because no matter to which yeshiva they send their children and no matter how much they are willing to spend, they have no access to genuine education.
The numerous yeshivas of Lakewood form an interest group whose political recommendations control the outcome of public school board elections. As expected, the Lakewood public school district (the district) responds when yeshiva administrators request materials or assistance. Individual parents have a harder time getting requests filled. For example, yeshivas do not provide SAT applications, individuals cannot order them, and the district does not order more than needed for public school students.\(^9\)

The cooperation between public school administrators and private school administration is not self-preservation, as yeshiva people form a majority on the school board, as much as it connotes a flawed, stereotypical conception of yeshiva community members. It is curious that a nation built upon the fundamental worth of the individual views the religious individual without any individuality. When many religious people have a particular trait, “they all do.” When the collective does not ask for it, then “nobody needs it.”\(^10\) The district fails to understand that educational opportunity is the right of the individual, not of the community. This should be obvious to the very officers charged by the state with the solemn duty to facilitate education, especially in Lakewood, where numerous obstacles against English education confront children and parents.

The law today

\(^9\) CollegeBoard only provides applications to schools. Lakewood High School, with about 1,100 students, ran out of forms before this author could obtain one for his daughter, not realizing that perhaps a few hundred of the 16,000 students who have no access to the forms might need them.

\(^{10}\) This author, a teacher in Lakewood High School, often hears students saying “the Jews are all rich” and their schools “get all the money.” The reality is that many yeshivas are housed in dilapidated single-family homes in tight quarters holding about 100 students on small properties. Other yeshivas are located in the Industrial Park. Students have no ball field and play among parked cars in the parking lot. 70% of yeshiva children receive reduced or free lunches.
Public schools are state actors and cannot discriminate over religion and viewpoint. Students in public schools enjoy the First Amendment right of viewpoint and religious expression subject to the disciplinary and pedagogic authority of the school to restrict the time, place and manner of the speech and the content of curriculum. Private schools are not state actors and enjoy their own first amendment freedom of association and expression. See Dale v. Boy Scouts of America, 530 U.S. 640 (2000). Students in private schools enjoy no speech rights under the United States Constitution, but enjoy them under the New Jersey Constitution. See State v. Schmid, 423 A.2d 615, 630 (N.J. 1980, members of the public have right to speak on Princeton University private property). The religious school’s United States First Amendment expressive right of association trumps the student’s freedom of expression under the state constitution.

The state can help bring educational opportunity to students in religious schools by authorizing vouchers, charter schools and dual education services. The most immediate improvement in the education of yeshiva children will come about through regulations pertaining to school voucher programs. Vouchers will challenge the exemption private schools in New Jersey have enjoyed from providing an equivalent education. Private school recipient of student vouchers have to administer the state standardized assessment. Yeshivas receiving voucher aid will have to initiate authentic programs of English education, teach to the state’s core curriculum, and will be accountable for the quality and content of its mathematics, language arts and science courses. New Jersey is moving to benchmark assessments and end of course tests like the New York regents, as next year will see the last of the High School Proficiency Assessment (HSPA).
The test for establishment clause violations is the three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court asks if appropriations that aid religious schools have 1) the primary effect of advancing or inhibiting religion 2) a secular purpose and 3) it makes an entanglement between the state and religion. Many concluded that *Agosini v. Felton*, 521 U.S. 203 (1997) “folded the entanglement inquiry into the primary effect inquiry.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002, Justice O’Connor concurring). The *Lemon* test is and will continue to be an important tool to evaluate direct aid of school wide services to private schools.

Governor Corzine’s Study Commission on New Jersey’s Nonpublic Schools reported a recommendation that “providing math teachers for nonpublic schools via third party providers . . . [would] eliminate any concern about the inclusion of religion in the mathematics classroom.” ¹¹ Third party providers paid by the state, say a local company founded to get government money, is thought by the Governor’s Commission to be constitutionally preferable to a real public school teacher in religious schools. Has it read *Agostini*? The *Agostini* decision of 1997 allows public school teachers to offer supplemental instruction in religious schools. “[T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination. . . .” *Id.* at 226. This ended the need for trailers outside the school. The Court rejected the notion that “any public employee who works on the premises of a religious school is presumed to inculcate religion in her work” and

“the presence of public employees on private school premises creates a symbolic union between church and state.” *Id.* at 222. Public school teachers, who are sworn or affirmed to uphold the constitution of the United States, disciplined by his or her profession and our nation’s schools of education, and accountable to the state, do not need “pervasive monitoring by public authorities.” *Id.* at 221 By contrast, if the state follows the recommendation of the commission and appropriates the unschooled, unaccountable, and uncertified, third party instructors, typical of secular instruction in many religious schools and permissible under Title I, rather than assigning authentic veterans of instruction under the state curriculum from the public schools, new vitality can be forged into *Lemon’s* third prong.

The trend of charter and voucher legislation indicates that the Roberts Court, already perhaps the “First Amendment Court,” will use a variant of the primary effects prong. The Court will inquire whether religious school aid 1) is the result of private choice, 2) applies to a broad class, and whether 3) it has a secular purpose. This test comes out of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld an Ohio voucher program, even though it indirectly advanced religion enabling the vast majority of the recipients to enroll in religious schools. Some, including this author, expected the plan to fail under the third prong of *Lemon* test, or under its folded primary effects prong, because religious and “secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state.” *Id.* at 691 (J. Stevens dissenting). Three years earlier, a plurality of the Court in *Mitchel v. Helms*, 530 U.S. 793 (1999) upheld the loan of computers and materials to religious schools, “So long as
the governmental aid is not itself ‘unsuitable for use in the public schools because of religious content,’ and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.” Id. at 820. But failing to achieve a majority on the Court, the law coming out of Mitchel seemed to be in accord with the concurrence, “that actual diversion of secular aid by a religious school to the advancement of its religious mission is [not] permissible.” Id. at 837, (O’Connor J. concurring). Vouchers provide salaries for teacher who can indoctrinate in ways that computers and materials cannot. More significantly, voucher statutes do not require that eligible schools restrict the state aid they receive to expenditures for the English program. Aid is actually diverted to religious use. “There is simply no line that can be drawn between the instruction paid for at taxpayers’ expense and the instruction in any subject that is not identified as formally religious.” Agosini, 521 U.S. at 246 (J. Souter dissenting). So can computers and materials be diverted? Can third party providers sent to a school for a secular purpose teach religion?

Genuine choice, choice by default, and per capita aid

The Court characterized Agostini, Mitchel and Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, (1993) as the product of choice that follows the student, rather than per capita aid to the school. Zobrest upheld the provision of a publicly employed sign language interpreter for a deaf student, James Zobrest, while attending a Catholic school, under the Individuals with Disabilities Educational Act (IDEA). Choice is prominent in all three cases, but each case restricts the use of public aid in ways that
vouchers do not. The Zobrest interpreter could not add initiate sectarian indoctrination.

“Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole.” Zobrest, 509 U.S. at 13. The Mitchel computers and materials, according to the concurrence, could not be diverted to sectarian purposes. The Agostini teachers could not teach courses that the school was already providing "reliev[ing] sectarian schools of costs they otherwise would have borne in educating their students." 521 U.S. at 228 (citing Zobrest, 509 U.S. at 12 nt. 11.).

The Mitchel Court “saw no difference in Zobrest between the government hiring the interpreter directly and the government providing funds to the parents who then would hire the interpreter.” 530 U.S. at 817 (citing 509 U.S. at 13, n11).” But, the law has to turn on this distinction. Note 11 in Zobrest says, both sides admitted that there would not be a violation of the “Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the interpreter themselves. ‘If such were the case, then the sign language interpreter would be the student’s employee, not the School District’s, and governmental involvement in the enterprise would end with the disbursement of funds.’” (Internal citations omitted). When the government hires the interpreter, funds the school to hire one, or sends a public employee interpreter, to aid a student by name wherever he or she is, then we have what we will call choice by default. If the parents hire the interpreter, then we have genuine choice

Who owns the service has to be the most important factor. If the state sends its teacher, interpreter, computer or material, the imprimatur of the state is on the teacher, interpreter, computer or material. Diversion becomes problematic if instruction and
material are used for sectarian purposes and if the school is relieved of “costs they
otherwise would have borne in educating their students.” This is choice by default. If the
funds are sent to the school for the acquisition of services by third party providers, at
best, the imprimatur of the state is upon the school acting as agent of the state, and
thereupon the teacher, interpreter and materials. At worse, the school takes the funds in
its own capacity, which is a violation of the Establishment Clause per se. Besides
diversion, the third *Lemon* prong of entanglement becomes problematic because a line
has to be drawn between school acting in its own capacity, and the school acting as an
agent of the state.

Genuine choice in *Zelman* is when the parent hires the teacher, interpreter,
computer or material. The state is out of the picture. The parent does not act as an
agent of the state but acts in his or her own capacity. The reception of voucher funds is
“no different from a State's issuing a paycheck to one of its employees, knowing that the
employee would donate part or all of the check to a religious institution.” *Michel*, 521
U.S.at 226. No inquiry over diversion or entanglement is needed. “The incidental
advancement of a religious mission, or the perceived endorsement of a religious
message, is reasonably attributable to the individual recipient, not to the government,
whose role ends with the disbursement of benefits.” *Zelman*, 536 U.S. 652. The primary
effects test of *Lemon* is closed when the choice is such that the parent directs the aid.

The *Lemon* test thus serves as the background for the *Zelman* factors. The
*Zelman* factors ask if 1) the aid is result of choice, 2) the eligibility criterion applies to a
broad class of students, and 3) the purpose of the aid is secular. If the choice is such
that the parent has complete control over the aid, or genuine choice, as when they hire
a school under a voucher plan, then the aid does not carry the imprimatur of the state and the Zelman factors alone satisfy the Lemon test. Teachers provide for education in as agents of the parents. Indoctrination comes from the choice of the parents. The agency of the parents is sufficient. If what is meant by choice is simply that the aid follows the student, or choice by default, such as federal funding that provides aid to the school that the student attends, then the aid carries the imprimatur of the state, and further inquiry into primary effects is needed. Public school teachers and third party providers of Title I and Title II provide services as agents of the state. Choice in this case means that the named student is the beneficiary. The state reaches the students wherever they are located. Since the agent is the state, the benefit of the named student is not sufficient if the school more than incidentally benefits. Lemon inquiry recognizes that the student is provided the aid regardless of institution, so that the student is the beneficiary of the aid rather than the school. To prevent benefit to the school, aid cannot replace a service that a school otherwise performs. The aid cannot be diverted. The state cannot become entangled with the school in monitoring compliance.

If the aid is not the result of choice at all, but per capita allocation, then the aid reaches the student only by virtue of attendance in the school. The teacher or provider is still the state or its agent, but the beneficiary is now the named school. Then the mere possibility of diversion is a constitutional bar. Lemon was such as case. Lemon overturned a statute that provided for direct payment and another statute that provided reimbursement for teachers of secular subjects in sectarian schools. Teachers “have a substantially different ideological character from books. In terms of potential for
involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not.” Lemon, 403 U.S. at 616. The Lemon Court worried over “the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.” The absence of choice does not bar all aid, but the beneficiary of the school bars aid that can be diverted to indoctrination.

Even a statute providing genuine choice has to benefit a broad class to be neutral. When its provisions apply to a broad class, then its constitutionality does “not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.” Zelman, 536 U.S. at 658. A statute would apply to a narrow class, if for example, the state excluded vouchers from students in public schools since they already were getting free education, or if it excluded vouchers from being used for attending an out-of-district public school. Then evidence of large numbers of beneficiaries choosing religious schools, rejected in Zelman, can be dispositive of the primary effect of the advancement of religion. The pending New Jersey Opportunity Scholarship Act applies to a broad class, all children in a geographic area below a certain income. It reserves the majority of voucher aid for students currently enrolled in public schools and enables any recipient to attend an out-of-district public school or a private school.

The result of ACSTO v. Winn
The New Jersey act will be immune from constitutional challenge for some time. The Court will not hear complaints by taxpayers or Establishment Clause advocates against plans that provide funding through tax credits or deductions. Last month, the Supreme Court decided in *Arizona Christian School Tuition Organization v. Winn* 131 S. Ct. 1436 (2011), that although a taxpayer has standing to claim appropriations out of the treasury violate the Establishment Clause, the taxpayer does not have standing to challenge the same violation when funded by tax credits. A taxpayer suffered no harm, and thus cannot complain that the plan is unconstitutional. A tax credit is not directly attributable to the state treasury so a taxpayer will not be heard to claim that his dollar was used to support religion not his own. The New Jersey Plan will initially fund vouchers through corporate donations credited against the corporation’s state business tax.

A student, on the other hand, will have standing in federal court to complain that the First Amendment is violated by the New Jersey voucher plan. A student can also complain in state court that his school does not teach to the New Jersey core curriculum standards or that it discriminated against him on a “basis that would be illegal if used by a school district.” Ass. 2810. 214th Sess. (N.J. 2010). The standardized assessment requirement in the bill will provide data to the state Department of Education, putting teeth into the compulsory education law, perhaps authorizing the department and the courts to hold school accountable for education “equivalent to that provided in the public

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12 see ש"ח ת"ה מ"ה"ו מ"ה"ו המ"ה ק"ה (1519) A Jewish person is not considered supporting the church by paying taxes originally imposed according to state customs and laws that later are diverted to the church. If on the merits, the Supreme Court were to find a violation of the Establishment Clause, dollars raised by the state for that violation would not be in its legitimate possession but illegitimately taken from the taxpayer and given to a religion not his own without the proper intermediacy of government. This is harm giving rise to standing.
schools.” A yeshiva subject to a discrimination claim will fare better, answering that its policy requires Talmudic proficiency, as schools can limit “admission to particular grade level or to areas of concentration at the school . . .” Id.

Gender discrimination and the religious exemption when hiring teachers

Schools receiving federal money have a religious exemption from Title VII employment discrimination. Section 702 exempts religious entities from discrimination “connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C 2000e-1 (LEXIS through 2011). Congress did not want to make hiring clergymen or teachers of other persuasions a condition of accepting federal money. Congress also excluded religious entities from retaining employees who violate religious doctrine. See Boyd Harding Academy of Memphis, 88 F.3d 410, 6th Cir. 1996 for consistent policy against fornication. If Congress intended not to force religious groups from compromising their faith by having employees of a different faith and intended not to force religious groups from compromising their faith by having employees who violate moral values ingrained in the faith, then Congress also intended not to force religions from compromising their faith by violating the moral values ingrained in the faith. Yeshivas need not be weary of attempting to hire real teachers by advertising in public schools for either a male or female teacher. The yeshiva community maintains strict religious separation of the genders for reasons of chastity engrained in the religion.

Yeshivas that do not accept federal money need not make this argument. A yeshiva is a non-diverse association of coreligionist, the mission of which is the study
and observance of all matters of religious practice. This claim will protect yeshivas from New Jersey discrimination law. *Roberts v. United States Jaycees*, 468 U.S. 60 is entirely dispositive. The First Amendment right of association did not protect the Jaycees from Minnesota gender discrimination law because the Jaycees often held meetings with women in attendance but did not admit them as members. The “local chapters of the Jaycees are large and basically unselective.” *Id* at 609. On the other hand, *Dale v. Boy Scouts*, 530 U.S. 640 (2000), which protected the Boy Scouts from New Jersey discrimination law, will no longer protect a yeshiva from application of state discrimination law once it accepts state voucher money. There is no religious exclusion in the state funding law.

The New Jersey program promises $9,000 per child. This will fundamentally restructure the operations of eligible schools. Unlike government aid that provides only secular studies, for which many Lakewood yeshivas are indifferent, vouchers cover the whole cost of both Hebrew and English. Once the program becomes permanent, schools will become more dependent upon the government spending and “government largesse brings government regulation.” *Lee v. Weisman*, 505 U.S. 577, 608, (1992) (Blackmun, J., concurring). When “government aid goes up, so does reliance on it; the only thing likely to go down is independence.” *Zelman*, 536 at 715 (Souter, J. dissenting).

**Dual education**

In making its recommendation, “First and foremost, the [Governor’s] Commission recognizes the state’s responsibility to provide a ‘thorough and efficient’ education for all
New Jersey students. To that end, the Commission recommends that any constitutionally viable programs or resources that are made available for New Jersey’s public school students in future budgets, also be made available to New Jersey’s nonpublic school students.” 13 This is not first and foremost, but last and plainly wrong. The Education Clause says, "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. Art. VIII, §4, P1. The state constitution only “guarantees a thorough and efficient educational opportunity to all children in the State who attend public schools.” Abbott by Abbott v. Burke, 153 N.J. 480, 531 (1998). The “thorough and efficient” clause does not guarantee education to children in private schools. The compulsory education statute does not even do that. The “thorough and efficient” clause does not even guarantee education in public schools for private school or homeschooled children for part-time access to courses and activities.

The Homeschooling FAQs page on the State Department of Education website maintains that a “board of education may, but is not required by law to, allow a child educated elsewhere than at school to participate in curricular and extracurricular activities or sports activities.” 14 That a district may, if it chooses, allow access to extracurricular activities follows Alpert v. Wachtung, 13 N.J.A.R. 110, 118 (1986). A “public school district may allow non public school students to take part in extra curricular activities but does not have to let them participate.” The state education department departed from Alpert, its own administrative decision, when it posted, “But is

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13 Governor’s Commission Report, 17
14 http://www.state.nj.us/education/genfo/faq/faq_homeschool.htm
not required by law” to allow part-time access to curricular activities. “So far as this judge knows, it has never been judicially suggested that the exercise of the basic right to forgo a public education in favor of equivalent instruction precludes a person of availing himself of any state supported educational service or facility.” Alpert distinguished dual education, or curricular activities from extra curricular activity. Nonetheless the department website, on the Homeschooling FAQs page, follows the law of a majority of states. There is no “right to a free part-time public education.” Swanson v. Guthrie Independent School District, 942 F. Supp. 511, 515 (W.D. Okl. 1996). Only Michigan has mandated the right for a homeschooled or private school student to access a course offered to public school children. See Snyder v. State, 421 Mich. 517 (1985). So, the New Jersey constitution certainly does not provide the responsibility for supporting access to education in the private school, it does not even provide for student access to education in its public schools.15

Dual education, or part-time access to public education, albeit, not a constitutional right, is the second most important means for yeshiva students to access education. The Establishment Clause does not bar and the Free Exercise Clause does not mandate core curricular courses, GEDs, drivers’ education courses, physical educational and technical courses, after school hours to accommodate yeshiva

15 Two or three years ago this author learned first hand of the ineptitude of some members of the governors commission when I received a mass mailing, seemingly written by a school child who had not yet taken high school history or civics, but indeed written by a grownup member of the commission, rampant with hyperbole, generalizations, and without citation of sources, claiming that New Jersey public schools are mistakenly commended, and are not really good. He accused one high school of a having a 90% dropout rate but did not report its name or district. This misinformation was disseminated about the same time that I complained to the English principal of my son’s non-public school that his American history teacher taught from Rush Limbaugh (a radio entertainer with a degree in broadcasting rather than knowledge in the field, that comes from academic study, historic research and peer review). He replied, “What’s wrong with that?”
students. Government has discretion in the area between the two clauses, the First Amendment’s “play in the joints.” *Locke v. Davey,* 540 U.S. 712, 718 (2004). *Locke* found no Free Exercise violation when a state excludes its college scholarship funds from religious use, even as a result of genuine private choice, while *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481 (1986) found no Establishment Clause violation when a state allows the same. This is “the play in the joints.”

The Lakewood Board of Education can immediately allow access to yeshiva children for credit recovery for courses that the student either failed or never was offered. The district has already paid $300 a seat for 500 students to access the APEX course online while only 133 students use it. Yet, the assistant superintendent has denied an email and oral request for that APEX opportunity in mathematics, claiming that somebody has to be assigned to the job. The Lakewood High School APEX mathematics courses are wholly automated, albeit under the supervision of a math teacher consistent with state rules, and the addition of math students involves no extra work. A properly registered part-time student for the course is consistent with the APEX contract that bars third party access. Currently 267 positions that can be used by our children to gain authentic high school credit in almost all the courses at Lakewood High School remain empty until the expiration of the APEX contract in the summer of 2011, even though the seats were already paid for. School leaders should know, but do know because their children do not grow up in Lakewood, and do not have the same limited opportunities, that thousands of children whose parents are paying their salaries, and pay almost whole of the public school expense relative to the state, are not even given access to education by the district when requested. APEX is the first and only chance
for genuine credit ever available to our children. Lakewood administrators should be inspiring and perspiring over how they, the representatives of their profession, can bring education to this multitude.

A yeshiva child can spend as little as a week or two in the public library, under parental supervision two hours a day, or a couple of hours per week on Friday afternoons, and gain full credit for geometry, or even Algebra II, a course that is not even offered at one of our best girls’ high schools, Bais Kaila. A parent can block all Internet sites except APEX by setting the computer proxy server address to the loopback address 127.0.0.1 so that all connections beside APEX are rerouted to the student computer. Most or our boys’ high schools do not make any serious attempt to teach Algebra I or Geometry, or any high school course for that matter, all of which are offered on APEX, many of which are fully automated.

The previously assistant superintendent, who actually lived in Lakewood twenty years ago, told this author, that access to education for yeshiva children is a community issue and not a public issue. But school leaders more reasonably should recognize the interest of individual children to access education by request, rather than block it by the default of the individual schools. The Board of Education does not have to wait for a political request in order to make education available to the parent that requests it. There are hundreds, if not thousands of children, who have dropped out of yeshiva, and are barred access to education. Many of these students have fallen by waysides of their community, but desire the opportunity to get a high school education. Like the Negro

child of old, the Jewish child of Lakewood today, is de facto excluded from the town public school, but the school is de jure open to him if only he would register full-time. Over and over again, district educators say, “it is a matter of choice.” This is entirely false. It is patronizing. It downplays the significance of the fact that out of perhaps 20,000 Lakewood yeshiva children, only one goes to Lakewood High School, and he no longer wears his yarmulke. There is no choice when your neighbor, your grocer, and your politician, the whole town community, not only sends all of its children to private schools, but most have never met or interacted with a public school child. The African American child’s opportunity for education was barred because of whom he or she was; the Lakewood child is barred from education because of to whom he or she belongs. Nothing will be solved, nay, the problem is not even admitted, by the indifference and prejudice of Lakewood implied by “it is a matter of choice.” No Lakewood family has ever been confronted with the decision of choosing whether to send a child to public or private schools. The only decision is which yeshiva to send the child. The situation in Lakewood, with respect to this official indifference, comes as close as anything today to the inexorable zero of disparate impact, if not invidious discrimination.17

Charter Schools

The market solutions to education dates back to Milton Friedman seminal work, Capitalism and Freedom. “Indeed, a major aim of the liberal is to leave the ethical

17For the inexorable zero, see Int'l Bhd. of Teamsters v. United States, 431 U.S. 324. For. This author was initially rejected from teaching in Lakewood High School in 2003 because it was assumed that a yeshiva person could not interact with females. He remained the only member of the Lakewood community in the high school for several years after breaking the religious barrier. A friend of the wife of this author applied for employment in the transportation office during that time period and was asked, “Whose side are you going to be on, their side or ours?”
problem to the individual to wrestle with.” Friedman popularized school vouchers as “a means to make a transition from a government to a market system.” A “major aim of the liberal is to leave the ethical problem to the individual to wrestle with.” And why not market solutions, after all, do we not only care about mathematics and science so that American children can compete in the international market, while history and civics have fallen by the wayside?

Americans need to beware that the private market is the mediator of private wants and desires not ideas and beliefs. “Why should we believe that the right policy goal is the one that satisfies only the self-interested preferences of consumers? Why should we not take into account the community regarding values that individuals seek through the political process as well?” Public schools were established because people would not pay on their own to teach their children the duties of citizenship, so essential to the survival of the republic. Burke, the father of conservative thought, described any nation, as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”

This not only applies to moral values and laws, but to education as well. A nation is what it is, because it knows what it was. Can a single generation discard the values, the traditions, and the nation of their parents?

The market solution to education does not even work when people are ready and

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willing to pay. No matter how much a parent in Lakewood wants their child to receive a quality education, no matter how much a school has promised it, the market has not produced a single school that teaches four years of English; World history, American history and government; biology, chemistry and physics; and Algebra I and II and geometry. This is the norm for a public high school student. Certainly, no school offers calculus or pre-calculus. Yet, the allure of the market and its invisible hand has not failed to gain the attention of the Court when dealing with education. In *Allen v. Wright*, 468 U.S. 737 (1984), African American taxpayers were denied standing because their complaint could not be redressed even if they would win on the merits to force the IRS to revoke the tax-exempt status of all white private schools. There was no evidence that the white schools would close down without tax deductibility, which would allegedly cause the public schools to become more integrated, the lack of which was their alleged harm. The dissent made a “restatement of elementary economics: when something becomes more expensive, less of it will be purchased. . . . If racially discriminatory private schools lose the ‘cash grants’ that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased.” *Id.* at 788, nt.5 (Stevens, J. dissenting). Is this really true when dealing with education? No matter how much a family in Lakewood will have to pay for tuition, every single family still sends all of their children to private schools. And the market has not worked in Lakewood to bring English education.

Charter schools have become the darling of corporate America as taxpayers with disposable income found a win-win advantage in the New Markets Tax Credit under 26 U.S.C. § 45D (LEXIS through 2011). Business and individuals that invest with a
qualified community development entity that funds a charter school in a low-income area receive a tax credit for up to 39% of the investment as long as they do not cash out for seven years. After seven years, they can cash out with profits and keep the credit. New Jersey law on the other hand, provides that entities that invest in charter schools “shall not realize a net profit from its operation of a charter school.” N.J. Stat. Ann. 18A:36A-4 (LEXIS through 2011). This does not mean that the entity cannot charge interest over the seven years, and together with the tax credit, effectively return a 100% profit to investors.

Although charters may be a panacea to the high-income taxpayer, brick and mortar charters will do little to bring education to Lakewood. Charter schools are public school. Just as members of the Lakewood community spurn pubic schools so not to mix with the general population, they will spurn charters. Conceivably, though, a Yiddish culture school, in which instruction is in Yiddish can open, just as an Israel culture school has already been chartered and opened in New Jersey. A charter school cannot discriminate on “the same basis that would be illegal if used by a school district; however, a charter school may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts.” Id. at 18A:36A-7. This is the same language as the pending voucher statute that has so much support in Lakewood. The difference is that charters are “deemed to be public agents. . . “ Id. at 18A:36A-3 The per capita funding scheme of charters forecloses a Zelman argument of genuine choice and the statutory status as a public school in New Jersey, forecloses the possibility of even voluntary religious classes.
Conceivably, the charter school can be located in a yeshiva building and open during afternoon hours, under separate management, enrolling the same students. New Jersey charters, unlike voucher schools, “operate in accordance with its charter and the provisions of law and regulation which govern other public schools.” Id. at 18A:36A-11. A majority of time can be set for religious studies, reserving, say, 2:00-6:30, as school hours for core curriculum and physical education, as the regulations require that a “school day shall consist of not less than four hours of actual instruction.” N.J. Stat. Ann. § 6A:32-8.3(b) (LEXIS through 2011).

Charter schools have flexibility in matters of curriculum. A charter can open with separate boys’ and girls’ campuses. The Commissioner of Education charters the school, rather than the local educational agency, so the charter may be considered single educational agency under Federal Department of Education regulations. A “public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school. . . .” C.F.R. §106.34(b)\(^2\) Even a regular public school can be single gender school if “students of the excluded sex a substantially equal single-sex school or coeducational school.” Id.

A school chartered to yeshiva parents and educators serving Lakewood children can maintain dual sites, one in Lakewood and one in Belmar or some place, open during afternoon hours, assuming many yeshiva students will want to learn English outside the Lakewood tachum, while allowing other students the option of attending school in Lakewood for their convenience. Or a charter can open in Lakewood, under a special exception to the tachum rule and as a sensible solution for the hundreds of

\(^2\) Federal Register /Vol. 71, No. 206 /Wednesday, October 25, 2006 /Rules and Regulations 62543
children who have dropped out of yeshiva and have no educational opportunity or structure, yet desire English education, while maintaining a strict separation between boys and girls.

A more interesting alternative is an online charter school. The New Jersey Virtual Charter School (NJVCS) will be established to serve 17-19 high school dropouts and will begin enrollment some time in 2012. This school plans on outsourcing some business services and instruction to the Monmouth-Ocean Educational Services Commission (MOESC), which has offered its online services to youth in juvenile detention facilities. The Rutgers Institute for Improving Student Achievement has partnered with NJVCS to provide student management services.\textsuperscript{24} As soon as next year, seats for 150 students will be open for students in various counties, including Ocean. NJVCS students will be provided with a laptop and complete coursework online at any place, and meet with teachers at a central location once a week. The budget calls for $1,870,786 of expenditures while the 150 students will bring in $1,789,150 from various government aid plus a $200,000 loan from MOESC. Students are required to participate a minimum of fours hours a day, the minimum amount of school day under state department regulations. Institutions donating use of their building can take a tax deduction for the value of that use and while contributing to education.

A group from Lakewood can form a board of trustees to get a similar charter tailored to the needs of Lakewood children. The charter school can supply laptops to students with mobile Internet connections that are dedicated to the school site to

\textsuperscript{24} source: \textit{New Jersey Virtual Charter School Application} binder, given to this author by Timothy Nogueira, Superintendent of MOESC and NJVCS lead founder.
prevent unsupervised Internet browsing.\textsuperscript{25} The program cannot be completely automated by law, and at least one certified teacher of each subject has to run it. “Distance learning and other techniques, if employed to supplement academic instruction provided by certified teachers, are appropriate. The State Board of Education has declared that these mechanisms may not supplant a properly certified teacher.” *Neptune Township Educational Association v. Neptune Township Board of Education*, OAL DKT. NO. EDU 392-99. Assignment of licensed New Jersey teachers pursuant to N.J. Stat. Ann. §18A:27-2 (LEXIS through 2011) can spend “live” time with students online and to supervise student progress. They do not need to meet with students in person. Considering that the average teacher might make $62,000 a year plus $18,000 in benefits to teach five classes a day and that a part-time virtual teacher can be hired for about $5,1000 per class for a total of $25,500 for five classes, while receiving full funding like a public school, the virtual charter school is a financially viable option. Schools having difficulty finding certified teachers can outsource instruction like NJVCS.

**Public school teachers**

Vouchers and charter schools will increase educational access, but the most authentic and best education, usually comes about through the instruction of public school teachers, who firmly believe that all students can learn, which is all about opportunity and inclusion. To be a public school teacher means to give every student

\textsuperscript{25} On a Windows computer, set up an administrator account, and logon as administrator. Go to Internet Explorer, tools, Internet Options, Connections, LAN settings, click a check on Proxy server, type in address 127.0.0.1 and Port 80. This will reroute all communications right back to the computer being used, blocking all websites. Click Advanced. In the Exceptions box click the only sites that the administrator wants the student to access.
the chance to succeed. It shows the willingness to accept every student put into your school and into your classroom. It means not to predict the achievement of a child by subjective and vague impressions of motivation and attitude, but by objective assessments conforming to articulated standards. It means to exclude no child from a school or classroom for behavioral temperament short of actions manifest in violation of clear and written rules of conduct. This is the service with which the public and community have solemnly entrust in the public school teacher. Anything less is not in the interest of the child and not in the interest of the nation.

Similar plans as the mentioned charter school can be implemented by the school district through an alternate program. It can run a virtual school direct to students wherever they are located, supervised by a public school teacher, or conduct a complete English program in a public school during afternoon hours. This also could serve children at risk who desperately need structure. District teachers and administrators are representative of the educational leaders of our nation. They have to reflect and instruct, facilitate and advocate, to generate educational opportunity.

The district can educate private school leaders through community outreach about the New Jersey curricular standards, professional practices, and explain the necessity of written policies, due process and accountability. The district can and should end third party provision of special education services utilizing its public employees. The district can send real public school teachers to yeshiva under Agostini to provide Chapter 192 remedial services to private school students. see N.J. Stat. Ann. §18A:46A-1 et seq. The district can provide GED testing and a SAT preparation course, separate male and female classes, and professional development and certification for
private school teachers who desire it, so that they too can advance in their profession.

The district should post notice in the yeshiva newspapers to publicize matters of interest to educators of both Hebrew and English, and although the district may not require residency for teachers under N.J. Stat. Ann. §18A:26-1.1, it should aggressively recruit yeshiva people, who are a community of learners, for district employment. The salary paid to a Lakewood resident stays in Lakewood. 26

State aid to Lakewood

To get a handle on the magnitude of the burden for which the Lakewood citizen carries, follow this thought experiment. Imagine that every school child on record in the central office was counted by the state. 27 By taking note about how this changes the financial balances of the district, we can speculate about the cost that Lakewood families bear in sending their children to school and evaluate the justice of the formula. Using the dollar figures in the 2009-10 district state aid profile and 2010-11 numbers, adding the 16,045 private school children to the 5,422 public school children totals 21,467. 28 The base cost would go up to $212,292,000 (21,467 X about $10,000).

26 Ultimately the district can tap into the Grant Program for School Facilities Projects in Regular Operating Districts (RODs) to cover forty percent of the cost of building a state of the art new high school and middle school campus, the rest financed by the selling the Somerset campuses, on land donated by the township, to serve public school children in the morning and yeshiva children in the afternoon, with two kitchens, one leased for kosher use, a commons area large enough to rent for weddings, providing tens of thousands of dollars per year to Lakewood students for the acquisitions of new computers, touch-screens, group work electronic systems, alternate educational programs, online courses, advanced calculators and durable goods.

27 The official numbers used in this paper did not use a full count of all yeshiva children. An individual child has infinite worth and cannot be reduced to number. A fully accurate and complete community census violates tenets of the Jewish faith.

28 2009-10 State aid profiles can be found at: http://www.state.nj.us/education/sff/profiles/0910/dist/29.PDF
Multiply that by \( 0.9424 \) = $200,063,981. At risk students are those eligible for Title I free or reduced lunch.\(^{29}\) The public schools have 4,209 Title I students and the private schools have 11,184 Title I students. Multiply the total of 15,393 Title I students times $10,000 is $153,393,000. That is multiplied by the at risk weight of 0.57 to $87,434,010.

Special education is assumed to be 14.69% of 21,467 students, or 3,154 students.

Special education and speech is \((21,467 \times 0.1469 \times $11,262 \times 2/3 \times 0.9424) + (21,467 \times 0.01897 \times $1,118 \times 0.9424)\) = $22,312,784 + $429,058 = $22,741,842. Add at risk cost, special education and speech cost to the base, leaving out limited English proficient students for which data lacking, brings the total cost to $310,239,813.

Subtract the local fair share of $61,956,724, and we would get $248,283,109 of equalization aid. The categorical aid for special education is 3,154 \times $11,262 \times 1/3 \times 0.9424 = $11,158,125. Security aid is base on at total population and at risk \([(21,467 \times 72) + (15,393 \times 420)] \times 0.94241 = $8,010,684. Add security aid and transportation aid of $5,936,131 to the equalization aid, bringing the total 2009-10 using the 2011 count funding to $273,388,049. This is almost a whole order of magnitude more than the uncapped $33,619,687 aid for 2010-11 and a 1,063% increase over the actual amount, $25,750,007, provided for 2009-10.\(^{30}\)

The formula that the state uses is questionable in the case of Lakewood because it is based on 14.69% of the public school enrollment of 5,422, which produces an unreasonable estimate of special education students. The school board provides

\[^{29}\text{See A Formula for Success: All Children, All Communities, NJ Dept. of Ed., 12 (2007) found at: http://www.state.nj.us/education/sff/reports/AllChildrenAllCommunities.pdf}\]

\[^{30}\text{http://www.state.nj.us/education/stateaid/1112/district.pdf. The 2009-10 aid was $25,750,007. This was derive from the adequacy $84,758,531 - $61,956,724 local fair share = $22,801,807l Add to that special education categorical aid, transportation and LEP comes out to $33,619,687. Since districts were capped to their 2008-09 aid, Lakewood only received $25,750,007.}\]
services to private school students, according to this same census method, 14.69% of 21,467 students, or 3,154 students. The district actually has classified 2,897 students with Individual Education Plans so the 14.69% is a reasonable estimate of the 21,467 students. But the state counts 14.69% of only the much smaller public school number coming out to 797 students receiving services.

Providing services in private school is optional under federal law, but federal law requires find and evaluation that must be performed on 16,045 private school students. 20 U.S.C.1412(a)(10)(A)(ii). Say, about three hundred of the 16,045 private school students will opt in for a Free and Appropriate Public Education (FAPE) usually because they cannot receive services in their private schools. These are usually the most severe cases that require the most resources. The extra three hundred public school students bring the number of public school students receiving special education services to 1,097, which is a 38% increase. If the state would fund by taking a true count of public school students receiving a FAPE, as with the old CEIFA formula, rather by an estimate, Lakewood would receive about $2,122,662 more for special education adequacy for those 300 and $1,061,331 in categorical aid, totaling $3,183,993. Instead, Lakewood is funded only for 14.69% of each incremental additional student brought into the district or a total of $467,728 for 300 students, since the number of special education students is derived from 14.69% of each enrolled student. But each additionally enrolled student is special education. In this way, special education students represent 100% of the increase in enrollment. Put another way, if Lakewood starts out with 797 special education students, and another 300 are brought in through the find and evaluate provisions of federal law, the state funds Lakewood only for 43 of the new students. The
state only counts $797 + 43 = 840$ special education students while in reality there are 1,097 in the public schools. Since the state funds by a percent of the total public school enrollment rather than an actual count of public school special education students, the district receives 28% less.

Some school districts are known for their special education services so that parents locate their residence in those districts effectively increasing special education student above the 14.49%. Lakewood, for no other reason than its public schools serve only 26% of the children in town, more than thee other districts, remarkably demonstrates the inadequacy of the state census model. Federal law requires each state to offer a free and appropriate education to students found in private schools. In compliance, New Jersey grants each private school student found to need special education services only $1,559 for FAPE in a public school. In a normal district, this is a small part of the total budget and does not significantly lower the extra $10,613 supposed allocated for each special education child in the district. In Lakewood, where the district has a pool of over three times as many children as the base used in the census,, the additional 300 students reduces the amount per child in public school by 28%. A colorable claim can be made that Article IV of the New Jersey Constitution providing for a thorough and efficient system of free public schools is violated as applied to Lakewood by the state funding scheme.

No matter what kind of program in which a student enrolls, in order for the district to enjoy full state funding, whether a virtual or brick and mortar charter or public school, the student would no longer be a student of any yeshiva that he or she might attend during the morning hours. The student would be registered in the school bringing the
funding. This will disqualify the student’s yeshiva from the benefit of that student’s participation in a free or reduced lunch program and from transportation to yeshiva in the morning.

The only effect a properly crafted program as applied Lakewood would have is to relieve the financial burden of our families and to open educational opportunity to yeshiva children. It would do nothing to advance religion. Some citizens spend more than earned for their yeshiva tuition. Food, clothing, housing and other expense that make up the smaller part of the family budget have to come from other sources. In fact, all Lakewood yeshiva parents spend a large portion of their income, most of which are meager, to send their children to school while these same Lakewood taxpayers have to pay almost the whole cost of the public school budget relative to the state because the state says we have so many people and so few children. Our children are not counted. Religious education has thrived despite the hardships of expense and forgoing of a secular education. Relief from this burden will not increase enrollment in religious schools.

Conclusion

Lakewood is unique. The issues that parents of yeshiva students, their children and the district face, are enormous. At the same time, it is abundantly clear that the Roberts Court is a staunch protector of First Amendment rights. Lakewood’s children have little access to education, its parents are strangled by financial burden, and the size of the community will affect the future of the state. If the adage “good cases make good law” is true, then Lakewood, is ripe for reform and new ideas that will certainly move the law in the right direction.