

Aaron Lang  
May 10, 2011

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

The population of Lakewood increased 54% over the last decade. Most of this increase is natural. The birthrate of 1,539 in 1995 increased to 3,461 in 2007 or 49.5 births per 1000.<sup>1</sup> 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. Of the 21,567 children registered in Lakewood schools, 75% attend private schools, saving the state almost \$300 million. Ninety-nine percent of township students are enrolled in private schools attend yeshivas.<sup>2</sup> This leaves the burden of education upon Lakewood families, about 34% of which are below the poverty level.<sup>3</sup> Recent Supreme Court decisions regarding state funded vouchers and the provision of public school teachers in religious schools, 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.

Compulsory education in New Jersey

New Jersey requires parents to provide that their “child regularly attends the public schools of the district or a day school in which there is given instruction

---

<sup>1</sup> Source: New Jersey Department of Health and Senior Services Center for Health Statistics, <http://www4.state.nj.us/dhss-shad/query/selection/birth/BirthSelection.html>

<sup>2</sup> 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.

<sup>3</sup> See [http://www.factfinder.census.gov/servlet/STTable?-geo\\_id=06000US3402938550&-qr\\_name=ACS\\_2006\\_EST\\_G00\\_S1702&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_](http://www.factfinder.census.gov/servlet/STTable?-geo_id=06000US3402938550&-qr_name=ACS_2006_EST_G00_S1702&-ds_name=ACS_2006_EST_G00_)

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). The New Jersey Department of Education 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.”<sup>4</sup> The requirement of “equivalent instruction” is not enforced.

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). Parents have the right to teach their children religion and to send them to schools that further this interest. *Pierce v. Society of Sisters*, 268 U.S. 510, (1925). The fundamental parental right of passing religion to his or her child outweighs the state interest in maintaining a population proficient in the skills and duties of citizenship. *Wisconsin v Yoder*, 406 U.S. 205 (1972) held that the state could not force Amish parents to educate their children after eighth grade in secular studies (English) against their wishes, even if the child wanted to go to school. This 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

---

<sup>4</sup> *Id.*

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.<sup>5</sup>

Very few religious groups can assert the *Yoder* exemption from compulsory education laws.<sup>6</sup> Several attributes of the Lakewood community, however, are dispositive toward a right of parents to not teach English after eighth grade, or at least to minimize it. Lakewood is a close-knit community in a distinct geographic area. The community eschews public school. Community leaders discourage 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. 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 [religious] community, but . . . endanger their own salvation and that of their children.” *Id.* at 209. The community in *Yoder* instead provided “an ‘ideal’ vocational education for their children in the adolescent years.” *Id.* at 224. Lakewood parents objecting to English after eighth grade do so with as part of a community wide project. Public school would expose their

---

<sup>5</sup> 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.

<sup>6</sup> See *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8<sup>th</sup> Cir. 1987). Several members of the *Fellowship* sent their children to public schools and owned televisions. The goals of the state in secular education did not differ from the religious beliefs and goals of the *Fellowship* group. The Amish, living in “distinct geographical areas of the state,” were different because of their “very unique circumstances and their centuries-old insulated, isolated lifestyle.” *Id.* at 496-47.

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. 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.

Other parents want educational opportunity for their children. These parents are caught between the prerogative of the community to reject English education and the right of the child to access 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.

#### Genuine choice, choice by default, and per capita aid

Establishment clause violations are tested under the three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* Court overturned direct state appropriations for private school teachers of secular subjects. The test is whether state aid 1) has the primary effect of advancing or inhibiting religion 2) has a secular purpose and 3) makes an entanglement between the state and religion. The *Lemon* test is and will continue to

be an important tool to evaluate per capita aid of school wide services to religious schools.<sup>7</sup>

The Court in *Agostini v. Felton*, 521 U.S. 203 (1997), *Mitchell v. Helms*, 530 U.S. 793 (1999) and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, (1993) allowed different type of aid, one that is product of choice following the student, rather than per capita aid to the school. *Agostini* upheld the provision of public school teachers to provide federal Title I remedial services to students in religious school classrooms. *Mitchell* upheld the loan of computers and materials to religious schools. *Zobrest* upheld the provision of a publicly employed sign language interpreter for a deaf student in a sectarian school, under the Individuals with Disabilities Educational Act (IDEA). Attendance in a religious school was not dispositive of an Establishment Clause violation since the aid targeted a particular eligible student regardless of where they attended school, However, although choice is prominent in all three cases, each case restricts the use of public aid in ways that vouchers do not.

The *Zobrest* interpreter could not add initiate sectarian indoctrination. *Mitchell* did not achieve a majority on the Court, so the law is 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.) In *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.). Voucher statutes do not require

---

<sup>7</sup> Many conclude that *Agostini 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).

that eligible schools restrict the state aid to expenditures for the English program. Aid is actually diverted to religious use. How is *Zelman* consistent with *Agosini*, *Mitchel* and *Zobrest*?

*Zobrest* provides the answer. Both sides admitted that there would not be a violation of the "Establishment Clause if the IDEA funds instead went directly to . . . 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.'" (509 U.S. at 13, nt. 11, 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 is 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 as more than an incidental beneficiary.

*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 are sufficient. Teachers provide for education as agents of the parents, not as agents of the state. Indoctrination comes from the choice of the parents.

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. The state reaches the named students wherever they are located. Choice in this case means that the named student is the *beneficiary*. Since instruction is under the agency of the state, the benefit of the student is not sufficient if the school more than incidentally benefits. 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. The provision for paying teachers in *Lemon* was such as case. 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 absence of choice does not bar all aid, but since the student is not the named beneficiary, aid that can be diverted to indoctrination is barred.

Even a statute providing *genuine choice* has to encompass a broad class in order the to be religiously 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. 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 voucher 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.<sup>8</sup> The New Jersey Plan will initially fund vouchers through corporate donations credited against the corporation's state business tax.

---

<sup>8</sup> see מה שקונים לע"ג ממצות השר הם קונים. (1519) שו"ת מהרי"ק סימן קצד 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.

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. 214<sup>th</sup> 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 schools.” A yeshiva subject to a discrimination claim for not admitting non-yeshiva people 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 v. Harding Academy of Memphis*, 88 F.3d 410, 6th Cir. (1996) (firing teacher for premarital relations). 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 deeply engrained in the religion. ,

Yeshivas that do not accept federal money need not make this argument. 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) (New Jersey cannot force Boy Scouts to accept gay person). 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 discrimination law. *Roberts v. United States Jaycees*, 468 U.S. 60 (1984) is entirely not 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* 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 voucher program promises \$9,000 per child. This will fundamentally restructure the operations of eligible schools. 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).

### State involvement in Private Schools

The state brings educational opportunity to students in religious schools by authorizing vouchers, charter schools and dual education services. 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).

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.”<sup>9</sup> This contradicts *Agostini v. Felton*, 521 U.S. 203 (1997). The *Agostini* 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, appropriating unaccountable and uncertified third party instructors, allowed under Title I, rather than for the assignment of authentic veterans of instruction under the state curriculum in the public schools, can raise questions of monitoring and entanglement.

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.”<sup>10</sup> 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.

---

<sup>9</sup> *Quality Education for All of New Jersey’s Children: The Importance of Supporting the Complementary Relationship Between New Jersey’s Public and Nonpublic Schools*, The Governor’s Study Commission on New Jersey’s Nonpublic Schools, 15 (2010). The report can be found at: [http://nj.gov/governor/news/reports/pdf/20100720\\_np\\_schools.pdf](http://nj.gov/governor/news/reports/pdf/20100720_np_schools.pdf).

<sup>10</sup> Governor’s Commission Report, 17

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.

### Dual Education

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.”<sup>11</sup> That a district may, if it chooses, allow access to extracurricular activities follows *Alpert v. Wachtung*, 13 N.J.A.R . 110 (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.” *Id.* at 118. This 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). Thus, the New Jersey constitution does not provide the responsibility for

---

<sup>11</sup> [http://www.state.nj.us/education/genfo/faq/faq\\_homeschool.htm](http://www.state.nj.us/education/genfo/faq/faq_homeschool.htm)

supporting access to education in the private school, it does not even provide for student access to education in its public schools.<sup>12</sup>

Dual education, or part-time access to public education, albeit, not a state 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, GED testing, drivers' education courses, physical educational and technical courses, and SAT preparation courses after school hours to accommodate yeshiva students, but 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 to access genuine high school credit using the online APEX program. APEX is a program under contract with the district to provide credit for courses that the student either failed or never was offered. The program offers all major core curriculum courses. The district paid \$300 a seat for 500 students to access this program but only about 133

---

<sup>12</sup> Two or three years received a letter written by a 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 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 history or political science). He replied, "What's wrong with that?"

students use it. Yet, the assistant superintendent has denied an email and oral request for part time access to 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. 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 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 they do not live in Lakewood, and their children do not grow up in Lakewood, 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. On the contrary, 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 even 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.<sup>13</sup> Many of 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.

For too long the district leaders have dismissed the lack of opportunities for our children as "a matter of choice." This is entirely false and patronizing. It downplays the significance that out of perhaps 20,000 Lakewood yeshiva children, only one goes to Lakewood High School. 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. Nothing will be solved, nay, the problem is not even admitted, by the indifference and prejudice of Lakewood administrators 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.<sup>14</sup>

### Charter Schools

---

<sup>13</sup> 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.

<sup>14</sup>For the inexorable zero, see *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324. 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. When a friend of my wife applied for employment in the transportation office during that time period, she was asked, "Whose side are you going to be on, their side or ours?"

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. The entity that invest in charter schools should be distinguished from the entity receiving the charter, which “shall not realize a net profit from its operation of a charter school.” N.J. Stat. Ann. 18A:36A-4 (LEXIS through 2011). Profit, interest and the tax credit, effectively return a 100% profit to investors in seven years.

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 schools. Members of the Lakewood community spurn public schools so not to mix with the general population, and 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, though, a 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)<sup>15</sup> 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 vicinity (*tachum*), while allowing other students the option of

---

<sup>15</sup> Federal Register /Vol. 71, No. 206 /Wednesday, October 25, 2006 /Rules and Regulations 62543

attending school in Lakewood for their convenience. Or a charter can open in Lakewood for girls, or for boys under a special exception to the no English rule in the *tachum*, as a sensible solution for the hundreds of 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) was established to serve 17-19 year old 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.<sup>16</sup> 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 four 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.

---

<sup>16</sup> source: *New Jersey Virtual Charter School Application* binder, given to this author by Timothy Nogueira, Superintendent of MOESC and NJVCS lead founder.

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 prevent unsupervised Internet browsing.<sup>17</sup> 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 will outsource instruction like NJVCS.

### Public school teachers

---

<sup>17</sup> 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.

Vouchers and charter schools will increase educational access, but the most authentic and best education opportunity comes through the instruction of public school teachers, who firmly believe that all students can learn and never reject any student that knocks on their doors. Similar plans as those discussed concerning charter schools can be implemented by the school district through an alternate program. The district 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 could serve yeshiva children at risk who desperately need structure. District teachers and administrators are among the educational leaders of our nation, charged to reflect and instruct, facilitate and advocate, and 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. It should utilize its currently employed public school teachers during school hours with a small additional hourly stipend for after-school hours. This will save district jobs and return traditional security to faculty members, whose primary reward is the mere satisfaction of public service. The district can send real public school teachers to yeshivas under *Agostini* to provide Title I and New Jersey Chapter 192<sup>18</sup> remedial services to private school students.

The district can provide SAT application forms, GED testing and a SAT preparation course, separate male and female classes, and professional development

---

<sup>18</sup> N.J. Stat. Ann. §18A:46A-1 *et seq.*

and certification for private school teachers who desire it, so that they too can advance in their profession.<sup>19</sup> 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. These teachers will then serve their communities on their own initiative by supplying afternoon instruction in private schools. The salary paid to a Lakewood resident stays in Lakewood.<sup>20</sup>

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 the 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.

### State aid to Lakewood

---

<sup>19</sup> CollegeBoard only provides applications to schools and yeshivas do not order them. Lakewood High School, with only about 1,100 students, ran out of forms before this author could obtain one for his daughter, not realizing that perhaps a few hundreds of the 16,000 students who have no access to the forms might need them.

<sup>20</sup> 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.

To get a handle on the magnitude of the burden for which the Lakewood citizen carries, and how much might flow one day into Lakewood with successful alternative educational initiatives, follow this thought experiment. Imagine that every school child on record in the central office was counted by the state.<sup>21</sup> 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.<sup>22</sup> The base cost would go up to \$212,292,000 (21,467 X about \$10,000). Multiply that by  $\times 0.9424 = \$200,063,981$ . At risk students are those eligible for Title I free or reduced lunch.<sup>23</sup> 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  $(21,467 \times 0.1469 \times \$11,262 \times 2/3 \times 0.9424) + (21,467 \times .01897 \times \$1,118 \times 0.9424) = \$22,312,784 + \$429,058 = \$22,741,842$ . 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  $3,154 \times \$11,262 \times 1/3 \times$

---

<sup>21</sup> 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.

<sup>22</sup> 2009-10 State aid profiles can be found at: <http://www.state.nj.us/education/sff/profiles/0910/dist/29.PDF>

<sup>23</sup> 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>

0.9424=\$11,158,125. Security aid is base on at total population and at risk [(21,467 X \$72) + (15,393 X \$420)] X 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.<sup>24</sup>

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 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

---

<sup>24</sup> <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 = \$22,801,807. 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.

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 the 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. 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 supposedly allocated for each special education child in the district. In Lakewood, where the district has a pool of over four 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 VIII 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.

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.