School Voucher Program Coming to a City Near You: The Supreme Court Rules Cleveland Program Constitutional

by
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On June 27,2002 the Supreme Court of the United States handed down its decision in Zelman v. Harris. In this case, the court ruled in favor of an Ohio program that allows taxpayers money to be used to send inner city students in Cleveland to private schools, including religious schools.

The ruling is seen as a huge victory for the "school voucher" movement. The school voucher movement has struggled to persuade state legislators throughout the nation to provide financial assistance to families of poor students in under-performing public schools to enable them to have a wider educational choice for their children, even if such assistance is used to enroll these students in religious schools. The 5-4 ruling is only the latest in a battle that promises to rage on for a while.

The court opinion written by Chief Justice Rehnquist was accompanied by concurring opinions by Justices Thomas and O'Conner as well as three dissenting opinions by Justices Souter, Breyer, and Stevens. The unusually high number of concurring and dissenting opinions and the desire of so many justices to write separately to express their point of view on this matter indicate that Justices on both sides of this ruling understand its potential impact on the future of both public and private education in the United States. Justice Souter, who wrote a lengthy and vigorous dissent, went as far as to hope that "…future court will reconsider today's dramatic departure from basic Establishment Clause principle…" in reference to the Constitutional Doctrine of the separation of church and state.

Although the notion of vouchers originated in the mid-1950, when economist Milton Friedman argued that vouchers would improve educational efficiency by placing schools in a competitive, free market position, the idea did not become realty until the early 1990 when Milwaukee enacted its voucher program. However, the current case stems from an Ohio program which was developed to deal with crises in the Cleveland City School District. In 1995, a Federal District Court placed the Cleveland City School District under state control. The court agreed with an audit that found that the District has failed to meet any of 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency exam.

In response the state legislators enacted a Pilot Project Scholarship Program that provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." The program provides tuition aid for students to attend a participating public or private school of their parent's choosing. Any private school religious or non-religious may participate in the program so long as the school is located within the boundaries of a covered district and meets statewide educational standards. In addition, participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." A participating private school would receive up to $ 2,250 per student.

In September of 1996, the program went into effect but was immediately challenged in court. In May of 1997, the State appeals court ruled the program unconstitutional for violating

the separation of church and state. The State appealed to the Ohio Supreme Court which ruled that the program does not violate the separation of church and state but it is, nevertheless, unconstitutional because it was enacted improperly as part of an unrelated spending bill. The opponents of the program, alarmed at the Ohio Supreme Court ruling, filled a suit in federal court in July of 1999 arguing that the program violates the constitutional principle of the separation of church and state. Initially, the federal district court judge ordered a stop to the program while it was under review, but soon after, he reversed himself allowing already enrolled students to continue in the program.

The first sign of how the Supreme Court would rule on this issue came when the Supreme Court ruled in November 1999 that new participants could take part in the program pending its review by the courts. In December 1999, the district court judge ruled the program unconstitutional, and the 6th Circuit Court of appeals in Cincinnati agreed with the ruling. In May 2001, the State of Ohio asked the Supreme Court of the United States to overrule the Court of Appeal's decision. The Supreme Court agreed to hear the case on September 25th, 2001 and rendered its decision on June 27, 2002.

The Court found that "…the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence." The court also found that this program permits parents "…to exercise genuine choice among options public and private, secular and religious." The court goes on to conclude, "The program is therefore a program of true private choice and does not offend the Establishment Clause of the constitution."

The Court rejected the dissent's contention that this program amounts to a government endorsement of religion. The Court asserted, "Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." The Court also did not agree with the dissent that the mere fact that the majority of schools participating in this program in a given year are religious would indicate a state support of religion. The Court insisted that as long as parents, who are afforded a meaningful choice between public and private school, make the decision to enroll the child in a religious school freely, the program does not violate the Establishment Clause of the constitution.

There are two other voucher programs in Wisconsin and Florida as well as close to a dozen proposals in various state Houses of legislation. This decision gives proponents of vouchers a new vigor to revive voucher proposals in states where the legislatures have tabled such proposals and push for new voucher programs in other states. However, the battle for voucher programs is far from over. Within hours of the Courts decision, organizations both for and against vouchers issued press releases outlining their positions on this matter. In general, civil rights and liberal organizations as well as teacher groups came out against the ruling, and conservatives as well as Catholic school leaders came out in support of it. The lines, however, are not perfectly drawn. ACLU declared that the Supreme Court decision is "bad for education, bad for religious freedom." And the Anti-Defamation League called the decision "the wrong choice for public education." In addition, the National Education Association posted on its web site a two-page statement outlining the educational, social, and legal case against vouchers even prior to the decision. The NEA also points out that voters have rejected vouchers every time they were put on the ballots in referendums in the last 30 years. On the

other hand, one Catholic leader described the ruling as hopeful news "…for the parents of kids who are consigned by the government's education monopoly to failing schools."

Opponents of vouchers make the following points: First, vouchers will drain money from already strapped public schools. Second, it will mean state endorsement of religion. Third, private schools are free to admit whomever they please, so they will drain better students away from the public school. Fourth, it will allow state control and regulation of religious education. Fifth, it will create dependency of religious schools on the state. On the other hand, proponents of vouchers make the following points: First, vouchers will force public schools to be competitive. Second, It will give poor students access to quality education that is already available to well-to-do students. Third, it will focus on the welfare and benefit of the child and not the bureaucracy. Fourth, school vouchers will nurture diversity.

Currently one Islamic school, *Assalam School* in Milwaukee, takes part in the voucher program, and perhaps there are other Islamic schools else where that do. Over one fourth of the student population at *Assalam School* is able to attend the school due to the voucher program. The overall impression of the program is positive. And the school finds no difficulty in meeting the programs requirement. However, it is essential for Islamic schools to research each program before it accepts to take part in it. There are some aspects of the voucher program that can place undue burden on Islamic schools due to the attitude of many public officials and some of the public at large.

Justices Souter, and Breyer addressed extensively in their dissent the potential difficulties that may affect Islamic schools. Justice Breyer points out that the Ohio program gives the state the right "…to revoke the registration of any school if after a hearing the superintendent determines that the school is in violation…" of the program rules. Justice Breyer goes on to say, "What kind of hearing will there be in response to claim that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest – say, the conflict in the Middle East or the war on terrorism? Yet any major funding program for primary religious education will require [such] criteria."

The question for Islamic schools is *will they be singled out for scrutiny on many of these issues the same way many members of the Muslim community are singled out for enforcement of immigration laws or other minor statutes while others are not*. Justice Souter takes another side of this line of questions when he says, "Religious teaching at taxpayer expense simply can not be condoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition." Then Justice Souter goes on to illustrate his point, "Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with deeply religious element. Nor will every secular taxpayer be content to support Muslim view on differential treatment of the sexes."

While vouchers may offer some alternatives to poor students in the inner city and bring some much needed funding to religious schools, it remains to be seen whether religious schools can afford to tie themselves with the strings that come with government funding. This question is especially important for Islamic schools.