

## THE OHIO VOUCHER PROGRAM

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I want to talk about the voucher program in Ohio: how it works, the kids that are the beneficiaries of it, some of the legal arguments being raised in the case, the status of the action, and a few thoughts of my own concerning this issue. Then I will discuss where I see the program going both as a matter of policy and as a matter of Constitutional law.

The voucher law was enacted in 1995. It first went into effect in the fall of 1996, meaning that we are now finishing the third school year of the program. Currently, there are about 4,000 children in the program. The program began with children from kindergarten through third grade, and now includes fourth and fifth graders. The first 1,500 scholarships went to families with an average family income of \$6,500 per family, well below the poverty line. Seventy-eight percent of the beneficiaries were minorities.

The beneficiaries also come from the Cleveland School District, where a five-year study of a class of eighth graders recently concluded that just 33% managed to graduate. The other 67% fell into two categories: 46% had dropped out by the twelfth grade and 21% had stayed in school, but did not graduate for one reason or another. Two years ago, only 9% of the children in the entire school district passed all four sections of the state proficiency tests. Throughout this period, the Cleveland School District received more money from the state than any other school district, and the district spends more per child in state money than any other district in the state. Money alone, it turns out, is not the answer to the problems facing the Cleveland School District.

In 1996, soon after the program was enacted, lawsuits were filed in state court in Columbus against the voucher program. The trial judge ruled in favor of the state and allowed the program to enter its first year. The court of appeals subsequently reversed the trial court, and stay motions were filed in the Ohio Supreme Court. The Ohio Supreme Court granted the state's stay motion and allowed the pro-

gram to continue pending appeal. There are now 4,000 children in the program. Next year will be the program's fourth year.

Last September, the Ohio Supreme Court heard arguments in the case concerning the Establishment Clause of the Constitution as well as several state constitutional issues, including the state religion clauses, the single subject guarantee, and the uniformity clause. We have not heard from the Court, but could get a decision any week.

With respect to the religion clause issue, the state has argued that the program is perfectly constitutional for at least two reasons. First, the voucher is entirely neutral. There is nothing about the program that prevents a school from participating because it is religious or non-religious, private or public. The neighboring public schools, surrounding Cleveland also are allowed to participate in the program.

Second, not a single penny of state money goes to a religious school, to the extent religious schools even participate, except through the individual choices of participating families. Any connection between church and state is broken, in other words, because no child ends up in a religious school except through private choice. Therefore, state money does not end up in a religious school unless that intervening personal decision has occurred. In that respect we think the program is very much like the GI Bill at the college level, which most constitutional scholars assume is constitutional and which the courts suggested was constitutional in the *Nyquist* decision.<sup>1</sup>

Now let me discuss plaintiffs' responses to these arguments. First, plaintiffs claim that the GI Bill is a program for college students, and thus is distinguishable from the voucher program, which is for young children. The Supreme Court, plaintiffs add, has said on several occasions that states need to be particularly careful when it comes to the involuntary influences of religion on young children. This approach, however, gets the question and answer wrong. Not a single five, six, seven, or eight-year-old child attends these schools except through the choice of their parents. The people making the choices in this setting are of course the parents. This, in short, is a GI Bill program for parents, not for kids.

A second argument that was made, and actually accepted at the court of appeals level, is that the program really does not offer neutral choices. The choices are not considered neutral because Cleveland parents are faced with an unfair choice between a private school and

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<sup>1</sup> See *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

the Cleveland school system. The parents can either send their children to the Cleveland public schools, which all agree are not doing well or they can go to a private school, which may be doing well. If this argument were accurate, however, voucher programs would be legitimate only in school systems that were thriving and succeeding. Thus, a voucher program would be constitutional in Shaker Heights, but not in the city of Cleveland. That seems implausible.

Third, opponents of voucher programs argue that a very high percentage of the program's participants are attending religious schools. Roughly, 70% to 80% of the children in the program are going to a religious school, be it an Islamic, Jewish, Catholic, evangelical Christian, or Protestant school. The problem with focusing on percentages, however, is at least twofold. One, this does not provide a final constitutional answer. The Court could set a percentage of permissible participation by religious schools at say, 50%, and the state could simply comply with it. Nor is this a complete answer in another respect. For it ultimately asks the state to determine the number of schools that can participate in the program based on their religious orientation. This strikes me as a very serious free exercise problem.

All of this is not to say that there are not serious policy arguments regarding school voucher programs. But those uncertainties represent one of the best reasons for allowing pilot programs like this one to proceed. School voucher programs are, after all, an experiment. The whole point of adopting them is to gather empirical evidence that shows what happens with these schools after voucher programs have been in place. Are test scores going up? Are parents happy? Are kids doing well? Maybe some of these schools cannot teach as effectively as the public schools. And maybe others can. Only time will tell.