
VOUCHERS AND RELIGIOUS SCHOOLS: WHY SOME RELIGIOUS SCHOOLS MAY REFUSE TO PARTICIPATE

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With the recent U.S. Supreme Court decision (Zelman v. Simmons-Harris, 2002), upholding the vouchers portion of an Ohio-based scholarship program, interest in vouchers is at an all-time high. Will the availability of voucher programs create an exodus of students from public schools? Will private schools open their doors and classrooms to respond to the increasing need? Several problems remain before voucher programs can become widespread, and even then some private and religious schools may opt not to participate. This article discusses the autonomy of religious schools, summarizes relevant court cases, and explores three possible reasons some private and religious schools may not be willing to accept vouchers.

The Supreme Court's decision in *Zelman v. Simmons-Harris* (2002), upholding the vouchers portion of the Ohio Pilot Project Scholarship Program, has brought some closure to the longstanding debate regarding the efficacy of vouchers (Moe, 2001). The Court ruled that Ohio's plan, which provides vouchers for parents of students in the Cleveland public schools to be used at a number of educational options, including religious schools, passed constitutional muster under the Establishment Clause. Although the Court did not find a constitutional infirmity with Ohio's plan authorizing the use of vouchers for religious schools, it neither required nor endorsed vouchers. If vouchers are to expand beyond the two states that currently permit them for religious schools, Ohio and Wisconsin (*Jackson v. Benson*, 1998), legislatures must be the bodies to make the decisions. Hence, decisions to implement voucher plans will be political ones.

Beyond the political realm, vouchers are likely to face challenges under state constitutions. For example, in *Holmes v. Bush* (2002), a state trial court in Florida struck down a voucher plan under a state constitutional provision

prohibiting the taking of any "money from the state treasury to use directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution" (*Fla. Constitution*, 2002). The court based its judgment on the fact that the vast majority of students taking part in the voucher program attended religious schools.

Thirty-six other states have similar constitutional provisions, sometimes referred to as Blaine amendments, named for Senator James Blaine who unsuccessfully sought, in the 1870s, to amend the Constitution to prohibit public funding for nonpublic religious schools (Kirkpatrick, 2002). These amendments originated in 19th-century anti-Catholicism flowing from the widespread establishment of Catholic schools in response to the largely Protestant-flavored public schools, and were designed to deny public funds from being used for Catholic schools.

Whether Blaine amendments or state statutes with similar content can withstand constitutional scrutiny remains to be seen. For example, in *Davey v. Locke* (2002), a divided Ninth Circuit invalidated a statute from Washington State (Wash. Rev. Code, 2002) that prohibited the granting of state aid for students pursuing theology programs. The majority in *Davey* was of the opinion that the state law depriving the student of funding available to other students for nonreligious programs violated the Free Exercise Clause in the First Amendment. Although *Davey* did not reach the validity of Washington's Blaine-type state constitutional amendment, the case suggests that the legal battles regarding vouchers are complex and far from over.

Even if vouchers are legal under state law, not all religious schools may choose to participate. Thus, the purpose of this article is to discuss why some religious schools may choose not to participate in voucher programs.

PARENT EXPECTATIONS AND THEIR CHILDREN'S EDUCATION

Vouchers represent an opportunity for parents with limited income to select alternative educational settings for their children. Lacking adequate financial resources, poorer parents are disenfranchised from the selection process available to their more affluent peers. Even though the Supreme Court has upheld a state tax deduction for tuition, transportation, or book expenses incurred with sending a child to school (*Mueller v. Allen*, 1983), such a program is of no benefit to parents who lack funds to pay for the first year's costs. Vouchers provide up-front money that can pay for tuition.

The Cleveland voucher program that is more fully discussed in another article in this issue provides a maximum of \$2,250 for parents to use for tuition at private, including religious, schools, as well as at public schools in districts contiguous to Cleveland. Aware of the fact that the majority of students in Cleveland are from low-income and minority families, Justice

Thomas observed in his concurring opinion in *Zelman*, that “the failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality and alienation that continues for the remainder of their lives” (pp. 2483-2484). Parents with access to vouchers clearly have the ability to make educational choices for their children that they had not had before.

The notion that parents can direct the education of their children has long been afforded constitutional protection. In *Meyer v. Nebraska* (1923), for the first time, the Supreme Court recognized that parental direction of the education of their children is a right protected by the liberty clause of the Fourteenth Amendment. In *Meyer*, when the State of Nebraska required all instruction to be in English, a teacher was charged with a misdemeanor for teaching Bible stories in German. In invalidating the state statute, the Court found that a teacher’s right to teach was a derivative “of parents to engage him so to instruct their children” (*Meyer*, 1923, p. 400). Two years later, in *Pierce v. Society of Sisters* (1925), the Court struck down an Oregon statute that required all students to attend public schools. In declaring that “the child is not the mere creature of the State,” the Court reasoned that the right of non-public schools to exist was a right derivative of “[the parents] who nurture him and direct his destiny” (p. 535). Two years after *Pierce*, the Court, in *Farrington v. Tokushigue* (1927), invalidated a statute in Hawaii that severely restricted the ability of children of foreign ancestry to participate in language schools off school premises and not held during the school day. As in *Meyer* and *Pierce*, the Court held that the right of children to attend these schools depended on “the right of [the Japanese parent] to direct the education of his own child without unreasonable restriction” (*Farrington*, p. 298).

Finally, in *Wisconsin v. Yoder* (1972), the Court held that Amish children did not have to attend school past the eighth grade, despite a state statute requiring attendance until age 16. Attendance at a public high school until age 16 threatened the existence of the Amish religious community because it intruded unreasonably upon the parents’ duty to inculcate “moral standards, religious beliefs, and elements of good citizenship” (p. 233). *Wisconsin v. Yoder* represents the high-water mark of parents’ rights to direct their children’s education. None of the four cases discussed involved parents and public schools. As would become clear, the right of parents to make educational decisions for their children did not apply to the public schools.

PARENT RIGHTS AND THE PUBLIC SCHOOLS

Parental attempts to effect changes in the public schools on behalf of their children have consistently met with lack of success. In *Mozert v. Hawkins* (1987), a parent requested an alternative reading series because the one adopted for her child contained content objectionable based on religious

beliefs. The Sixth Circuit upheld a school board policy that prohibited accommodation of such parent requests. An accommodation would amount to an advancing of religious beliefs in violation of the First Amendment's establishment of religion. Eight years later, in *Settle v. Dickson County* (1995), the Sixth Circuit again revisited the issue with a similar result. The court decided that a teacher could refuse to permit a student to write a biography on Jesus Christ, even though the teacher was in error on both her application of the class assignment requirements to the student's topic and her understanding of the law regarding religion and public schools. In *Brown v. Hot, Sexy and Safer* (1995), the First Circuit refused to permit parents to sue school officials even though they violated board policy by failing to send parent consent forms home. As a result, parents had no legal recourse when their children were required to attend a graphically vivid sexual presentation. Finally, in *C.H. v. Oliva* (2000), the Third Circuit found no free speech violation when a kindergartner's drawing of Jesus Christ was removed from display in a school hallway and then replaced in a less prominent position.

These cases indicating the absence of enforceable parental rights in public schools occurred against a backdrop of the Supreme Court's systematic excision of religion from the public schools. Beginning with *Engle v. Vitale* (1962) and *School District of Abington Township v. Schempp* (1963), the Court removed prayer and Bible reading from the schools. This theme was repeated three decades later when the Court struck down prayer at graduation in *Lee v. Weisman* (1992), followed 8 years later when the Court invalidated prayer before football games in *Sante Fe Independent School District v. Doe* (2000). Earlier, the Court struck down a state effort to require public school boards to provide a balanced treatment in teaching evolution by also requiring the teaching of creation science (*Edwards v. Aguillard*, 1987).

A common theme among these cases involving parental rights was the Court's refusal to permit practices even though there was majority support at the local and/or state levels and no student would have been coerced into participating. The notion that board-member- or state-legislator-expressed support for prayer or teaching creationism could be the basis for invalidating such practices served notice that a person's religious motives were suspect under the Establishment Clause.

Although none of the prayer or creationism cases turned on the issue of parent rights, they did reflect a change by a majority of the Supreme Court as to the place and prominence of religion in public schools. This change was not supported by all members of the Court as reflected by Chief Justice Rehnquist's acerbic remark in his dissent in *Santa Fe* that "the [majority's] opinion...bristles with hostility to all things religious in public life" (2000, p. 318). Not surprisingly, Rehnquist's sentiment resonates with parents who are disaffected with the public schools and are looking for alternative venues for their children's instruction.

THE AUTONOMY OF RELIGIOUS SCHOOLS

Beginning in the mid-1970s, the demand for religious schools increased significantly. Protestant churches, especially evangelical ones, struggled to keep pace with the demand by starting new schools even as the number of Catholic schools declined. While the largest number of religious schools continue to be Roman Catholic, a significant number of evangelical Protestant churches have expanded their ministries to include K-12 education (James & Levin, 1988).

The role of parents in today's religious schools differs dramatically from the heady days of *Meyer* and *Pierce* when the functioning, and even existence, of such schools depended on the constitutional right of parents to direct the education of their children. In this new round of litigation, states have treated religious schools as separate legal entities with their own rights and responsibilities. The significance of such a change becomes evident when these schools are faced with the opportunity to participate in voucher programs.

Yet, before vouchers ever came onto the educational scene religious schools faced prolonged and bitter conflict with state efforts to control their activities. If states could not legislate religious schools out of existence, as was addressed in *Pierce*, could they impose such onerous regulations that, in effect, they could regulate them out of existence? The 1980s was a decade of conflict where the faith of churches in starting religious schools was severely tested. Contrary to *Meyer*, *Pierce*, *Farrington*, and *Yoder*, none of these cases reached the Supreme Court, and most were litigated in state courts.

The first important case was *State v. Whisner* (1976) wherein the State of Ohio sought to impose on a church-controlled religious school 400 standards and guidelines that ostensibly were required of all public schools. The attorney in *Whisner* was William Ball, the attorney who successfully argued *Yoder* before the Supreme Court. In an approach not unlike the one that he took in *Yoder*, Ball developed a similar coercion argument to demonstrate the suffocating effect the 400 standards and guidelines would have had on the church's ability to operate its school. Among the standards that church officials objected to were those specifying the courses to be taught and the amount of instructional time to be spent on the courses, leaving no time for religious instruction, and those that required nonpublic schools to participate in "cooperative assessment of community needs," even though the school refused to "seek its direction from the world or from the community it serves" (pp. 762-763). The school had drawn "lines of separation from the world" that included no drinking and card playing (p. 754).

In finding for the religious school, the Supreme Court of Ohio held that the standards were so pervasive and all-encompassing that total compliance "would effectively eradicate the distinction between public and nonpublic

education" (*State v. Whisner*, 1976, p. 768). By regulating "the content of the curriculum that is taught, the manner in which it is taught, the person or persons who teach it, the physical layout of the building in which the students are taught, the hours of instruction and the educational policies intended to be achieved," the effect would be "to obliterate the philosophy of the school and impose that of the state" (p. 770).

Most of the cases involving religious schools did not involve large numbers of regulations. The most frequently litigated state regulation concerned teacher certification requirements. When only one regulation was at issue, state courts were more likely to find against the schools. *State v. Faith Baptist Church of Louisville* (1981) represents the persistent and overreaching effort by a state to compel compliance with its regulations. Here a church operated a religious school on its premises. When school officials refused to furnish the names of students and their parents to the state department of education, to request approval for its religiously based instructional program, and to hire accredited teachers, the State of Nebraska padlocked the church door. The doors were opened only for Sunday and Wednesday evening services. The Supreme Court of Nebraska held for the State, deciding that the teacher certification requirement that teachers have a baccalaureate degree was "neither arbitrary nor unreasonable" (*State v. Faith Baptist*, p. 579). In addition, the court upheld jailing of the pastor, who was also the school's administrator, on two occasions for contempt for continuing to operate the school (*Siliven v. Tesch*, 1982).

In a similar dispute, *State v. North Platte Baptist Church* (1985), a pastor was incarcerated from 9 a.m. to 3 p.m. each day and fined \$200 daily for contempt for continuing to operate a church school. Eventually, 2 years later, the pastor's accumulated \$19,000 in fines was reversed on procedural grounds (*State v. North Platte*, 1987), but by then both the church and its religious school had suffered from the prolonged intrusion by the state.

By the end of the 1990s, most states had moderated their requirements for religious schools so that they could operate with minimal control by state departments of education. The result was that religious schools and the churches that operated them had considerable autonomy over their instructional functions. This autonomy presents a conflict as to whether religious schools will participate in voucher programs because educators in these schools fear that "control follows the dollar," meaning that if the state provides resources, it will want to direct how they are used.

VOUCHERS AND SCHOOL CHOICE

The voucher plan challenged in *Zelman* offered 4,000 vouchers, now increased to almost 5,500, to poor students. Very probably, the parent demand for these 5,500 vouchers will be as over-subscribed as it had been for the

original 4,000. The question is whether parents will have enough schools, particularly religious ones, to choose from. Now that vouchers are constitutional, at least in Ohio under both federal and state constitutions, the problem may end up being on the supply side rather than on the demand side. Since religious schools have been by far the primary participants in the Cleveland voucher program (46 of 56 private schools were religious enrolling 96% of students), the issue is whether the supply of religious school spaces will increase to accommodate the demand. Yet, in light of the litigation reviewed earlier in this article, one can suggest several reasons why some religious schools may not want to participate. Among those reasons are concerns about state action, a school's mission, and church governance.

STATE ACTION

Fear about government intrusion focuses on Section 1983 damages claims against religious schools grounded in state action. Section 1983 of the Civil Rights Act of 1871 is an expansive federal statute which provides that "every person who, under color of any [law] of any State...[deprives another person] of any rights...secured by the Constitution and laws shall be liable to the person injured" (1994). Under Section 1983, the critical issue for religious schools is whether they can be considered as operating under color of state law.

A line of cases dating back to the leading Supreme Court's decision in *Rendall-Baker v. Kohn* (1982) has agreed that a wide range of contacts between religious schools and the state are not sufficient to invoke state action under one or more legal theories: state entanglement, public function, and symbiotic relationship (Mawdsley, 2000). However, the Supreme Court recently, in *Brentwood Academy v. Tennessee School Athletic Association*, (2001), introduced a less stringent theory, referred to as entwinement, to find state action. In the first post-*Brentwood* federal circuit court of appeals decision involving state action, *Logiodice v. Trustees of Maine Central Institute*, (2002), the First Circuit held that a public school board's providing tuition to place a student in a private school was not sufficient to constitute state action. When the student was suspended, the parents sued for due process violations under several state action theories. Although a two-judge majority agreed that there was no state action, one member of the panel, in a strong dissent, argued that school officials should have been liable for damages under the Supreme Court's more lenient entwinement theory. One must await future litigation to determine whether constitutional rights for students and employees will be applicable to religious schools under the more relaxed entwinement theory based on reception of state financial assistance. Under an approach advanced by the dissent in *Logiodice*, it is possible that one such form of state financial assistance that might bring religious schools into the ambit of state control is

publicly funded vouchers. Thus, the interpretation of state action appears to be in transition. If so, some religious schools may not be willing to participate in a voucher program that might bring constitutional rights into the school and subject it to damages for violation of those rights.

SCHOOL MISSION

Religious schools differ as to their indoctrination functions with regard to students. To the extent that a school's mission requires all students to participate in the religious activities of the school, the Ohio statutory provisions pertaining to vouchers suggest some problems.

Two statutory provisions may present challenges for schools that desire to present their religious beliefs to all students and require uniform student participation. One provision provides that the school not "discriminate on the basis of...religion" (Ohio Rev. Code, sec. 3313.976 (A)(4) (2002)). A second provides that a school cannot "teach hatred of any person or group on the basis of...religion" (Ohio Rev. Code Sec. 3313.976 (A)(7) (2002)). Would a religious school discriminate on the basis of religion if it requires its students not of its faith to participate in religious activities, such as chapel and religion classes? Further, would a religious school demonstrate hatred toward a religion if, in the course of classroom instruction or liturgical preaching, teachers or clergy refer to the errant beliefs of other religious faiths?

The meaning of these two statutory provisions has not been tested in Ohio. Yet, schools that have a strong indoctrination mission may choose not to participate in vouchers because they are not willing to dilute or overlook their mission. Even if a court were eventually to find no statutory violations, the schools may not be willing to endure the time, energy, and expense of the litigation to reach that result when they can simply choose not to participate in the program.

GOVERNANCE

Most religious schools have church affiliations that frequently involve varying degrees of commitments to the religious beliefs of the host churches. As a result, most churches exert a fair amount of governance over the schools. In many cases, churches underwrite facility and personnel costs that permit the schools to keep tuition costs relatively low. When considering participation in a state voucher program, the cost of tuition is important since, at least under the Ohio program, the maximum amount available is 90% of \$2,500, or \$2,250. This relatively low dollar amount helps explain why 96% of the voucher students in Cleveland attended religious schools as opposed to other nonpublic schools.

The Ohio voucher statute suggests that a church's governance role over its school might be affected by the provisions discussed in the previous sec-

tion. Churches that exert a close and direct governance of their schools may find the statute an interference with that degree of control. Although the statute does not facially create parents' rights, it does provide for limitations on church control over the religious practices in the school, ostensibly by permitting parents to complain about "discrimination" or "hatred."

For churches that place great stock in their control over the religious beliefs and practices of their schools, the notion that the schools may be subjected to statutorily-imposed restrictions will deter some churches from permitting their schools to participate in vouchers. However worthy the purpose of vouchers in giving access by parents to school choice, that choice will not be permitted to interfere with church control over their schools.

CONCLUSION

The Ohio voucher program tested in *Zelman* exposes an anomaly about parental rights to direct their children's education. No religious school would dispute that parents are the greatest single influence over their children's lives and that a parent's right to direct his or her children's education must include a right of educational choice. However, for many religious schools, that right of parental choice cannot come at the expense of the religious integrity of the schools and their host churches. Religious churches and schools have fought hard to preserve their autonomy from the state and are not likely to give that up, even if it means denying parents access to their schools under state voucher programs.

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