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Education Vouchers: The Constitutional Standards

David M. Ackerman
Legislative Attorney
American Law Division

Summary

The establishment of religion clause of the First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion...." In numerous cases the Supreme Court has construed this clause to impose substantial constraints on the provision of public aid to sectarian elementary and secondary schools. That has been true with respect both to direct aid to such institutions and to indirect aid, *i.e.*, aid that goes initially to students or their parents and that is used to defray the cost of attendance. But the constraints are not absolute. The Court's decisions permit a limited degree of public aid to be provided directly and a broader range of assistance indirectly. This report sketches the constitutional standards that apply to public aid to sectarian schools and especially to programs of indirect assistance such as education vouchers. It also summarizes recent significant state court decisions involving vouchers.

Direct Aid

A fundamental tenet of the Supreme Court's interpretation of the establishment clause is that it "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[1] As a consequence, the Court has held that public assistance which flows **directly** to religious institutions in the form of grants or contracts must be limited to aid that is "secular, neutral, and nonideological...."[2] That is, under the establishment clause government can provide direct support to secular programs and services sponsored or provided by religious entities but it cannot directly subsidize such organizations' religious activities or proselytizing.[3]

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[1] Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

[2] Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

[3] In most of the cases involving aid to religious institutions, the Court has used what is known as the Lemon test to determine whether a particular aid program violates the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary
(continued...)

Thus, the permissible scope of direct public aid depends in part on whether a religious institution's secular functions and activities are separable from its religious functions and activities. If the institution engages in essentially secular functions, the Court has made clear that government can directly subsidize those functions. However, if the entity is so permeated by a religious purpose and character that its secular functions and religious functions are "inextricably intertwined," *i.e.*, the entity is "pervasively sectarian," the Court has held the establishment clause generally to forbid direct public assistance even to the entity's secular functions.[4]

In several cases the Court has found religious hospitals, social welfare agencies, and colleges generally to fall into the first category and as a consequence has held direct public grants to them for secular services to be constitutional.[5] Religious elementary and secondary schools, on the other hand, have generally been found by the Court to be pervasively sectarian; and as a result, it has held direct public assistance to such entities to be severely constrained.[6]

Thus, the basic constitutional standard governing direct public assistance to religious entities is that it must be "secular, neutral, and nonideological" in nature. A critical factor

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[3](...continued)
effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

The secular purpose prong of this test has rarely posed an obstacle to public aid programs benefiting private sectarian schools, but the primary effect and entanglement prongs have operated, in Chief Justice Rehnquist's term, as a "Catch-22" for such programs. That is, under the primary effect test a direct aid program benefiting religious schools but not limited to secular use has generally been held unconstitutional because the aid can be used for the schools' religious activities and proselytizing. But if a program is limited to secular use, it has often still foundered on the entanglement test because the government's monitoring of the secular use restriction has intruded it too much into the affairs of the religious schools. See Lemon v. Kurtzman, *supra*. The Court has for some time been sharply divided on the utility and applicability of the tripartite test and particularly of the entanglement prong. Nonetheless, the Court still uses the Lemon test, although it is no longer the exclusive test for establishment clause cases. Moreover, in Agostini v. Felton, 117 S.Ct. 1997 (1997) the Court eliminated excessive entanglement as a separate element of the tripartite Lemon test and held it to be part of the inquiry into primary effect. As reformulated, the entanglement inquiry now asks whether government monitoring of a program would have the effect of inhibiting religion.

[4] Committee for Public Education v. Nyquist, supra; Lemon v. Kurtzman, supra.

[5] *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899) (public grant to Catholic hospital to provide medical care to the poor upheld); Bowen v. Kendrick, 487 U.S. 589 (1988) (grants to religiously affiliated agencies to provide pregnancy prevention and care services to adolescents upheld); and Tilton v. Richardson, 403 U.S. 672 (1971) (grants for the construction of academic buildings at institutions of higher education, including ones religiously affiliated, upheld).

[6] *See, e.g.*, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants to sectarian elementary and secondary schools held unconstitutional); Lemon v. Kurtzman, 403 U.S. 602 (1971) (public subsidy of teachers of secular subjects in sectarian elementary and secondary schools held unconstitutional); and Meek v. Pittenger, 421 U.S. 349 (1975) (direct loan of instructional materials and equipment to nonpublic schools held unconstitutional).

in determining the permissibility of such aid is whether or not the recipient institution is pervasively sectarian.

Indirect Aid

Indirect assistance such as tax benefits or education grants or loans or vouchers — *i.e.*, assistance that is received initially by a party other than the private religious school — has, on the other hand, been given greater leeway by the Court. Such programs still must be religiously neutral in their design and have been held unconstitutional by the Court where their structure has virtually guaranteed that the assistance flows largely to pervasively sectarian schools. However, where the design of the programs has not dictated where the assistance is channeled but has given a genuine choice to the immediate beneficiary (the taxpayer or voucher recipient), the Court has held the programs to be constitutional even though pervasively sectarian schools have benefited.

Seven decisions by the Court are particularly important in defining the constitutional parameters of indirect assistance. In two decisions particular programs of indirect assistance were struck down; in five others particular programs were upheld.

In *Committee for Public Education v. Nyquist, supra,* and *Sloan v. Lemon*[7] the Court found tax benefit and tuition grant programs limited to children attending private elementary and secondary schools to have a primary effect of advancing religion and, thus, to violate the establishment clause. In *Nyquist* a state tuition grant program assisted low-income parents of children attending private elementary or secondary school while another program permitted middle-income parents of children attending such schools to take a predetermined amount as a tax deduction for each attendee. In *Sloan* a state tuition grant program assisted all parents with children attending private elementary and secondary schools. In both cases the Court found that most of the private schools attended were religiously affiliated (85-90 percent), that those schools were pervasively sectarian, and that the aid was not limited to secular use either by its nature or by statutory restriction. As a consequence, it concluded that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[8] "In both instances," it said in *Nyquist*, "the money involved represents a charge made upon the state for the purposes of religious education."[9]

In three other cases involving programs indirectly assisting children attending elementary and secondary schools the Court reached a contrary conclusion. In *Mueller v. Allen*[10] the state program at issue provided a tax deduction to the parents of **all** elementary and secondary schoolchildren, both public and private, for a variety of educational expenses, including private school tuition. *Witters v. Washington Department*

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[7] 413 U.S. 825 (1973).

[8] Committee for Public Education v. Nyquist, *supra*, at 783.

[9] *Id.*, at 791, quoting from the lower court decision at 350 F.Supp. 655, 675 (1972).

[10] 463 U.S. 388 (1983).

of Services for the Blind[11] involved a state vocational rehabilitation grant to a blind applicant who wanted to use the grant for study at a Bible college to prepare for a religious vocation. *Zobrest v. Catalina Foothills School District,*[12] in turn, involved the provision by a public school district of a sign-language interpreter for a deaf student attending a sectarian secondary school under the federal "Individuals with Disabilities Education Act" (IDEA).[13] The Court held all three forms of assistance constitutional.

In *Mueller* it cited as critically important that "the deduction is available for educational expenses incurred by **all** parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." The Court also stressed that any aid received by sectarian schools became "available only as a result of numerous, private choices of individual parents of school-age children."[14] In *Witters* it emphasized the factors that "any aid provided ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients" and that there was no evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education."[15] In *Zobrest* it underscored that the program at issue was "a general government program that distributes benefits neutrally to any child qualifying as `handicapped' under the IDEA without regard to the `sectarian-nonsectarian or public-nonpublic nature' of the school the child attends" and that "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[16]

In addition to these decisions at the elementary and secondary level, the Court has also summarily affirmed two lower federal court rulings upholding education grants to college students, including those attending religious colleges, to help them defray the cost of attendance. Both *Smith v. Board of Governors of the University of North Carolina*[17] and *Americans United for the Separation of Church and State v. Blanton*[18] involved the federal State Student Incentive Grant program[19] under which the federal government makes matching grants to the states for use in making scholarship grants to undergraduate students "on the basis of substantial financial need." Both North Carolina and Tennessee allowed the grants to be used at public and private colleges, including religiously affiliated colleges. In addition, North Carolina, but not Tennessee, barred the grants from being used to train for a religious vocation. In both instances the programs were held not to violate the establishment clause by three-judge federal district courts, and the Supreme Court summarily affirmed. The district courts reasoned that the scholarship grant

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[11] 474 U.S. 481 (1986).

[12] 509 U.S. 1 (1993).

[13] 20 USC 1401 *et seq.*

[14] Mueller v. Allen, *supra*, at 397 and 399.

[15] Witters v. Washington Department of Services for the Blind, *supra*, at 487.

[16] Zobrest v. Catalina Foothills School District, *supra*, at 10.

[17] 429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

[18] 433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

[19] 20 U.S.C.A. 1070c *et seq.*

programs did not directly aid the sectarian purposes and activities of the religiously affiliated colleges attended by some of the students but did so only incidentally as the result of the choices of the students and their parents.

Thus, the critical elements distinguishing indirect assistance programs that have been held constitutional from those struck down under the establishment clause appear to be the religious neutrality of the beneficiary class and the element of choice. If the government so designs the program that the class of immediate beneficiaries is limited only to private elementary and secondary schoolchildren and/or their parents and as a result the assistance is virtually certain to flow primarily to pervasively sectarian schools, the program is likely to be held unconstitutional. But if the class of immediate beneficiaries includes public as well as private schoolchildren and/or their parents and if the beneficiaries possess a genuine choice about where to use the assistance, the program is likely to be held not to have an unconstitutional primary effect of advancing religion.[20]

Justice Powell, in a concurring opinion in *Witters*,[21] summarized the critical factors as follows:

> *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. We noted the State's traditional broad taxing authority ..., but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children."

Recent Decisions

Illustrating the difficulty of navigating the constitutional shoals of the establishment clause and of the sometimes-stricter provisions of state constitutions, three state courts have recently reached conflicting conclusions about the constitutionality of particular

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[20] It seems doubtful that the entanglement aspect of the Lemon test poses a serious obstacle to educational voucher programs. The Court addressed the issue only in Mueller, and there it found the tax benefit program not to precipitate any excessive entanglement between the government and the religious institutions that ultimately benefited from the program. In general the Court has not found excessive entanglement to exist except where a secular use restriction on a direct public aid program has required the government to engage in a "comprehensive, discriminating, and continuing...surveillance" of publicly funded activities on the premises of pervasively sectarian institutions. See, *e.g.*, Lemon v. Kurtzman, *supra* and Meek v. Pittenger, 421 U.S. 349 (1975). But such secular use restrictions are not constitutionally necessary in indirect assistance programs. In addition, as noted above (*see* n. 3), the Court has recently held entanglement not to be a separate test but simply an element of the inquiry into a program's effect.

[21] Witters v. Washington Department of Services for the Blind, *supra*, at 490-91 (Powell, J., concurring).

voucher programs. In *Jackson v. Benson*[22] the Wisconsin Supreme Court recently held the Milwaukee Parental Choice Program (MPCP) to be constitutional under both the establishment clause and the Wisconsin Constitution. As originally enacted, the program provided vouchers to a small number of poor children in grades 1-12 in Milwaukee to use to attend private nonsectarian schools in the city. But in 1995 Wisconsin substantially expanded the program and also began to allow sectarian schools to participate. Upon suit a trial court found that two-thirds of the schools participating were pervasively religious; and as a consequence, it held the expanded program to violate several provisions of the Wisconsin Constitution. On August 22, 1997, an appellate court affirmed, 2-1, primarily for the reason that the program constituted a benefit to religious schools in violation of a provision of the state constitution prohibiting any money from being drawn from the treasury "for the benefit of religious societies, or religious or theological seminaries" (Art. I, § 18). But the Wisconsin Supreme Court said the MPCP satisfied both that clause and the establishment clause because it extended a benefit to parents on a religion-neutral basis and flowed to sectarian schools "only as a result of numerous private choices of the individual parents of school-age children." The decision is virtually certain to be appealed to the U.S. Supreme Court.

In *Simmons-Harris v. Goff*,[23] on the other hand, an intermediate appellate court in Ohio held the Ohio Pilot Scholarship Program to be constitutional. The program provided "scholarships" worth up to $2500 to children of poor families in the Cleveland public schools which could be used to attend private schools, including sectarian schools, in the city or public schools in the school districts around Cleveland. The trial court found that none of the surrounding public school districts chose to participate in the program and that 80 percent of the participating private schools were pervasively sectarian. Nonetheless, the court held the program to pass muster under the establishment clause and several provisions of the Ohio Constitution. On May 1, 1997, however, the Ohio Court of Appeals unanimously reversed. Although the purpose of the program was clearly secular, the court said, the failure of the state to require public school participation meant the program was "skewed toward religion." "Benefits in the program," it said, "are limited, in large part, to parents who are willing to send their children to sectarian schools"; and parents, it stated, did not have a "genuine and independent" choice about where to use the scholarships. As a consequence, it held the program to provide "direct and substantial, non-neutral government aid to sectarian schools" in violation of the establishment clause and of two provisions of the Ohio Constitution it said were "coextensive" with the establishment clause. Despite this decision, however, the program remains in effect. On July 24, 1997, the Ohio Supreme Court stayed the decision pending resolution of an appeal.

Finally, a trial court in Maine has held that state's constitution to bar the inclusion of sectarian schools in a voucher program allowing parents in rural areas without public schools to send their children to private schools at state expense.[24] That decision is also on appeal.

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[22] No. 97-0270 (Wis. S. Ct., decided June 10, 1998), *reversing*, 213 Wis.2d 1, 570 N.W.2d 407 (Ct. App. 1997).

[23] No. 96APE08-982 and -991 (Ct. App. Ohio, Tenth District, decided May 1, 1997).

[24] Bagley v. Town of Raymond, Me., No. ___ (Me. Superior Ct., decided April 23, 1998).